2024

Hfx No. 531463

SUPREME COURT OF NOVA SCOTIA

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

AND IN THE MATTER OF A PLAN OR ARRANGEMENT OF SALTWIRE NETWORK INC., THE HALIFAX HERALD LIMITED, HEADLINE PROMOTIONAL PRODUCTS LIMITED, TITAN SECURITY & INVESTIGATION INC., BRACE CAPITAL LIMITED AND BRACE HOLDINGS LIMITED

BETWEEN:

Fiera Private Debt Fund III LP and Fiera Private Date Fund V LP,
each by their general partner, Fiera Private Debt GP Inc.

Applicants

-and-

Saltwire Network Inc., The Halifax Herald Limited, Headline Promotional Products Limited, Titan Security & Investigation Inc., Brace Capital Limited and Brace Holdings Limited

Respondents

BOOK OF AUTHORITIES OF THE APPLICANTS

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TAB 1

CITATION: MJardin Group, Inc. (Re), 2022 ONSC 3338
COURT FILE NO.: 22-00678813-00CL
DATE: 2022-06-03

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT INVOLVING MJARDIN GROUP, INC., GROWFORCE HOLDINGS INC., 8586985 CANADA CORPORATION AND HIGHGRADE MMJ CORPORATION

BETWEE

PRICEWATERHOUSECOOPERS INC., IN ITS CAPACITY AS COURT-APPIONTED RECEIVER AND MANAGER OF BRIDGING FINANCE INC. AND CERTAIN RELATED ENTITIES AND INVESTMENT FUNDS

APPLICANT

- and -

MJARDIN GROUP, INC., GROWFORCE HOLDINGS INC., 8586985 CANADA CORPORATION AND HIGHGRADE MMJ CORPORATION

RESPONDENTS

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Rebecca Kennedy and Adam Driedger*, for the Applicant

Chris Armstrong and Andrew Harmes, for KSV Restructuring Inc., Proposed Court-appointed Monitor

Aiden Nelms, for the Proposed CRO

HEARD and DETERMINED: June 2, 2022

REASONS: June 3, 2002

ENDORSEMENT

[1] PricewaterhouseCoopers Inc. ("PwC"), court-appointed receiver and manager of Bridging Finance Inc. ("BFI") and certain related entities and investment funds (in such capacity, the "Bridging Receiver") brings this creditor initiated application for an initial order (the "Initial Order") pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA") in respect of MJardin Group, Inc. ("MJar"), and together with its direct and indirect subsidiaries, (the "MJar Group"), Growforce Holdings Inc. ("Growforce"), 8586985 Canada Corporation ("858") and Highgrade MMJ Corporation ("Highgrade" and, together with MJar, Growforce and 858, the "Respondents"). All capitalized terms are as defined in the Affidavit of Graham Page, sworn June 1, 2022.

[2] By orders dated April 30, 2021, May 3, 2021 and May 14, 2021, PwC was appointed as the Bridging Receiver pursuant to s. 129 of the *Securities Act (Ontario).*

[3] One group of loans within Bridging's portfolio are those made by Bridging to certain entities in the MJar Group, in respect of which each of the Respondents is either a borrower or guarantor. The Respondents are in the cannabis cultivation and cannabis management services businesses, and their business represents the core remaining business of the MJar Group.

[4] Pursuant to the Canadian Loan Agreement among Growforce, as borrower, BFI, as agent, the Bridging investment funds from time to time acting as lenders (the "Lenders"), and each of MJar, Highgrade, and 858 as obligors, the Lenders made available to Growforce a revolving demand loan (the "Canadian Loan"). The total amount outstanding under the Canadian Loan Agreement is approximately $135 million. The obligations of the Respondents under the Canadian Loan Agreement are secured.

[5] Pursuant to the U.S. Loan Agreement, the Lenders made available to the U.S. Borrowers certain demand loans (the "U.S. Loans" and together with the Canadian Loan, the "Loans"). The U.S. borrowers are indirect subsidiaries of MJar and no relief is being sought in respect of the U.S. Borrowers at this time. The total amount outstanding under the U.S. Loan Agreement is approximately $44 million.

[6] The Respondents and other entities in the MJar Group are indebted to Bridging in the amount of approximately $178 million under the Loans.

[7] The Respondents are in default of their obligations to Bridging under the Loan Agreements and the Loans are past maturity.

[8] On March 23, 2022, the Bridging Receiver sought and obtained the Receivership Order appointing KSV Restructuring Inc. ("KSV") as receiver and manager of MJar (in such capacity, the "MJar Receiver").

[9] The principal mandate of the MJar Receiver was to review and consider available options to monetize and maximize the value of the MJar Group. The MJar Receiver filed a report dated June 1, 2022 with respect to its activities. The MJar Receiver determined that the best path for the MJar Group would be to develop and implement an operational restructuring of the Respondents'

business and, ultimately implement a restructuring transaction that will preserve and maximize value for the benefit of Bridging and other stakeholders of the Respondent.

[10] The Bridging Receiver and the MJar Receiver are of the view that the CCAA provides the most appropriate forum to achieve such a result. As a result, the Bridging Receiver brought this creditor initiated application for the Initial Order. The Initial Order contemplates the appointment of KSV as the monitor of the Respondents.

[11] The Bridging Receiver has advised that, at the Comeback Hearing, it will seek the appointment of Howards Capital Corp. ("HCC") to act as chief restructuring officer of the Respondents (in such capacity, the "CRO"). It is proposed that the CRO will lead the restructuring efforts on behalf of the Respondents.

[12] MJar is a corporation incorporated under the laws of Ontario. MJar is the parent company of the MJar Group and is the direct parent company of Growforce.

[13] Growforce is a corporation incorporated under the laws of Ontario and is a borrower under the Canadian Loan Agreement and is a guarantor of the U.S. Loans. Growforce is wholly owned by MJar and is the direct parent company of Highgrade and 858.

[14] Each of Highgrade and 858 are corporations incorporated under the laws of Canada. Highgrade and 858 each hold cannabis licenses under the *Cannabis Act*. Each of Highgrade and 858 is a guarantor of the Loans.

[15] The Respondents employ approximately 75 employees, who are primarily located in Ontario.

[16] According to the most recent financial statements, the Respondents are stated to have total assets with a book value of $85.9 million and total liabilities of $208.2 million.

[17] After the granting of the Receivership Order, the Bridging Receiver, on behalf of the Lenders, advanced approximately $2.54 million to the MJar Receiver.

[18] The Bridging Receiver understands that the Respondents have arrears on excise taxes and HST, which, as at March 22, 2022, totalled approximately $650,615 and $325,920, respectively.

[19] As noted above, the Bridging Receiver, in consultation with the MJar Receiver, determined that the best available option to maximize the value of the Respondents' business and assets and to pursue certain operational restructuring initiatives under the CCAA.

[20] The MJar Receiver supports the filing of this application and also consents to its appointment as monitor. Counsel has indicated that an order will be sought discharging the MJar Receiver immediately following the granting of the Initial Order.

[21] It is well-established that creditors may bring an application for an initial order under the CCAA in respect of a debtor company. (*Miniso International Hong Kong Limited v. Migu Investments Inc.*, 2019 BCSC 1234 ("*Miniso*").

[22] Counsel to the Applicant submits that the Lenders are the senior secured creditors of the Respondents and are the primary stakeholders with an economic interest in the Respondents, which justifies bringing this application.

[23] In order to qualify for CCAA protection, each of the Respondents must be a "debtor company" whose liabilities exceed $5 million. A "debtor company" is defined in the CCAA to include a "company" that is "insolvent" or that has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* ("BIA").

[24] Each of the Respondents is a corporation incorporated under the laws of Ontario or Canada and therefore constitutes a "company" and having reviewed the record and hearing submissions, I am satisfied that each of the Respondents is a "debtor company" to which the CCAA applies.

[25] I am also satisfied that it is appropriate to grant a stay of proceedings pursuant to the CCAA.

[26] I am also satisfied that it is appropriate to appoint KSV as Monitor. In arriving at this conclusion, I have taken into account that the Receivership Order provides that KSV is authorized and empowered to act as Monitor of MJar and any of its subsidiaries in any CCAA proceeding.

[27] The Bridging Receiver also requests an order that grants a super-priority administration charge, pursuant to s. 11.52 of the CCAA, in favour of the Monitor and the Monitor's independent legal counsel in the amount of $100,000 (the "Administration Charge"). The only creditors who are likely to be impacted by the Administration Charge are the Lenders. The Bridging Receiver, on behalf of the Lenders, is of the view that the priority and quantum of the Administration Charge are reasonable and appropriate in the circumstances.

[28] I am satisfied that it is appropriate to grant the Administration Charge.

[29] The Bridging Receiver also requests that the DIP Term Sheet and the DIP Lender's Charge be approved. The statutory authority to approve same is set out in s. 11.2 of the CCAA and s. 11.2(2) provides the court with the express statutory authority to order that the DIP Lender's Charge rank in priority to the claim of any secured creditor of the debtor company.

[30] The Bridging Receiver requests that the court grant a super-priority charge in favour of the DIP Lender in the amount of $250,000 (the "DIP Lender's Charge"). I am satisfied that this amount is required to ensure that the Respondents can continue operating their business through the Initial Stay Period and the DIP Lender's Charge will not initially prime any secured creditor of the Respondents who did not received notice of the application for the Initial Order.

[31] In my view, it is appropriate to approve the DIP Term Sheet and the DIP Lender's Charge. In arriving at this conclusion, I have taken into account that the record establishes that the Respondents have urgent liquidity needs and without the DIP Financing, the Respondents would

be unable to continue in business and make payroll in the near term. The record also establishes that the quantum of the DIP Financing is reasonable and appropriate having regard to the cash flow forecast and that the amounts involved amount to what is reasonably necessary in the circumstances and, finally, the only creditors likely to be impacted by the DIP Lender's Charge are the Lenders, who are providing the DIP Financing.

[32] The Bridging Receiver also requests that the court grant a super-priority charge in favour of the Respondents' directors and officers in the initial amount of $355,000 (the "Directors' Charge") to secure the indemnity provided to the Respondents' directors and officers in respect of any liabilities they may incur during the CCAA proceedings. The authority to grant such a charge is set out in s. 11.51 of the CCAA. The Bridging Receiver submits that the Respondents will benefit from the active and committed involvement of the current and future directors and officers and that the directors and officers cannot be certain whether the existing insurance will respond to any claims made against them. Further, the only creditors who are likely to be impacted by the Directors' Charge are the Lenders, who consent to, and seek approval of, the Directors' Charge.

[33] In the circumstances, I am satisfied that it is appropriate to grant the Directors Charge in the requested amount.

[34] In the result, the Initial Order is granted. A Comeback Hearing has been scheduled for Thursday, June 9 commencing at 10:45 AM.

Chief Justice G.B. Morawetz

Date: June 3, 2022

TAB 2

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Miniso International Hong Kong Limited v. Migu Investments Inc.,* 2019 BCSC 1234

Date: 20190729
Docket: S197744
Registry: Vancouver

Between:

MINISO INTERNATIONAL HONG KONG LIMITED, MINISO INTERNATIONAL (GUANGZHOU) CO. LIMITED, MINISO LIFESTYLE CANADA INC., MIHK MANAGEMENT INC., MINISO TRADING CANADA INC., MINISO CORPORATION and GUANGDONG SAIMAN INVESTMENT CO. LIMITED

Petitioners

And

MIGU INVESTMENTS INC., MINISO CANADA INVESTMENTS INC., MINISO (CANADA) STORE INC., MINISO (CANADA) STORE ONE INC., MINISO (CANADA) STORE TWO INC., MINISO (CANADA) STORE THREE INC., MINISO (CANADA) STORE FOUR INC., MINISO (CANADA) STORE FIVE INC., MINISO (CANADA) STORE SIX INC., MINISO (CANADA) STORE SEVEN INC., MINISO (CANADA) STORE EIGHT INC., MINISO (CANADA) STORE NINE INC., MINISO (CANADA) STORE TEN INC., MINISO (CANADA) STORE ELEVEN INC., MINISO (CANADA) STORE TWELVE INC., MINISO (CANADA) STORE THIRTEEN INC., MINISO (CANADA) STORE FOURTEEN INC., MINISO (CANADA) STORE FIFTEEN INC., MINISO (CANADA) STORE SIXTEEN INC., MINISO (CANADA) STORE SEVENTEEN INC., MINISO (CANADA) STORE EIGHTEEN INC., MINISO (CANADA) STORE NINETEEN INC., MINISO (CANADA) STORE TWENTY INC., MINISO (CANADA) STORE TWENTY-ONE INC. and MINISO (CANADA) STORE TWENTY-TWO INC.

Respondents

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for Petitioners: K.M. Jackson
G.P. Nesbitt

Counsel for Respondents:	V.L. Tickle D.R. Shouldice
Place and Date of Hearing:	Vancouver, B.C. July 12, 2019
Place and Date of Ruling with Written Reasons to Follow:	Vancouver, B.C. July 12, 2019
Place and Date of Written Reasons:	Vancouver, B.C. July 29, 2019

INTRODUCTION

[1] The petitioners bring these proceedings pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). Unlike the usual circumstance where the debtor companies commence the proceedings, the petitioners are the secured creditors of the respondent debtor companies, resulting in a creditor-driven *CCAA* proceeding.

[2] The petitioners, collectively described as the "Miniso Group", are the owners of the "Miniso" Japanese lifestyle product brand. The Miniso Group manufactures products and operates a number of Miniso stores in Asia where those products are sold. The Miniso Group licenses the "Miniso" name for use in other parts of the world and sells products to those entities.

[3] The respondent debtor companies, collectively described as the "Migu Group", are the Canadian owners and operators who have licensed the use of the "Miniso" brand in Canada. The Migu Group also purchases products from the Miniso Group for resale here in Canada.

[4] On July 12, 2019, I granted an initial order in this matter (the "Initial Order") with reasons to follow. These are those reasons.

BACKGROUND FACTS

[5] The evidence at the hearing consisted of the Affidavit #1 of Qihua Chen, an employee of one entity within the Miniso Group, sworn July 11, 2019.

[6] The Miniso Group manufacture lifestyle products under the "Miniso" brand name and distribute those products, under licence, to retail outlets selling "Miniso" branded inventory to the public.

[7] The Miniso Group, through a related entity, Miniso Hong Kong Limited, holds all applicable trademarks related to the "Miniso" brand (respectively, the "Miniso Trademarks" and the "Miniso Brand"), including in Canada.

[8] The Migu Group are a group of corporations formed primarily to sell “Miniso” branded products in Canada under a licensing agreement with the Miniso Group.

[9] The respondent Migu Investments Inc. (“Migu”) is the parent company. It owns 100% of the respondents Miniso Canada Investments Inc. (“MC Investments”) and Miniso (Canada) Store Inc. (“MC Store”).

[10] The controlling mind of the Migu Group is Tao Xu, a resident of Toronto, Ontario. Mr. Xu owns the only issued and outstanding common voting share of Migu. The only other shares of Migu are non-voting and non-participating preferred shares.

[11] In 2017, the Migu Group acquired the right to use the Miniso Brand in Canada pursuant to various licensing and cooperation agreements with members of the Miniso Group. In addition, on October 7, 2016, various entities entered into a framework cooperation agreement. That agreement provided that the Miniso Group would contribute Miniso Brand products including, without limitation, inventory and standardized Miniso store fixtures (the “Miniso Products”) equivalent in value to 20,000,000 RMB and that certain investments would be made to set up a company or companies to operate under the Miniso Brand in Canada.

[12] The terms of these agreements, as later amended, included that:

a) The Miniso Group agreed to supply Miniso Products to the Canadian operations for sale in various stores in exchange for payment; and

b) The Canadian operations were to be conducted under the Miniso Group’s standard master license agreement, which would allow the Miniso Group to control the use of the Miniso Brand (of which the Miniso Products are a part), throughout the Canadian operations.

[13] Starting in 2017, the Migu Group (through MC Investments) began incorporating various subsidiaries. MC Investments owns and controls each of the other named respondent subsidiaries (the “Subsidiaries”). Although the corporate structure is somewhat unclear at this time, these Subsidiaries, either alone or through partnerships or joint ventures, have opened or are in the process of opening

retail stores throughout Canada that sell Miniso Brand products (the "Outlet Stores"). Some of the Subsidiaries own more than one Outlet Store and some were incorporated in anticipation of opening additional Outlet Stores.

[14] As part of the arrangements, an entity related to the Miniso Group granted to Migu (on behalf of the Migu Group) the right to use and sell Miniso Products and display the Miniso Trademarks in Canada pursuant to a trademark licence agreement dated June 1, 2018 (the "Licence Agreement"). The Licence Agreement contained the following material terms, among others:

a) The Migu Group was only permitted to sell Miniso Products via the Outlet Stores, unless otherwise agreed to by the Miniso Group;

b) The Migu Group was permitted to grant sub-licenses to sub-licensees at its discretion subject to, among others, the condition that each sub-license would require each sub-licensee to be bound by the terms of the Licence Agreement; and

c) The Miniso Group could terminate the Licence Agreement in the event that Migu became insolvent or committed an act of bankruptcy.

[15] The Migu Group, through the Subsidiaries, have opened, or are in the process of opening a number of Outlet Stores across Canada (78 estimated at the time of the hearing). The Outlet Stores are located in British Columbia, Alberta, Ontario and Quebec. All Outlet Stores operate out of leased premises. There are two Miniso branded retail locations operating in Nova Scotia in which the Migu Group has an interest, but which are not operated by the Migu Group. The Migu Group also leases several warehouses, distribution centres and offices in various locations. The Migu Group's head office is located in Richmond, B.C.

[16] In some cases, the Migu Group contracted with individual investors (the "Investors") to open Outlet Stores partnered with one of the Subsidiaries. It is believed that, in most instances, MC Investments (on behalf of the Migu Group) and

an Investor would enter into two agreements to document their arrangement, as follows:

a) An "Investment and Cooperation Agreement", whereby MC Investments and the Investor would agree that, in exchange for the Investor's investment, MC Investments would incorporate a company (one of the Subsidiaries) to operate and manage an Outlet Store selling Miniso branded products. As part of this, MC Investments would grant to the Subsidiary a sublicense permitting it to sell Miniso branded products and to use the Miniso Trademarks under the Miniso Brand; and

b) A "Limited Partnership Agreement", whereby the Investor and MC Investments would act as limited partners and the Subsidiary (through which the Outlet Store would operate) would act as general partner.

[17] The parties refer to these arrangements together as the "Joint Venture Store Agreements".

[18] In cases where MC Investments entered into a Limited Partnership Agreement with respect to an Outlet Store, the Subsidiary which operated such Outlet Store either acted as general partner to the partnership formed by the Limited Partnership Agreement, or incorporated a general partner in which it held a 51% ownership interest (the "JV Store Affiliates"), with the remaining 49% being owned by the applicable Investors.

[19] The Miniso Group understands that each of the Outlet Stores holds a separate bank account through the applicable Subsidiary that operates that Store (collectively, the "Deposit Accounts"), the majority of which are held at TD Canada Trust, which are used for the receipt of cash sales and credit card sales at the Outlet Stores. In addition, the Miniso Group understand that MC Investments holds a master Canadian-dollar account (the "Master Account") and that, historically, the Deposit Accounts were manually swept on a regular basis, at the Migu Group's discretion, into the Master Account.

[20] The employees are all employed by MC Investments. The Migu Group currently directly employ approximately 700 people on a part-time or full-time basis. There is no union and collective bargaining agreement in place.

EVENTS LEADING TO INSOLVENCY

[21] For some years now, the Miniso Group has shipped and delivered a substantial amount of Miniso Products to the Migu Group. The Miniso Group is the primary supplier of product and inventory to the Migu Group, such that it is estimated that Miniso Product accounts for 80-90% of all merchandise sold in the Outlet Stores. During that time period and until 2018, the Miniso Group shipped and sold approximately $30 million of Miniso Products to the Migu Group, which was then distributed to the Subsidiaries for sale in the Outlet Stores.

[22] In December 2017, Miniso International Hong Kong Limited, on behalf of the Miniso Group, advanced a US$2.4 million demand loan to MC Investments (on behalf of the Migu Group) to fund the Migu Group's working capital requirements.

[23] In October 2018, the Migu Group also received a substantial amount of Miniso Products valued at approximately $17.5 million. The Miniso Group was not paid for this shipment.

[24] In the fall of 2018, the Miniso Group and the Migu Group had a dispute about the demand loan and account receivable. This led to the Miniso Group making demand on the Migu Group for payment. Later still, in mid-December 2018, the Miniso Group filed an application in this Court for a bankruptcy order against the Migu Group.

[25] In January 2019, the dispute was resolved when the parties entered into a forbearance agreement. The forbearance agreement provided that:

a) The Migu Group acknowledged and agreed that the demand loan and inventory receivable was due and owing to the Miniso Group;

b) By January 21, 2019, or as otherwise agreed, the parties agreed to negotiate an agreement by which the Miniso Group would acquire all of the assets of the Migu Group relating to its Canadian operations; and

c) The Miniso Group agreed to forbear for a period of time from taking steps to collect the demand loan and the account receivable. In addition, in the meantime, the Miniso Group agreed to continue to supply Miniso Products to the Migu Group, with the purchase price to be added to the outstanding indebtedness. Title to the Miniso Products remained with the Miniso Group until payment in full was made for them.

[26] On January 4, 2019, as a condition to the Miniso Group's forbearance:

a) The Migu Group granted to the Miniso Group a general security agreement securing the past and future obligations owing to the Miniso Group;

b) Mr. Xu postponed the security held by him against the Migu Group to the security in favour of the Miniso Group; and

c) The Migu Group entered into a temporary licence agreement for the use of the Miniso Brand during the period of the forbearance.

[27] On March 5, 2019, the Migu Group provided a further general security agreement to the Miniso Group as security for its obligations to the Miniso Group. Mr. Xu, MC Store and MC Investments also executed priority agreements in favour of the Miniso Group.

[28] On February 23, 2019, various entities entered into an asset purchase agreement by which the Migu Group agreed to sell its Canadian operations Miniso Lifestyle Canada Inc. ("Miniso Lifestyle") or a designated purchaser (the "APA"). The APA provided that:

a) The Migu Group appointed Miniso Lifestyle to operate and manage the Canadian operations until the earlier of the closing of the sale under the APA or termination of the APA;

b) The Miniso Group would continue to supply the Miniso Products to MC Investments; and

c) Grant Thornton LLP would be engaged as auditor to conduct an audit of the Canadian operations of the Migu Group to determine the amount of net capital invested by the Migu Group, including Mr. Xu, for the purpose of determining the purchase price payable under the APA.

[29] In addition, on March 5, 2019, the Miniso Group provided financial support to the Migu Group pending a closing or termination of the APA. Miniso Lifestyle advanced $1.5 million to the Migu Group to be used to fund its Canadian operations. In addition, Miniso Lifestyle deposited $1.5 million in escrow pending the closing of the transaction contemplated in the APA or the termination of the APA.

[30] After completing its due diligence, the Miniso Group did not waive the conditions in the APA. Accordingly, effective June 30, 2019, the APA expired.

[31] On June 25, 2019, the Miniso Group's counsel demanded payment of the amounts owing under the demand loan, the earlier account receivable and the amounts owing for the further supply of Miniso Products after January 2019. On July 3, 2019, the Miniso Group's counsel demanded the return of the deposit that had been placed in escrow and payment of the March 2019 loan.

CURRENT STATUS

[32] As of July 3, 2019, the total indebtedness owing from the Migu Group to the Miniso Group was approximately $35.5 million.

[33] The Miniso Group is the primary secured creditor of the Migu Group's assets, under two general security agreements (except in Quebec where no security is held). There are other minor secured interests registered by certain equipment

financiers and landlords. Mr. Xu still holds security against the assets, which is subordinated to the Miniso Group.

[34] The Migu Group is current in respect of its obligations to pay employee wages and related remittances. However, it is possible that some or all employees are owed accrued and unused vacation pay. The Migu Group does not have a pension plan for their employees.

[35] It is uncertain if the Migu Group's provincial sales tax remittances are current.

[36] As noted, all of the premises from which the Migu Group operates across Canada are leased. The Migu Group currently remits monthly rents of approximately $1.79 million. Some of the July rental payments (for 20 stores) have been paid; however, rent for the remainder of the premises, totalling approximately $1.16 million, has not been paid.

[37] The Migu Group owes approximately $2 million in other accrued and unpaid unsecured liabilities, including to suppliers and service providers. It is anticipated that the Migu Group will honour outstanding gift card and credit notes during these *CCAA* proceedings and honour existing warranty and return policies.

[38] The Migu Group's consolidated assets, as at May 31, 2019, had a book value of approximately $53.3 million.

[39] The Migu Group's value is almost entirely derived from their ability to sell and market Miniso Products under the Miniso Brand in Canada through the various agreements with the Miniso Group and importantly, their licence agreements with the Miniso Group. As of this date, the Miniso Group has terminated the Migu Group's right to sell and market the Miniso Brand in Canada and the Miniso Group will not deliver further product, save on terms acceptable to the Miniso Group. As such, the Migu Group is no longer able to market and sell the Miniso Brand. In addition, the Miniso Product in the possession of the Migu Group is the property of the Miniso Group until it is paid for.

[40] The result is obvious – the Migu Group cannot operate their business and generate revenue without the cooperation and support of the Miniso Group.

***CCAA* ISSUES**

[41] I will briefly discuss the various issues that arose on this application for the Initial Order.

Statutory Requirements

[42] The *CCAA* applies in respect of a "debtor company" or "affiliated debtor companies" where the total amount of claims against the debtor or its affiliates exceeds $5 million: *CCAA*, s. 3(1). "Debtor company" is defined in s. 2 of the *CCAA* to include any company that is bankrupt or insolvent.

[43] I am satisfied that each of the companies within the Migu Group is a "company" existing under the laws of Canada or one of the provinces and that the claims against them exceed $5 million.

[44] Further, I am satisfied that the Migu Group, either individually or collectively, are unable to meet their liabilities as they come due and are therefore insolvent, and thus each is a "debtor company" within the meaning of the *CCAA*: see *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 2; *Re Stelco Inc.*, [2004] O.J. No. 1257 (Sup. Ct. J.) at paras. 21-22; leave to appeal ref'd, [2004] O.J. No 1903 (C.A.); leave to appeal to S.C.C. ref'd [2004] S.C.C.A. No 336.

[45] The *CCAA* expressly grants standing to creditors, such as the Miniso Group, to commence proceedings in respect of a debtor company: *CCAA*, ss. 4-5; *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] O.J. No. 1818 (Sup. Ct. J.) at para. 34.

Objectives of the *CCAA*

[46] In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, the Court provided a detailed analysis of the purpose and policy behind the *CCAA*. Of particular note were the Court's comments that:

a) 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 (para. 15); and

b) the *CCAA*'s distinguishing feature is a grant of broad and flexible authority to the supervising court to use its discretion to make the order necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The courts have used its *CCAA* jurisdiction in increasingly creative and flexible ways (para. 19).

[47] The commencement of *CCAA* proceedings is a proper exercise of creditors' rights where, ideally, the *CCAA* will preserve the going-concern value of the business and allow it to continue for the benefit of the "whole economic community", including the many stakeholders here. This is intended to allow stakeholders to avoid losses that would be suffered in an enforcement and liquidation scenario: *Citibank Canada v. Chase Manhattan Bank of Canada*, [1991] O.J. No. 944 (Ct. J. (Gen. Div.)) at para. 49; *Re Nortel Networks Corp.*, [2009] O.J. No. 3169 (Sup. Ct. J.) at paras. 33 and 40.

[48] The imperatives facing both the Miniso Group and the Migu Group here are stark.

[49] Without the cooperation of the Miniso Group, including access to immediate interim financing from the Miniso Group, the Migu Group will be unable to meet their liabilities as they become due and it will not be able to continue their operations and preserve their assets. The Migu Group is facing numerous claims from creditors other than the Miniso Group.

[50] In addition, the Migu Group's ability to repay the indebtedness owed to the Miniso Group will be severely compromised in the event of a receivership and liquidation.

[51] Simply put, the Migu Group cannot proceed with its business operations without the ongoing support of the Miniso Group.

[52] There is no doubt that the Miniso Group has dictated the course forward, for the most part. The Miniso Group holds first ranking security over all of the Migu Group's assets. The Miniso Group has determined that a *CCAA* process is the best means to ensure the preservation and sale of the Migu Group's business as a going concern and maintain enterprise value for the benefit of all stakeholders, including the Miniso Group. In addition, as discussed below, the Miniso Group has agreed to provide interim financing during the course of the restructuring in order to allow that process to unfold.

[53] I have no doubt that the Migu Group has asserted its wishes and wants within the context of the past and ongoing negotiations between the two Groups. However, the Migu Group now grudgingly accepted its fate and did not oppose the relief sought here.

[54] In addition, I was satisfied that the stakeholders require the relief sought in the Initial Order on an urgent basis in order to allow the Migu Group to continue operating their business. The need for cash was immediate and without access to interim financing and the stay of proceedings, the Migu Group was not be able to preserve the value of their business or even ensure the coordinated realization of their assets. As such, the Initial Order was the best option toward preserving the Migu Group's enterprise value for the benefit of their stakeholders.

[55] After considering all of the circumstances, I am satisfied that these *CCAA* proceedings can assist in preserving value for the stakeholders, until a longer term solution is found.

The Stay of Proceedings

[56] In addressing the granting of a stay of proceeding in an initial order under the *CCAA*, Justice Farley in *Re Lehndorff General Partner Ltd.*, [1993] O.J. No. 14 (Ct. J. (Gen. Div.)) stated:

> [5] … a judge has the discretion under the CCAA to make [an] order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed

> compromise or arrangement which will be to the benefit of both the company and its creditors. …
>
> [6] … 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 the approval of creditors. 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 will succeed …
>
> 7 One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors …

[57] I was satisfied that it was appropriate to exercise my discretion under s. 11.02(1) of the *CCAA* to grant a stay that temporarily enjoins the Migu Group's creditors from proceeding with claims against the debtor companies. This stay of proceedings will prevent any creditor from gaining any advantage that might otherwise be obtained. It will also facilitate the ongoing operations of the Migu Group's business to preserve value and provide the Group with the necessary breathing room to carry out a restructuring or organized sales process.

[58] The Miniso Group sought a stay not only against the Migu Group, but also with respect to other entities that are not parties to this proceeding, namely the JV Store Affiliates. The JV Store Affiliates are the general partner companies or partnerships formed to operate the Outlet Stores.

[59] The Court has broad jurisdiction under s. 11.02(1) of the *CCAA* to impose stays of proceedings where it is just and reasonable to do so, including with respect to third party non-applicants.

[60] In *Re Cinram International Inc*., 2012 ONSC 3767, the court discussed circumstances that could justify extending the stay to third party non-applicants:

> [64] The Courts have found it just and reasonable to grant a stay of proceedings against third party non-applicants in a number of circumstances, including:
>
> a. where it is important to the reorganization process;
>
> b. where the business operations of the Applicants and the third party non-applicants are intertwined and the third parties are not

> subject to the jurisdiction of the CCAA (such as partnerships that are not "companies" under the CCAA);
>
> c. against non-applicant subsidiaries of a debtor company where such subsidiaries were guarantors under the note indentures issued by the debtor company; and
>
> d. against non-applicant subsidiaries relating to any guarantee, contribution or indemnity obligation, liability or claim in respect of obligations and claims against the debtor companies.

[61] As noted in *Cinram*, there is specific authority to grant a stay of proceedings against entities within a limited partnership context, where the business operations of the debtor companies are intertwined within that corporate/partnership structure: *Lehndorff General Partner* at paras. 12, 16-21; *Re Canwest Publishing Inc.*, 2010 ONSC 222 at paras. 33-34.

[62] I found that it was just and appropriate to extend the stay in these proceedings to include the JV Store Affiliates in the circumstances. The business operations of the Outlet Stores are intertwined with the JV Store Affiliates. There is also some intertwining of the financial obligations of the Migu Group and that of the JV Store Affiliates.

[63] The draft Initial Order sought a stay for 10 days until July 22, 2019. It appears that the length of the stay was set at 10 days in light of the uncertainty with respect to amendments proposed to the *CCAA* by the *Budget Implementation Act*, 2019, No. 1 Part 4 ("Bill C-97") tabled in Parliament in March 2019.

[64] With respect to initial applications under the *CCAA*, ss. 136-138 of Division 5 (Enhancing Retirement Security) of Bill C-97 contains an important amendment. Section 137 includes an amendment to s. 11.02(1), as follows:

> **Stays, etc. — initial application**
>
> **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 10 days,
>
> [Emphasis added.]

[65] Bill C-97 received Royal Assent on June 21, 2019. However, s. 152 of Bill C-97 provides that the amendments to the *CCAA* come into force on a day to be fixed by order of the Governor in Council. As best the parties have discerned, no such order in Council has yet been pronounced.

[66] The intent behind the new s. 11.02(1) is clear. It limits the exercise of discretion by the Court in determining the length of any stay such that the maximum amount of any stay will be 10 days, as opposed to the previous 30-day limit.

[67] In any regard, I was satisfied that the relief sought here for a 10-day stay was appropriate. At this time, only the Miniso Group has been involved in this process. All parties recognize that many other stakeholders' interests are at play here. Those persons are entitled to notice as soon as possible so that they can appear and be heard in respect of the relief granted in the Initial Order and in terms of any relief that might be granted in this proceeding in the future.

[68] I therefore exercised my discretion and concluded that the 10-day stay was appropriate in the circumstances.

The Monitor

[69] The Miniso Group proposed that Alvarez & Marsal Canada Inc. ("A&M") act as the monitor. As I will discuss below, the relief sought would vest A&M with powers greater than is usually found in a *CCAA* proceeding, giving the monitor more oversight and power to direct the business operations of the Migu Group over the course of the restructuring.

[70] In the usual fashion, A&M filed a Pre-Filing Report as the proposed monitor dated July 12, 2019.

[71] A&M indicated that it has no conflicts that would prevent it from acting as a monitor in this proceeding: *CCAA* s. 11.7(2). A&M have consented to act as monitor and to provide supervision and monitoring during the proceedings. In addition, in accordance with the Initial Order, A&M agreed to manage the Migu Group's business during these proceedings, including by engaging Miniso Lifestyle under a

management services agreement, until the implementation of a restructuring transaction.

[72] I was satisfied that A&M is an appropriate entity to be appointed as monitor in these proceedings (the "Monitor").

Interim Financing

[73] The Miniso Group sought an order to approve interim financing for the Migu Group in order to allow the Migu Group to meet its obligations over the stay period granted under the Initial Order. In consultation with the Monitor, the Miniso Group agreed to advance up to $2 million to the Migu Group under an interim credit facility agreement to allow the Migu Group to pay their ongoing business and restructuring expenses.

[74] As is typically the case, it was a condition of any advance under the interim financing that the lender be granted a priority Court-ordered charge on all the assets, rights, undertakings and properties of the Migu Group as security for amounts advanced, to rank after the proposed administration charge discussed below.

[75] Section 11.2(1) of the *CCAA* vests the Court with jurisdiction to grant an interim debtor-in-possession a financing charge in priority to the claim of any secured creditor of the debtor company, on notice to secured creditors who are likely to be affected by the security or charge. Section 11.2(4) of the *CCAA* sets out the non-exhaustive factors that the Court may consider before granting such a charge:

> (a) the period during which the company is expected to be subject to proceedings under the CCAA;
>
> (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, if any.

[76] Bill C-97 is also relevant to this aspect of the relief sought in respect of the interim financing.

[77] Section 136 of Bill C-97 provides for a new s. 11.001. This new section introduces, within the context of s. 11 orders generally, a restriction on the Court's discretion to not only order what is "appropriate" under s. 11, but also only what is "reasonably necessary for the continued operations of the debtor company in the ordinary course" during the relevant stay period:

> **Relief reasonably necessary**
>
> **11.001** An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.
>
> [Emphasis added.]

[78] Specific amendments in respect of interim financing are also found in Bill C-97 and dovetail the above restriction in s. 11.001 as to what is "reasonably necessary". Section 138 of Bill C-97 provides for the addition of a new s. 11.2(5) of the *CCAA*, as follows:

> **Additional factor — initial application**
>
> **(5)** When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.
>
> [Emphasis added.]

[79] Accordingly, the intent of Parliament under the new s. 11.2(5) is to curtail the discretion of the Court to grant interim financing in the stay period under an initial order (i.e. up to 10 days) to only what is "reasonably necessary" during that stay period.

[80] This provision is not inconsistent with the current approach of Canadian courts when exercising its discretion under s. 11.2 of the *CCAA*. Indeed, the provisions of the new s. 11.2(5) are echoed in Justice Farley's comments in *Re Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th) 314 ((Ct. J. (Gen. Div.)):

> [24] It follows from what I have said that, in my opinion, extraordinary relief such as DIP financing with super priority status should be kept, in Initial Orders, to what is reasonably necessary to meet the debtor company's urgent needs over the sorting-out period. Such measures involve what may be a significant re-ordering of priorities from those in place before the application is made, not in the sense of altering the existing priorities as between the various secured creditors but in the sense of placing encumbrances ahead of those presently in existence. Such changes should not be imported lightly, if at all, into the creditors mix; and affected parties are entitled to a reasonable opportunity to think about their potential impact, and to consider such things as whether or not the CCAA approach to the insolvency is the appropriate one in the circumstances—as opposed, for instance, to a receivership or bankruptcy—and whether or not, or to what extent, they are prepared to have their positions affected by DIP or super priority financing. As Mr. Dunphy noted, in the context of this case, the object should be to "keep the lights [of the company] on" and enable it to keep up with appropriate preventative maintenance measures, but the Initial Order itself should approach that objective in a judicious and cautious matter.
>
> [Emphasis added.]

[81] A consideration of the proposal for interim financing here is very much informed by the considerable uncertainty about what financial resources are available to the Migu Group at this time.

[82] The Monitor reports that the opening cash position of the Migu Group is approximately $1.4 million as of July 12, 2019. However, certain creditors have recently filed an action against the Migu Group and, on July 9, 2019, obtained a garnishing order for $1,040,772.50 as against MC Investments' Master Account at TD Canada Trust. It is therefore possible that TD Canada Trust has paid that amount or some of that amount into court or, at least, frozen the balance in Master Account. If that has happened, then the balance on hand is no longer available for the Migu Group's needs.

[83] The cash flow indicates that payroll of approximately $700,000 was to be due the week after the Initial Order was granted. In addition, rental payments of

approximately $800,000 were necessary in the immediate future. The cash flow projections assume ongoing sales, but that amount is also uncertain.

[84] The Monitor supported the granting of the interim financing, in light of the needs of the Migu Group required during the restructuring and in light of the uncertainty about current financial resources.

[85] I was satisfied that the s. 11.2(4) factors supported the approval of the $2 million interim financing and the granting of a charge to secure the amounts advanced.

[86] I accepted the submissions of the Miniso Group, supported by the Monitor, that the intention is to develop and prepare a restructuring transaction, including a restructuring and a sale of some part of the Migu Group's Canadian operations, as soon as practicable. It is obvious that financing is required to continue operations. With this financing, the Migu Group is able to continue to operate the Outlet Stores, with continued employment of their store-level employees and ongoing payment of rents, while they work with the Monitor and the Miniso Group to formulate a plan. The interim financing is therefore necessary to permit the Migu Group to maintain the value of the enterprise while they pursue a restructuring.

[87] In addition, I was provided some assurance that the interim financing will be used only by the Migu Group in accordance with the direct supervision of the Monitor. The Monitor's powers include the monitoring, review and direction regarding the Migu Group's receipts and disbursements.

[88] I also approached the matter of interim financing in the spirit of the new s. 11.2(5) of the *CCAA*. I was satisfied that, in these unique and uncertain circumstances, the $2 million of interim financing was potentially reasonably necessary to address the needs of the Migu Group until the comeback hearing 10 days later on July 22, 2019.

[89] In addition, in order to reflect the Court's clear intention in that respect, the Initial Order was amended to limit the Migu Group's use of the $2 million interim financing by provided that:

> 50. … until the Comeback Hearing, borrowings are limited to the minimum amount required to cover all expenses reasonably incurred by the Debtors in carrying on the Business in the ordinary course.

[90] I also concluded that the interim financing was on commercially reasonable terms: allowing for draws of $250,000; no standby fee; interest rate of 10% per annum; and, no prepayment penalty.

Restructuring Charges

[91] The Miniso Group sought an administration charge over the Migu Group's assets, properties, and undertakings up to the maximum amount of $1 million to secure payment of the fees and disbursements of the Monitor, and its and the Migu Group's legal counsel, incurred in connection with services rendered both before and after the commencement of these *CCAA* proceedings. The administration charge sought is to rank in priority to all other encumbrances, including all other court-ordered charges.

[92] Section 11.52 of the *CCAA* expressly provides the Court with the power to grant a charge in respect of professional fees and disbursements on notice to affected secured creditors.

[93] Administration charges are a usual feature of *CCAA* initial orders. As stated in *Re Timminco Ltd.*, 2012 ONSC 506 at para. 66, unless professional advisor fees are protected by way of a charge, the objectives of the *CCAA* would be frustrated as professionals would be unlikely to risk offering services without any assurance of ultimately being paid. Failing to provide protection for professional fees will "result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings".

[94] The basis for an administration charge is well made out here, particularly given the Miniso Group's substantial and first ranking charge over the Migu Group's assets.

[95] In *Canwest Publishing* at para. 54, the court refers to certain factors that could be considered in determining the amount of an administration charge:

> (a) the size and complexity of the business being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is 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.

[96] I was satisfied that a $1 million limit for the administration charge was appropriate. The amount of the administration charge was determined in consultation with the Monitor. I concluded that this amount was fair and reasonable in light of the number of stakeholders, the size and complexity of the Migu Group's business and the scope and complexity of the proposed restructuring.

[97] The Miniso Group was also seeking a directors' and officers' charge (the "D&O Charge") over the Migu Group's assets, properties and undertakings to indemnify the directors and officers in respect of liabilities they may incur as directors and officers during these proceedings, up to a maximum of $1 million.

[98] Pursuant to s. 11.51(1) of the *CCAA*, the Court has jurisdiction to grant a charge to secure a directors' and officers' indemnification on a priority basis on notice to the affected secured creditors. The charge must relate to any obligations or liabilities that may be incurred after the commencement of proceedings. The court must be satisfied with the amount of the charge, that insurance is not otherwise available (s. 11.51(3)) and that the charge will not provide coverage for wilful misconduct or gross negligence (s. 11.51(4)): *Canwest Publishing* at paras. 56-57.

[99] Here, the extent to which the directors and officers of the Migu Group may be exposed is unknown to a large degree. The Miniso Group has been advised that the directors and officers of the Migu Group do not have any directors' and officers' liability insurance in place. In consultation with the Migu Group, the Monitor has recommended that the D&O Charge be limited to $1 million.

[100] I concluded that the D&O Charge was necessary and appropriate in the circumstances. The D&O Charge will ensure that the directors and officers of the Migu Group continue in their current capacities in the context of these *CCAA* proceedings. I am advised that the directors and officers of the Migu Group are prepared to continue in their roles during these proceedings.

[101] I also accepted the Miniso Group's proposal that the various restructuring charges granted rank in priority, as follows:

a) Firstly, the administration charge (maximum $1 million);

b) Secondly, the interim financing charge (maximum $2 million, plus interest, costs, fees and disbursements); and

c) Thirdly, the D&O Charge (maximum $1 million).

Restructuring

[102] At this preliminary stage, the germ of the restructuring plan has been formulated by the Miniso Group and generally provides:

a) There will be a consensual realization process toward ensuring the preservation of the Migu Group's Canadian operations;

b) Miniso Lifestyle will manage the Canadian operations on behalf of the Migu Group during the *CCAA* proceedings in accordance with the management services agreement;

c) The Migu Group will not have any further communications with landlords, creditors or other stakeholders, except as approved by the Miniso Group;

d) The Monitor will consult with the Miniso Group and, with respect to certain premises, the Migu Group, regarding which real property leases are to be terminated. Some leases are personally guaranteed by entities who want to be consulted before any disclaimer. Sales at Outlet Stores would continue during the 30-day disclaimer period and retail employees would be incentivized to continue their employment during that time;

e) A&M will have enhanced powers as Monitor to manage the Canadian operations and negotiate and implement a transaction, in consultation with the Migu Group; and

f) By that anticipated transaction, the Miniso Group would acquire certain assets of the Migu Group comprising some or all of the Canadian operations so as to allow continued operation of certain of the Outlet Stores.

[103] The stay under the Initial Order will remain in place until July 22, 2019. By that time, the numerous other stakeholders will have been served and they will have time to enable them to consider the impact of these *CCAA* proceedings and their position, if any, in response to it.

[104] At the comeback hearing, the Court and all other stakeholders will have updated information as to the status of the Migu Group. In the meantime, the stay will be in place to allow the Monitor to operate the business and maintain the *status quo* while it works with the Miniso Group and Migu Group to develop a restructuring plan. The best estimate at the time of the hearing was that such a plan may be ready to present to the creditors within a few months.

CONCLUSION

[105] At the conclusion of the hearing, I granted the Initial Order, as proposed, with certain amendments that arose from a consideration of certain issues during the course of the hearing.

"Fitzpatrick J."

TAB 3

Court File No.: SJM/125/2023

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

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 SOUTH SHORE SEAFOODS LTD., CAPTAIN COOKE'S SEAFOOD INC., BY THE WATER SHELLFISH (2012) INC., CAN-AM LOBSTER & SHELLFISH LTD., SOUTH SHORE SEAFOODS INTERNATIONAL LTD., BRIDGE LOBSTERS LIMITED, ARSENAULT'S FISH MART INC. (each a "Company" and collectively the "Companies")

B E T W E E N :

THE TORONTO-DOMINION BANK

APPLICANT

- and –

SOUTH SHORE SEAFOODS LTD., CAPTAIN COOKE'S SEAFOOD INC., BY THE WATER SHELLFISH (2012) INC., CAN-AM LOBSTER & SHELLFISH LTD., SOUTH SHORE SEAFOODS INTERNATIONAL LTD., BRIDGE LOBSTERS LIMITED, ARSENAULT'S FISH MART INC.

RESPONDENTS

AMENDED AND RESTATED INITIAL ORDER

THIS APPLICATION, made by the Applicant, The Toronto-Dominion Bank, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day in person at the City of Saint John, Province of New Brunswick.

ON READING the affidavit of Andrea Jamnisek sworn September 18, 2023 (the "**Jamnisek Affidavit**") and the Exhibits thereto, the report of Deloitte Restructuring Inc. dated September 18, 2023 (the "**Pre-Filing Report**"), in the capacity of proposed Monitor of the Companies, and the report of Deloitte Restructuring Inc. ("**Deloitte**") dated September 25, 2023 (the "**First Report**"), in the capacity of Monitor of the Companies and the Supplemental to the First Report dated

JGS

September 27, 2023 (the "**Supplemental Report**");

AND UPON IT APPEARING from the affidavits of service of Katie Parent sworn September 18, 2023 and September 25, 2023 (the "**Affidavits of Service**") that the following persons received notice of this Application:

a) The Companies;
b) Canada Revenue Agency;
c) BDC Capital Inc.;
d) Business Development Bank of Canada;
e) Robert Arsenault;
f) Thunder Cove Investments Inc.;
g) Maplewood Trust, by its trustee, Warren Ellis;
h) Dewis Cooke;
i) Randy Cooke;
j) Murphy's Limited Liability Company; and
k) BTW Holdings Inc.

AND ON READING the consent of Deloitte Restructuring Inc. to act as the Monitor, and hearing the submissions of counsel for the Applicant, the proposed Monitor, the Companies and those other parties present, and no one appearing for any other party although duly served as appears from the Affidavits of Service;

IT IS ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the Notice of Application, the Application Record and the Pre-Filing Report and the Notice of Motion, the Record on Motion and the First Report as set out in the Affidavits of Service and the Supplemental Report is hereby deemed adequate so that this Application is properly returnable today.

APPLICATION

2. The Companies are affiliated debtor companies within the meaning of the CCAA to which the CCAA applies.

POSSESSION OF PROPERTY AND OPERATIONS

3. The Companies shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Companies shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property.

4. The Companies shall be entitled to continue to utilize the central cash management system currently in place as described in the Pre-Filing Report or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Companies of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Companies, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under a plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

5. The Companies may pay the following expenses whether incurred prior to or after this Order:

a. all outstanding and future wages, salaries, employee and pension benefits, vacation pay, and expenses payable to employees who continue to provide service on or after the date of this Order ("**Active Employees**"), in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

b. all existing and future employee health, dental, life insurance, short and long term disability and related benefits (collectively, the "**Group Benefits**") payable on or after the date of this Order to Active Employees, in each case incurred in the ordinary course of business and consistent with existing policies and arrangements or such amended policies and arrangements as are necessary or desirable to

deliver the existing Group Benefits.

6. With the consent of the Monitor, the Companies may make payments owing to suppliers, contractors, subcontractors and other creditors in respect of amounts owing prior to the date of this Order where such payments are deemed by the Companies to be necessary for the ongoing operation of the Companies or preservation of the Property, up to an aggregate limit of $900,000.

7. Except as otherwise provided to the contrary herein, the Companies may pay all reasonable expenses incurred by the Companies in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

a. all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

b. payment for goods or services actually supplied to the Companies following the date of this Order.

8. The Companies shall remit or pay, in accordance with legal requirements or on terms as may be agreed to between the Companies and the applicable authority:

a. any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of: i) employment insurance, ii) Canada Pension Plan, iii) Quebec Pension Plan, and iv) income taxes;

b. all goods and services or other applicable sales taxes (collectively, **"Sales Taxes"**) required to be remitted by the Companies in connection with the sale of goods and services by the Companies, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

c. any amount payable to the Crown in right of Canada or of any Province or any

regulatory or administrative body or any other authority, in all cases in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are: i) entitled at law to be paid in priority to claims of secured creditors; ii) attributable to or in respect of the ongoing Business carried on by the Companies; and iii) payable in respect of the period commencing on or after the date of this Order.

9. Until such time as any Company who is a tenant under a lease, disclaims a real property lease in accordance with the CCAA, such Company shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the applicable Company and the landlord from time to time, for the period commencing from and including the date of this Order, in accordance with its existing lease agreements. On the date of the first of such payments, any arrears relating to the period commencing from and including the date of this Order shall also be paid.

10. Except as specifically permitted herein or by further Order of this Court, the Companies are hereby directed, until further Order of this Court: i) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Companies to any of their creditors as of the date of this Order without prior written consent of the Monitor; ii) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and iii) to not grant credit or incur liabilities except in the ordinary course of the Business or with the prior written approval of the Monitor.

APPOINTMENT OF CRO

11. David Boyd, as a representative of Resolve Advisory Services Ltd. ("**Resolve**"), is hereby appointed Chief Restructuring Officer (the "**CRO**") over the Companies and shall, subject to the Orders of the Court that have been and may be granted from time to time in these proceedings, have the powers to perform the services set out in the engagement letter dated September 13, 2023 in the form attached as Exhibit "II" to the Jamnisek Affidavit (the "**CRO Agreement**"), provided that all such services are to be performed in conjunction with the Monitor and the Applicant.

12. The CRO Agreement is approved and the Companies are authorized to perform all of

their obligations pursuant to the CRO Agreement.

13. Neither the CRO nor any employee or agent of the CRO shall be deemed to be a director or trustee of any of the Companies.

14. Neither the CRO nor any officer, director, employee or agent of the CRO, including without limitation, David Boyd, shall incur any liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any liability or obligation incurred as a result of gross negligence or wilful misconduct on its or their part; provided that any liability of the CRO hereunder shall in no event exceed the quantum of the fees paid to the CRO.

15. The fees and expenses payable to Resolve pursuant to the CRO Agreement are entitled to the benefit of the Administration Charge, as defined in the companion Amended and Restated Charging Order dated September 21, 2023.

NO PROCEEDINGS AGAINST THE COMPANIES OR THE PROPERTY

16. Until and including October 6, 2023, or such later date as this Court may order (the **"Stay Period"**), no claim, grievance, application, action, suit, right or remedy, proceeding or enforcement process in any court, tribunal or arbitration association (each, a **"Proceeding"**) shall be commenced, continued or enforced against or in respect of the Companies, the CRO or the Monitor, or affect the Business or the Property, except with the written consent of the Companies, the CRO, the Monitor and the Applicant, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Companies or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

17. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing collectively being **"Persons"** and each being a **"Person"**) against or in respect of the Companies or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Companies, the Monitor and the Applicant, or leave of this Court, provided that nothing in this Order shall: i) empower the Companies to carry on any business which the Companies are not lawfully entitled to carry on; ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA; iii) exempt the Companies from compliance with statutory or regulatory provisions relating to health, safety or

the environment; iv) prevent the filing of any registration to preserve or perfect a security interest; or v) prevent the registration of a claim for lien and the related filing of an action to preserve the right of a lien holder provided that the Companies shall not be required to file a defence during the stay period.

NO INTERFERENCE WITH RIGHTS

18. During the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Companies, including but not limited to renewal rights in respect of existing insurance policies on the same terms, except with the written consent of the Companies and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

19. During the Stay Period, all Persons having oral or written agreements with the Companies or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Companies, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Companies, and the Companies shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Companies in accordance with normal payment practices of the Companies or such other practices as may be agreed upon by the supplier or service provider and each of the Companies and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

20. Notwithstanding anything else contained herein, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property, or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Companies.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

21. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Companies with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Companies whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Companies, if one is filed, is sanctioned by this Court or is refused by the creditors of the Companies or this Court, or these proceedings are dismissed by final Order of this Court or with leave of this Court.

APPOINTMENT OF MONITOR

22. Deloitte Restructuring Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Business and financial affairs of the Companies, the Property and the Companies' conduct of the Business with the powers and obligations set out in the CCAA or set forth herein and that the Companies and their shareholders, officers, directors and employees shall advise the Monitor of all material steps taken by the Companies pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

23. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

a. approve all of the Companies' receipts and disbursements;

b. report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Approved Cash Flow, the Property, the Business, the activities of the Companies and such other matters as may be relevant to the proceedings herein; have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents, relating to the Business and Property of the Companies, to the extent that is necessary to adequately assess the Companies' Business and financial affairs or to perform its duties arising under this Order;

c. engage independent legal counsel or such other Persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order, including any affiliate of or Person related to the Monitor;

d. develop a claims process to ascertain the quantum of the claims of all creditors;

e. investigate the Subject Transactions (as defined in the Supplemental Report) and any other transactions deemed appropriate for investigation by the Monitor;

f. oversee and have access to all elements of the management and operation of the business of the Companies and, without limitation, be shall provided advance details of all proposed sale transactions, including estimated production and transportation cost, price and payment terms;

g. report to, meet with, discuss and share information with such Persons as the Monitor deems appropriate, subject to such terms as to confidentiality as the Monitor deems advisable;

h. perform such other duties as are required by this Order or by this Court from time to time.

24. The Monitor shall not take possession of the Property and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

25. Deloitte, including, without limitation, any director, officer or employee of the Monitor, shall incur no liability or obligation as a result of its appointment as the Monitor or the carrying out the provisions of this Order, or in the case of any party acting as a director, officer or employee of the Monitor so long as acting in such capacity, save and except for any gross negligence, breach of contract or actionable misconduct on the part of such party. Nothing herein contained shall limit the protections afforded the Monitor at law including those protections set out in the CCAA.

26. The Monitor shall provide any creditor of the Companies or a potential debtor-in-possession lender ("**DIP Lender**") with information provided by the Companies in response to reasonable requests for information made in writing by such creditor or DIP Lender addressed

to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Companies is confidential, the Monitor shall not provide such information to creditors or a DIP Lender unless otherwise directed by this Court or on such terms as the Monitor and the Companies may agree.

27. The Monitor, counsel to the Monitor, counsel to the Applicant and all counsel to the Companies shall be paid their reasonable fees and disbursements, in each case not to exceed their standard rates and charges, by the Companies as part of the costs of these proceedings. The Companies are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, counsel for the Applicant and counsel for the Companies immediately upon receipt of an invoice.

28. The Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to the Clerk of the Court of King's Bench in New Brunswick, in accordance with the Rules of Court, or a Justice of the Court of King's Bench in New Brunswick.

SERVICE AND NOTICE

29. The Monitor shall: i) without delay, publish in Saltwire/Telegraph a notice containing the information prescribed under the CCAA; and ii) within five (5) days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Companies of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

30. The Monitor and the Applicant shall be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Companies' creditors or other interested parties at their respective addresses as last shown on the records of the Companies and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

31. The Applicant and the Monitor, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the service list from time to time, and the Monitor may post a copy of any or all such materials on its website at https://www.insolvencies.deloitte.ca/SouthShoreSeafoods.

32. A party who makes a motion in these proceedings shall, subject to further Order, serve a motion record at least ten (10) calendar days' before the date on which the motion is to be heard (the "**Return Date**").

33. Any responding party objecting to the relief sought in a motion must serve responding materials no later than 4 p.m. on the date that is four (4) calendar days before the Return Date (the "**Objection Deadline**"). If the responding party will not be serving responding material but nevertheless intends to object to the relief sought in a motion, then such responding party must serve, by the Objection Deadline, a notice stating its objection to the relief sought and the grounds for such an objection (a "**Notice of Objection**").

34. If either (i) responding materials, or (ii) a Notice of Objection is served in respect of a motion, the motion shall be heard on the Return Date, unless the Court orders otherwise.

35. If neither (i) responding materials; nor (ii) a Notice of Objection is served by the Objection Deadline, the Monitor shall contact the judge having carriage of the motion (the "**Presiding Judge**") and request a determination as to (a) whether a hearing is necessary, (b) whether such hearing will be in person, by telephone or by written submissions only, and (c) which parties, if any, are required to make submissions on the motion (collectively, the "**Hearing Details**"). Promptly after being advised by the Presiding Judge of the Hearing Details, the Monitor shall advise the service list of such Hearing Details. If the Presiding Judge does not direct otherwise in any Hearing Details, then the motion shall be heard on the Return Date.

GENERAL

36. The Applicant, the Companies or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

37. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, construction lien trustee or a trustee in bankruptcy of the Companies, the Business or the Property.

38. The aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States is requested to give effect to this Order and to assist the Companies, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Companies and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding or to assist the Companies and the Monitor and their respective agents in carrying out the terms of this Order.

39. Each of the Companies and the Monitor is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and the Monitor is authorized and empowered to act in a representative capacity in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

40. This Order and all of its provisions are effective as of 12:01 a.m. Atlantic Standard/Daylight Time on the 21st day of September, 2023.

Dated at Saint John, New Brunswick, this 21st day of September, 2023.

Justice of the Court of King's Bench
of New Brunswick

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TAB 4

TAB A

CITATION: Re Crystallex International Corporation, 2011 ONSC 7701
COURT FILE NO.: CV-11-9532-00CL
DATE: 20111228

SUPERIOR COURT OF JUSTICE - ONTARIO
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CRYSTALLEX INTERNATIONAL CORPORATION

(the "Applicant")

BEFORE: Newbould J.

COUNSEL: Markus Koehnen, Andrew J.F. Kent and Jeffrey Levine, for the Applicant

Richard Swan, S. Richard Orzy and Emrys Davis, for Computershare Trust Company of Canada

Alex L. MacFarlane, for Tenor Capital Management

David R. Byers, for Ernst & Young Inc. as proposed Monitor

HEARD: December 23, 2011

Newbould J.

[1] This is a contest between two competing CCAA applications. One is proposed by the debtor Crystallex International Corporation ("Crystallex") and one is proposed by Crystallex's principal creditor, the noteholders under a 2004 Trust indenture (the "Noteholders") who are represented by the trustee Computershare Trust Company of Canada. Both Crystallex and the Noteholders agree that a CCAA application is appropriate. They disagree over which application should proceed.

[2] This is not the first contest between Crystallex and the Noteholders. On two previous occasions the Noteholders applied for a declaration that there had been a "Project Change of Control" within the meaning of the trust indenture which, if it were the case, would have required Crystallex to purchase the notes of the Noteholders before their maturity at 102% of par value plus accrued interest. Both applications were dismissed.

[3] Both CCAA applications were filed on December 22, 2011, the day before the notes held by the Noteholders became due. I heard argument on December 23, 2011 and on that day made an Initial Order in the application brought by Crystallex and dismissed the application by the Noteholders, with reasons to follow. These are my reasons.

Business of Crystallex

[4] The business of Crystallex and its difficulties in Venezuela are referred to in some detail in the two prior decisions dismissing the Noteholders' applications. It is not necessary to review here all of those details. A few will suffice.

[5] The principal asset of Crystallex is its right to develop the Las Cristina gold project in Venezuela. Las Cristinas is one of the largest undeveloped gold deposits in the world containing indicated gold resources of approximately 20.76 million ounces.

[6] Crystallex obtained the right to mine the Las Cristinas project in September 2002 through a Mining Operation Contract (the "MOC") with the Corporacion Venezolana de Guayana (the "CVG"), a state-owned Venezuelan corporation. Crystallex's position is that it complied with all of its obligations under the MOC and that neither the CVG nor the Government of Venezuela raised any material concerns about lack of compliance. The CVG confirmed on several occasions that the MOC was in good standing and that Crystallex was in compliance with it.

[7] On February 3, 2011, CVG purported to "unilaterally rescind" the MOC. CVG rationalized its termination of the contract for reasons of "expediency and convenience" and because Crystallex had allegedly "ceased activities for over a year" on the project. Crystallex's

position is that it did not cease activities. It was maintaining the mining site in a shovel-ready state and was awaiting receipt of an environmental permit which the Ministry of Environment advised would be issued, and for which the Ministry sent Crystallex a bill that Crystallex paid.

[8] On February 16, 2011 Crystallex filed a Request for Arbitration with the International Centre for the Settlement of Investment Disputes ("ICSID") against Venezuela pursuant to a Bilateral Investment Treaty between Canada and Venezuela. ICSID is a mechanism through which private investors can seek legal redress against a foreign government for conduct that might be otherwise immune from suit.

[9] In the arbitration, Crystallex claims restitution of the MOC, issuance of the environmental permit and compensation for interim losses. In the alternative, Crystallex seeks compensation of $3.8 billion for the value of its investment.

Crystallex's liquidity crisis

[10] Crystallex has a number of liabilities, the most of significant of which is liability of approximately $100 million in senior unsecured notes that were issued pursuant to a Trust Indenture dated December 23, 2004. The notes fell due on December 23, 2011. In addition, Crystallex has other liabilities of approximately Cdn. $1.2 million and approximately US $8 million.

[11] The principal asset of Crystallex is its arbitration claim of US$3.8 billion against Venezuela. In addition, Crystallex has mining equipment with a book value of approximately $10.1 million and cash of approximately $2 million.

[12] Because of Venezuela's refusal to allow Crystallex to exploit Las Cristinas, Crystallex did not have the funds to pay out the 2004 notes on December 23, 2011. It is Crystallex's belief that a settlement of the arbitration claim or recovery on an arbitration award will result in Crystallex receiving cash far in excess of what is required to pay all of its creditors in full.

Crystallex application

[13] The Crystallex application seeks the authority to file a plan of compromise and arrangement, an order that it remain in possession of its assets with the authority to continue to pursue the arbitration against Venezuela and continue to retain all of the various experts necessary for that purpose. It seeks a directors' and officers' indemnity and charge not exceeding $10 million to the extent that they do not have directors' and officers' insurance, which insurance may not be subrogated, and an administration charge of $3 million to cover the expenses of the Monitor, Crystallex and their solicitors.

[14] Crystallex also seeks authority to pursue all avenues of interim financing or a refinancing of its business and to conduct an auction to raise interim or DIP financing pursuant to procedures approved by the Monitor. Crystallex has already received expressions of interest in DIP financing and an unsolicited offer of DIP financing from Tenor Capital Management. However the board of directors of Crystallex was not comfortable accepting the terms of the proposed DIP without a broader canvas of the market to determine if there were more favourable terms available.

Noteholders' application

[15] The affidavit of Mr. Mattoni filed on behalf of the Noteholders is critical of the actions of Crystallex taken since at least the time that litigation between the two parties commenced in December 2008. It states that the Noteholders instructing Computershare hold approximately 77% of the outstanding notes and have made it clear that they will never support a restructuring that does not repay them in full immediately or which keeps the current management and board in a position of control going forward.

[16] The Noteholders propose a Plan of Compromise and Reorganization to be authorized in the Initial Order, which contemplates:

(a) New common shares will be issued by Crystallex and all existing shares will be cancelled without any repayment of capital or other compensation.

(b) The Plan will involve a structured process by which there will be an attempt to raise sufficient new equity funds to repay all of the creditors in full.

(c) The existing shareholders will be entitled first to subscribe for the new common shares. Any new common shares not taken by the existing shareholders may be subscribed for by new investors.

(d) If the new common share offering is not fully subscribed for, then it will not proceed and the claims of creditors will be satisfied through a pro rata conversion of those claims to equity, such that all existing debt holders would become the equity holders and Crystallex would be debt-free.

[17] The Plan contemplates a meeting of creditors to vote on the plan of arrangement and reorganization after a claims bar process has taken place.

[18] The Initial Order proposed by the Noteholders provides that Crystallex shall carry on only such operations as are necessary to facilitate and implement the Plan and may continue to retain employees, consultants etc. to the extent necessary to facilitate and implement the Plan. It contains no ability of Crystallex to pursue the arbitration or to seek DIP or permanent refinancing.

[19] In short, if the CCAA application of the Noteholders succeeds, it will mean that the interests of the current equity holders will be immediately cancelled.

Analysis

[20] The CCAA is intended to provide a structured environment for negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. See *Re Lehndorff General Partner Ltd.*, (1993), 17 C.B.R. (3d) 24, per Farley J. The benefit to a debtor company could, depending upon the circumstances, mean a benefit to its shareholders.

[21] It is clear that the CCAA serves the interests of a broad constituency of investors, creditors and employees. See *Hong Kong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d0 311 (B.C.C.A.). See also *Janis P. Sarra*, Rescue! The Companies' Creditors

Arrangement Act (Thomson Carswell) at p.60. Thus it is appropriate at this stage to consider the interests of the shareholders of Crystallex.

[22] In my view, to cancel the shares of the existing shareholders at this stage is premature. The value of the gold at Las Cristinas is staggering. Las Cristinas contains at least 20,000,000 ounces of gold. At today's gold prices, the gold has increased in value by approximately $20 billion since Crystallex acquired its rights under the MOU. Crystallex's damage claim is for $3.8 billion.

[23] No one can be sanguine about the outcome of the arbitration. The noteholders, however, have not argued that the arbitration will not succeed, which is not surprising, because if their Plan is accepted, they may well end up owning Crystallex and pursuing the arbitration for their own gain. Mr. Swan stated in argument that the Noteholders do not intend to stand in the way of the arbitration claim. I dealt with the issue of CVG having grounds to rescind the CVG contract in my reasons of September 29, 2011 on the second attempt by the Noteholders to obtain a declaration that there had been a "Project Change of Control" and stated that while the issue of whether CVG breached its contractual provisions purporting to rescind the CVG contract is a matter for the arbitration, the noteholders had not established that CVG had grounds to rescind the CVG contract. There is no new evidence before me to suggest otherwise.

[24] Crystallex has spent over $500 million on the project. In the event that Crystallex only recovered that amount, without interest and without any compensation for the loss of the ability to develop the project, Crystallex would still have more than enough to pay all of its debts and have substantial value left over for its shareholders.

[25] There is evidence that Venezuela has a history of settling arbitrations and examples of substantial sums being paid are included in the record, including offering Exxon a settlement of $1 billion in December 2011 arising from the nationalization of certain assets.[1] At a procedural

[1] In the first attempt of the Noteholders to obtain a declaration of a Change of Control as a result of the threats of Venezuela to confiscate Crystallex's interests, there was evidence that Crystallex had advice that it was better to try to negotiate rather than arbitrate, which had led the board of directors to attempt to negotiate. Whether there has been a change of policy in Venezuela is no doubt a question mark.

meeting on December 1, 2011, the arbitration tribunal in the claim by Crystallex against Venezuela established Washington D.C. as the seat of the arbitration proceeding and established a timetable for the arbitration which requires Crystallex to submit its witness statements, supporting documents and written argument in February 2012. The hearing of the arbitration is scheduled for November 2013.

[26] In my view, what the Noteholders propose at this stage, including the cancellation of the common shares held by the shareholders of Crystallex, is not a fair balancing of the interests of all stakeholders. To say that they will never vote in favour of any plan unless they are paid out immediately or the current management and board of Crystallex is removed is not reflective of the purposes of the CCAA at this stage.

[27] The application of Crystallex and the terms of its Initial Order are not prejudicial to the legitimate interests of the Noteholders. The Noteholders are entitled to submit any proposal they wish to the board of Crystallex who will be obliged to consider it along with any other proposals obtained. The board of directors of Crystallex has a continuing duty to balance stakeholder interests. If the Crystallex board does not choose their proposal, the Noteholders would have their remedies, if appropriate, in the CCAA process. What the Noteholders have sought in their CCAA application is to effectively prevent Crystallex from taking steps under the CCAA to attempt to obtain a resolution for all stakeholders without the benefit of seeing what Crystallex may be able to achieve. It cannot be said at this stage that the efforts of Crystallex are doomed to fail.

[28] The Noteholders contend that their Plan is reasonable as it permits investors to invest in new shares of Crystallex and gives Crystallex the ability to determine if the market thinks that the arbitration claim is worth at least $100 million, the amount required by the Noteholders' Plan to permit the issuance of the new shares. There is no evidence, however, that the attempt to raise funds in a tight timetable as set out in the Noteholders' Plan by means of issuance of new common shares is the best or the only possible means of raising money, or a true test of the market's view of the value of the arbitration claim, and for a court at this stage to require that to

be done would in my view be impermissibly usurping the power of the board of directors of Crystallex in its restructuring efforts. See *Re Stelco* [2005] O.J. No. 4733 (C.A.) at para. 26.

[29] In the circumstances, I am not prepared to act on the Noteholders' Plan or to issue an Initial Order as proposed by them. In my view, the Crystallex proposal in its proposed Initial Order is in keeping with the objectives of the CCAA and will permit a fair and balanced process at this initial stage.

[30] Mr. Swan said that with respect to the Crystallex application, the most significant concern of the Noteholders is that the DIP financing may be used as a long-term financing vehicle for months and years without presenting a real refinancing plan, and that to provide security would change the status quo. It seems to me that this concern is somewhat premature, as it is not known what financing, DIP or otherwise, will be achieved and proposed for approval by the Court.

[31] Crystallex proposes a Directors' and Officers' charge of $10 million to secure the indemnity provided to them in the Initial Order. In its proposed Initial Order, the Noteholders proposed an indemnification secured by a charge of $100,000. In argument, Mr. Swan contended that $500,000 to $1 million was more typical and that $10 million was wholly excessive. It must be remembered that the charge only applies to liabilities in excess of the D&O insurance coverage that the directors and officers have, which is $20 million and in place until September 2012. It is not known whether the policy can be renewed in September 2012 at a reasonable cost. It may be that the charge may never be needed, in which case the Noteholders should have no concern about the size of it. If it is needed, however, I would not at this stage limit it to the amount suggested by the Noteholders. There has already been extensive litigation involving Crystallex and the directors and officers understandably need assurances of the kind normally provided in CCAA proceedings. To lose the senior officers and directors of Crystallex at this stage would undoubtedly have a negative impact on the preparation and prosecution of the arbitration claim. Mr. Byers on behalf of Ernst & Young Inc., the proposed Monitor, stated that the Monitor would be prepared to look at the quantum of the charge. In the circumstances, I

accept the $10 million figure for the charge with the proviso that the Monitor review it and if thought appropriate report back to the Court.

[32] Crystallex proposes an Administration Charge of $3 million. The Noteholders propose an Administration Charge limited to $1 million. In light of the contentious nature of the relationship between the Noteholders and Crystallex, I think the Administration Charge of $3 million is reasonable.

Conclusion

[33] It was necessary that the Initial Order be signed on December 23, 2011. Its provisions reflect my comments in this endorsement. The return date for any application for the extension of the stay provisions in the Initial Order is scheduled for January 20, 2012 at 9 a.m.

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Newbould J.

Released: December 28, 2011

CITATION: Re Crystallex International Corporation, 2011 ONSC 7701
COURT FILE NO.: CV-11-9532-00CL
DATE: 20111228

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CRYSTALLEX INTERNATIONAL CORPORATION

(the "Applicant")

REASONS FOR JUDGMENT

Newbould J.

Released: December 28, 2011

TAB B

COURT OF APPEAL FOR ONTARIO

CITATION: Crystallex (Re), 2012 ONCA 404
DATE: 20120613
DOCKET: C55434 & C55435

O'Connor A.C.J.O., Blair and Hoy JJ.A.

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 Crystallex International Corporation

Richard B. Swan, S. Richard Orzy, Derek J. Bell and Emrys Davis, for the appellant Computershare Trust Company of Canada

Andrew J.F. Kent, Markus Koehnen and Jeffrey Levine, for the respondent Crystallex International Corporation

Barbara L. Grossman, for Tenor Capital Management Company, L.P. and Affiliates

Robert Frank, for Forbes & Manhattan Inc. and Aberdeen International Inc.

David Byers, for the Monitor Ernst & Young Inc.

Heard: May 11, 2012

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice dated January 20, 2012, with reasons reported at 2012 ONSC 538, and from the orders of Justice Frank J.C. Newbould of the Superior Court of Justice dated April 16, 2012, with reasons reported at 2012 ONSC 2125.

Hoy J.A.:

I. OVERVIEW

[1] The primary issue in these appeals is the scope of financing the supervising judge can or should approve, without the sanction of creditors, while

a company is under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

[2] The respondent Crystallex International Corporation ("Crystallex") is a Canadian mining company. Its principal asset was the right to develop Las Cristinas in Venezuela, which is one of the largest undeveloped gold deposits in the world. Crystallex obtained this right through a contract with the Corporacion Venezolana de Guayana (the "CVG"), a state-owned Venezuelan corporation. On February 3, 2011, after Crystallex spent over $500 million on developing Las Cristinas, the CVG sent Crystallex a letter to "unilaterally rescind" the contract for reasons of "expediency and convenience". There is no suggestion in these proceedings that the rescission was due to any mismanagement by Crystallex.

[3] As a result of the cancellation of the contract, Crystallex was unable to pay its $100 million in senior 9.375 per cent notes due December 23, 2011 (the "Notes"). It sought and, on December 23, 2011 obtained, protection under the CCAA.

[4] At present, Crystallex's only asset of significance is an arbitration claim for US $3.4 billion against the government of Venezuela in relation to the cancellation of the contract. The arbitration claim is the "pot of gold" in the CCAA proceeding.

[5] The appellant Computershare Trust Company of Canada, in its capacity as Trustee for the holders of the Notes (the "Noteholders"), appeals, with leave, three orders made by the supervising judge in the CCAA proceeding: (i) the January 20, 2012 CCAA Bridge Financing Order (with reasons released January 25, 2012 and reported at 2012 ONSC 538 (the "Bridge Financing Reasons")) authorizing Crystallex to obtain bridge financing of $3.125 million (the "Bridge Loan") from the respondent Tenor Special Situations Fund, L.P. ("Tenor L.P."); (ii) the April 16, 2012 CCAA Financing Order authorizing Crystallex to obtain $36 million of what the supervising judge characterized as Debtor in Possession ("DIP") financing from Tenor Special Situation Fund I, LLC ("Tenor") (the "Tenor DIP Loan"); and (iii) the April 16, 2012 Management Incentive Plan Approval Order approving a Management Incentive Plan ("MIP") designed to ensure the retention of key executives until the arbitration is completed. The supervising judge's reasons for the CCAA Financing Order and Management Incentive Plan Approval Order are reported at 2012 ONSC 2125 (the "DIP Financing Reasons").

[6] Among other conditions, the Tenor DIP Loan, due December 31, 2016, entitles Tenor to 35 per cent of the net proceeds of the arbitration in addition to interest, provides governance rights that may continue after Crystallex exits from CCAA protection, and requires Tenor's approval to a range of options that might customarily be offered to unsecured creditors in seeking to negotiate a plan of compromise or arrangement.

[7] Substantially all of the creditors opposed the approval of the Bridge Loan, the Tenor DIP Loan and the MIP. Crystallex represents that it hopes to negotiate a plan of arrangement or compromise with the Noteholders and other creditors before the current stay until July 30, 2012 expires.

[8] The bulk of the $36 million Tenor DIP Loan comprises financing to pursue the arbitration claim, which may continue after the period of CCAA protection.

II. THE LEGISLATIVE FRAMEWORK

[9] The CCAA was amended effective September 18, 2009 to add the following provisions regarding the grant of a charge to secure financing required by the debtor:

> Interim financing
>
> 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.
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> ...
>
> Factors to be considered
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> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> > (a) the period during which the company is expected to be subject to proceedings under this Act;

> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.[1]

Prior to the enactment of these provisions, the court relied on its general authority under the CCAA to approve DIP financing: see Lloyd W. Houlden, Geoffey B. Morawetz & Janis P. Sarra, *The 2012 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2011), at p. 1175.

III. THE BACKGROUND

A. Events Prior to the CCAA Filings

[10] Crystallex has filed a Request for Arbitration pursuant to the Canada-Venezuela Bilateral Investment Treaty, claiming $3.4 billion plus interest for the loss of its investment in Las Cristinas. The hearing of the arbitration is scheduled for November 11, 2013.

[1] Paragraph 23(1)(b) provides that the monitor shall "review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings".

[11] Crystallex's most significant liability is its debt to the Noteholders. In addition to amounts owed to the Noteholders, Crystallex has other liabilities of approximately CAD $1.2 million and approximately US $8 million.

[12] The current Noteholders are hedge funds, some of whom purchased Notes after Venezuela announced its intention to expropriate Las Cristinas at prices as low as 25 cents on the dollar.

[13] The relationship between Crystallex and the current Noteholders is hostile. Crystallex and the Noteholders have been in litigation since 2008. Prior to the maturity date of the Notes, the Noteholders twice, unsuccessfully, brought court proceedings against Crystallex alleging that an event had occurred which accelerated Crystallex's obligation to pay the Notes. Those proceedings were also heard by the supervising judge: see *Computershare Trust Co. of Canada v. Crystallex International Corp.* (2009), 65 B.L.R. (4th) 281 (S.C.), aff'd 2010 ONCA 364, 263 O.A.C. 137; and *Computershare v. Crystallex*, 2011 ONSC 5748.

B. Commencement of Proceedings under the CCAA and Chapter 15

[14] On December 22, 2011, one day prior to the maturity of the Notes, Crystallex and the Noteholders filed competing CCAA applications. The Noteholders' application contemplated that all existing common shares would be cancelled, an equity offering would be undertaken, and if, or to the extent, the

equity proceeds were insufficient to pay out the Noteholders, the Notes would be converted to equity.

[15] Crystallex sought authority to file a plan of compromise and arrangement, the authority to continue to pursue the arbitration in Venezuela, and the authority to pursue all avenues of interim financing or a refinancing of its business and to conduct an auction to raise financing. In his supporting affidavit sworn December 22, 2011, Robert Fung, Crystallex's Chairman and Chief Executive Officer, indicated that Crystallex wished to have all claims stayed against it until the arbitration settled or Crystallex realized the arbitration award. Crystallex had already received an unsolicited offer of financing from Tenor Capital Management.

[16] It was (and is) expected that, if the arbitration is successful and the award is collected, there will be more than enough to pay the creditors and a significant amount will be available to shareholders.

[17] On December 23, 2011, the supervising judge made an order granting Crystallex's CCAA application (the "Initial Order"). In his reasons released December 28, 2011, he explained that the Noteholders' proposal was not a fair balancing of the interests of all stakeholders: *Re Crystallex International Corporation*, 2011 ONSC 7701, at para. 26. The Noteholders did not appeal the Initial Order.

[18] Crystallex obtained an order under chapter 15 of the United States Bankruptcy Code from the United States Bankruptcy Court for the District of Delaware, among other things giving effect to the Initial Order in the United States as the main proceeding.

C. Crystallex Develops a DIP Auction Process

[19] Paragraph 12 of the Initial Order authorized Crystallex to pursue all avenues of interim financing or a refinancing of its business or property, subject to the requirements of the CCAA and court approval, to permit it to proceed with an orderly restructuring. It further provided:

> Without limiting the foregoing, the Applicant may conduct an auction to raise interim or DIP financing pursuant to procedures approved by the Monitor and using such professional assistance as the Applicant may determine with the consent of the Monitor. If such approved procedures are followed to the satisfaction of the Monitor then the best offer as determined by the Applicant pursuant to the approved procedures shall be afforded the protection of the *Soundair* principles so that it will be too late to make topping offers thereafter and such offers will not be considered by this Court.

[20] Crystallex hired an independent financial advisory firm, Skatoff & Company, LLC, and developed a set of procedures to govern the solicitation of bids to provide financing to Crystallex. The Monitor, Ernst & Young Inc., approved the bid procedures. The bid procedures indicated that Crystallex's objective was to obtain financing of not less than $35 million, net of costs, that, on completion of the CCAA and U.S. Chapter 15 reorganization proceedings,

would roll into financing maturing not sooner than December 31, 2014. The bid deadline was February 1, 2012.

D. The Bridge Loan

[21] On January 20, 2012, the supervising judge considered competing proposals from Tenor L.P. and the Noteholders to provide bridge financing. Tenor L.P. offered $3.125 million with interest at 10 per cent per annum. The Noteholders offered $3 million with interest at 1 per cent per annum.

[22] The board of Crystallex, taking into account advice received from Mr. Skatoff, recommended the Tenor L.P. offer. Mr. Skatoff was concerned that the Noteholders' objective may have been to defeat the larger DIP financing process so that they could ultimately impose financing terms on Crystallex. It was also his view that Crystallex should avoid entering into an important financial relationship with a hostile party.

[23] The supervising judge approved Tenor L.P.'s offer.

E. The Noteholders Object to the DIP Auction Process

[24] On January 20, 2012, the Noteholders brought a cross-motion to modify the DIP auction process then underway, which they severely criticized. They objected to the amount sought, the term, and the lender back-end entitlement a successful DIP lender could acquire. In their view, Crystallex was inappropriately seeking financing in excess of amounts required until a compromise or plan of

arrangement could be arrived at between Crystallex and its creditors. Given their existing position in Crystallex, the Noteholders also objected to being required to sign a non-disclosure agreement containing a standstill provision in order to be a qualified bidder.

[25] The supervising judge held that if the Noteholders wished to be considered as a qualified bidder, they would have to sign a non-disclosure agreement: Bridge Financing Reasons, at para. 27. As to their other concerns, he wrote, at para. 29:

> In my view these objections are premature and it is not necessary for me to consider their strength at this stage. The time for filing bids from qualified bidders has not yet expired and what bids will be received is unknown. It is when a successful bidder has been chosen and the DIP facility is before the court for approval that these issues raised by the Noteholders would be more appropriately dealt with. Until then, there is no factual foundation for judgment to be passed on the bid procedures for the DIP facility for which Crystallex will seek approval.

F. Competing DIP Financing Offers: The Tenor DIP Loan and the Noteholders' Offer

[26] The bidders who responded to the request for DIP financing included three hedge funds that hold approximately 77 per cent of the Notes and Tenor.

[27] Those hedgefund Noteholders proposed a loan of $10 million with a simple interest rate of 1 per cent repayable on October 15, 2012.

[28] The supervising judge described Tenor's proposed terms in the DIP Financing Reasons:

> [23] The Tenor DIP facility contains the following material financial terms:
>
> (a) Tenor will advance $36 million to Crystallex due and payable on December 31, 2016. This period for the loan is based on Crystallex's arbitration counsel's assessment of the likely timing of a decision from the arbitral tribunal and collection of the award.
>
> (b) The advances will be in four tranches, being $9 million upon execution of the loan documentation and approval of the facility by court order in Ontario, the second being $12 million upon any appeal of the Ontario court order approving the facility being dismissed and upon a U.S court order approving the facility, the third being $10 million when Crystallex has less than $2.5 million in cash and the fourth being $5 million when Crystallex again has less than $2.5 million in cash.
>
> (c) The loans are to be used to (i) repay an interim bridge loan of $3.25 million advanced by Tenor with court approval of January 20, 2012 and payable on April 16, 2012, (ii) fees and expenses in connection with the facility, (iii) general corporate expenses of Crystallex including expenses of the restructuring proceedings and of the arbitration in accordance with cash flow statements and budgets of Crystallex approved by Tenor from time to time.
>
> (d) Crystallex will pay Tenor a $1 million commitment fee.

> (e) $35 million of the loan amount will bear PIK interest (payment in kind, meaning it is capitalized and payable only upon maturity of the loan or upon receipt of the proceeds of the arbitration) at the rate of 10% per annum compounded semi-annually.
>
> (f) Tenor will receive additional compensation equal to 35% of the net proceeds of any arbitral award or settlement, conditional upon the second tranche of the loan being advanced. Net proceeds of the award or settlement is defined as the amount remaining after payment of principal and interest on the DIP loan, taxes and proven and allowed unsecured claims against Crystallex, including the noteholders, the latter of which will have a special charge for the unsecured amounts owing. Alternatively, Tenor can convert the right to additional compensation to 35% of the common shares of Crystallex. This conversion right is apparently driven by tax considerations.

[24] The Tenor DIP facility also provides for the governance of Crystallex to be changed to give Tenor a substantial say in the governance of Crystallex. More particularly:

> (a) Crystallex shall have a reduced five person board of directors, being two current Crystallex directors, two nominees of Tenor and an independent director selected by agreement of Crystallex and Tenor.
>
> (b) The independent director shall be chair of the board of directors and shall not have a second-casting or tie-breaking vote.
>
> (c) The independent director shall be appointed a special managing director and shall have all the powers of the board of

> directors to (i) the conduct of the reorganization proceedings in Canada and in the U.S. and the efforts of Crystallex to reorganize the pre-filing claims of the unsecured creditors, (ii) any matters relating to the rights of Crystallex and Tenor as against the other under the facility, (iii) the administration of the MIP to the extent not otherwise delegated to the bonus pool committee under the MIP, and (iv) to retain any advisor in respect of these matters. The special manager shall first consult with a non-board advisory panel, consisting of the three Crystallex directors who will step down from the board, and consider in good faith their recommendations.
>
> (d) With respect to matters that may not at law be delegable to the special managing director, he will be required to obtain board approval. If the Tenor nominees use their votes to block that approval, Tenor will forfeit its 35% additional compensation.

> [25] The Tenor DIP facility contains proscribed rights of Tenor in the event of default. Tenor may seize and sell assets other than the arbitration proceeding (i.e. any cash and unsold mining equipment). It may not sell the arbitration claim. If there is a default before any arbitration award, Tenor would have the right to apply to court to have the Monitor or a Canadian receiver and manager appointed to take control of the arbitration proceedings. If such application were not granted, Tenor would be entitled to exercise the rights and remedies of a secured creditor pursuant to an order, the loan documentation or otherwise at law.

[29] Mr. Skatoff recommended, and the board of Crystallex agreed, to accept the Tenor DIP Loan. Mr. Skatoff indicated, in an affidavit sworn March 20, 2012,

that he had recommended that the board reject the Noteholders' offer of a $10 million loan for 6 months because Crystallex could not be assured that it could borrow the balance of the required funds at the expiry of that period on the same terms as the Tenor DIP Loan.

G. The Noteholders' Further, Competing Offer to Allay Mr. Skatoff's Concerns

[30] In his affidavit on behalf of the Noteholders, sworn March 27, 2012, Mr. Mattoni responded to Mr. Skatoff's concern by committing that the Noteholders would be prepared to,

> … provide financing to Crystallex on the same terms as the [Tenor DIP Loan], in the event that prior to October 1, 2012, the Court orders that such long-term financing is appropriate and necessary. The Noteholders would reserve their complete and unfettered ability as creditors to continue to oppose stay extensions or attempts to secure such long-term financing outside of a Plan of compromise (including, specifically, financing to the extent contemplated by the Proposed Loan), but they will provide it if it is ordered by the Court on the same basis as currently proposed with Tenor...

H. The Noteholders' Proposed Plan

[31] Prior to the April 5, 2012 hearing, the Noteholders proposed a plan to indicate a good faith intention to bargain. They did not seek approval of this proposed plan at the April 5, 2012 hearing.

[32] The plan's terms included that the Noteholders would provide a $10 million loan on the terms described above; exchange their debt for approximately 58 per cent of the equity; provide $35 million to Crystallex in exchange for 22.9 per cent of the equity; and provide incentives to management at a lesser level than the MIP. Their proposed plan left approximately 14 per cent of the equity for the existing shareholders.

I. The Management Incentive Plan

[33] The Noteholders had criticized the independent directors of Crystallex as not being sufficiently independent. As a result, the independent directors of Crystallex comprising the compensation committee retained Jay Swartz, a partner of Davies Phillips Vineberg, to determine, from the perspective of an independent director, what an appropriate MIP would be. He in turn retained an independent national executive compensation consulting firm to provide expert advice. Mr. Swartz opined that the overall compensation proposal for the establishment of the bonus pool for the benefit of Crystallex's management was reasonable in the circumstances. The independent directors of Crystallex comprising the compensation committee approved the MIP.

[34] At para. 102 of the DIP Financing Reasons, the supervising judge described the MIP:

> In sum, a pool of money, consisting of up to 10% of the net proceeds of the arbitration up to $700 million and

> 2% of any further net proceeds, after all costs and charges, including the amounts owing to noteholders, is to be set aside and money in this pool may be paid to the beneficiaries of the MIP, depending on the determination of an independent committee. The amounts to be allocated to participants by the compensation committee are discretionary and could be nil. No one will be entitled to any particular amount. Members of the compensation committee will not be eligible for any payments.

[35] The MIP sets out a number of factors to be considered by the compensation committee in exercising its discretion. They include the amount and speed of recovery, the amount of time and energy expended by the individual, and the opportunity cost to the individual in staying with Crystallex.

[36] In the view of the Noteholders, the MIP is too generous. They proposed that management receive 5 per cent through an equity participation in any after tax award. They also took issue with the range of persons eligible under the MIP.

J. The April 5, 2012 motion

[37] On April 5, 2012, Crystallex sought orders approving, among other things, the Tenor DIP Loan and the MIP. The Noteholders as well as Forbes & Manhattan Inc. and Aberdeen International Inc., creditors owed approximately $2.5 million by Crystallex, opposed both the Tenor DIP Loan and the MIP. The one shareholder who attended opposed the MIP.

[38] The supervising judge approved the Tenor DIP Loan and the MIP.[2] He also extended the stay until July 30, 2012.

K. Events since April 5, 2012

[39] Tenor made the first, $9 million advance under the Tenor DIP Loan. The Bridge Loan was repaid out of the first advance.

[40] At the hearing of this appeal, the Monitor advised that Crystallex would require further funds before the anticipated release of this court's decision. Crystallex accepted Tenor's offer to advance a further $4 million to Crystallex, on the same terms as the first, $9 million tranche of the Tenor DIP Loan. Accordingly, this further advance does not entitle Tenor to participate in any arbitration proceeds, or trigger any change in the governance of Crystallex. If the Noteholders' appeal succeeds, the additional amounts advanced by Tenor are, like the first tranche, to be immediately repaid with interest at the rate of 1 per cent per annum, and the Noteholders shall fund the repayment. No commitment fee is payable in respect of this additional advance.

[2] The MIP was approved subject to an amendment (agreed to by Crystallex) to provide that the value of any stock options ultimately realized by participants of the MIP would be deducted from the amount of any bonus awarded under the MIP on a tax neutral basis.

IV. THE SUPERVISING JUDGE'S REASONS

A. The Bridge Loan

[41] The supervising judge noted, at para. 5 of the Bridge Financing Reasons, that Tenor L.P.'s bridge financing proposal was "really short-term DIP financing". With respect to the boards' recommendation – based on Mr. Skatoff's advice – that Tenor L.P.'s proposal be approved, he wrote, at para. 12:

> This was a business judgment protected by the business judgment rule so long as it was a considered and informed judgment made honestly and in good faith with a view to the best interests of Crystallex. See *Re Stelco Inc*. (200[5]), 9 C.B.R. (5th) 135 (Ont. C.A.) regarding the rule and its application to CCAA proceedings. I see no grounds for concluding that the decision of Crystallex to prefer the Tenor bridge financing proposal is not protected by the business judgment rule or that I should not give it appropriate deference. [Citation corrected.]

[42] The supervising judge noted, at para. 13, that "the Monitor has no basis to say that the business judgment exercised by the Crystallex board of directors was unreasonable". The supervising judge accordingly approved the Bridge Loan.

[43] Mr. Skatoff expressed concern that the Noteholders' objective in offering bridge financing on such advantageous terms (interest at the rate of 1 per cent, as opposed to the 10 per cent in the Tenor L.P. offer) was to undermine the DIP auction process. The supervising judge observed, at para. 14:

> Whether Mr. Skatoff is correct in his concerns, it seems to me that the relatively minor extra cost involving the Tenor proposed bridge financing for at most a few months must be weighed against the risk of harm to the longer-term DIP financing auction process, and that for the sake of that process, it is preferable not to run the risks that Mr. Skatoff is concerned about.

B. The Tenor DIP Loan

[44] The substance of the supervising judge's reasons for approving the Tenor DIP Loan – as set out in the DIP Financing Reasons – may be summarized as follows.

i. The exercise of business judgment by the board of directors of Crystallex in approving the Tenor DIP Loan is a factor that can be taken into account by the court in considering whether to make an order under s. 11.2(1) of the CCAA (at para. 35).

ii. The Tenor DIP Loan did not amount to a plan of arrangement or compromise. Notably, it did not take away the rights of the Noteholders as unsecured creditors to apply for a bankruptcy order or to vote on a plan of compromise or arrangement. A vote of the creditors was therefore not required (at para. 50). In coming to this conclusion, the supervising judge relied on *Re Calpine Canada Energy Limited*, 2007 ABQB 504, 415 A.R. 196, leave to appeal refused, 2007 ABCA 266, 417 A.R. 25.

iii. Crystallex intended to negotiate a plan of compromise or arrangement with the Noteholders during the stay extension until July 30, 2012 (paras. 48, 126). The Tenor DIP Loan is therefore distinguishable from the financing rejected by the court in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577, because in that case the debtor did not have an intention to propose an arrangement or compromise to its creditors.

iv. Because the Tenor DIP Loan involves the grant of a financial interest in part of the assets of Crystallex, it is appropriate to consider the *Soundair* factors in deciding whether to approve it (at para. 59). Crystallex conducted a robust competitive bidding process (at para. 39).

v. Mr. Skatoff's evidence was that the Noteholders' proposed six month facility "would seriously erode the chances of Crystallex obtaining third party financing in October" (at para. 90). Counsel for Computershare had said during argument on the motion that the Noteholders "were not prepared to agree to such a $35 million facility at this time but only at some future time as the $10 million facility they now proposed became due" (at para. 27). While it would have been preferable if the Noteholders had been willing to lend on the basis of the terms of the Tenor DIP facility, "it was made clear during argument that the noteholders were not prepared at this time to do so" (at para. 91).

vi. As to the enumerated factors in s. 11.2(4):

(a) Given that Crystallex intends, if possible, to negotiate an acceptable plan of arrangement or compromise, the length of time during which Crystallex is expected to be subject to the CCAA proceedings is not a determinative factor. The financing will be required to pursue the arbitration (at para. 62) and, as the supervising judge noted, “the only way any of the creditors will receive any substantial cash payment is from the proceeds of the arbitration” (at para. 47);

(b) The management of the business and affairs of Crystallex “are a reasonable compromise between Crystallex and Tenor designed to protect the interests of the stakeholders, including the noteholders” (at para. 73). The fact that Tenor is given substantial governance rights does not in itself mean that the DIP Tenor Loan should not be approved. Tenor does not have the right to conduct the reorganization proceedings or the arbitration proceeding. Moreover, under s. 11.5(1) of the CCAA, the court may remove a director whom it is satisfied is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made. Arguably, a court could remove a Tenor nominee under this section without triggering an event of default under the Tenor DIP Loan (at paras. 63-71);

(c) While the Noteholders expressed “extreme displeasure” at Crystallex’s management’s delay in commencing arbitration proceedings,

they do not oppose management having a continuing role in the arbitration (at para. 72);

(d) The Noteholders' argument that the terms of the Tenor DIP Loan – in particular, the fact that the refusal of the court to grant a stay or a bankruptcy are events of default, the grant of a 35 per cent interest in the arbitration proceeds, and the limits on the type of restructuring that can be concluded without the approval of Tenor – will effectively prevent any plan of arrangement was rejected (at paras. 74-82). While, as the Monitor points out, the introduction of a third party, Tenor, with consent rights to certain actions will add complexity to the negotiation of a CCAA plan (at para. 93), the Tenor DIP Loan would enhance the prospects of a viable compromise or arrangement (at para. 83):

> ... Crystallex requires additional financing to pay its expenses and continue the arbitration. A DIP loan allows the company to have the arbitration financed, which if it were not at this stage would impair the arbitration and perhaps the attitude of Venezuela towards the arbitration claim, and as such enhances the viability of a CCAA plan. I have not accepted the argument of the noteholders that the loan would prevent a plan of arrangement.

(e) The supervising judge noted that Crystallex's principal asset is its US $3.4 billion arbitration claim against Venezuela (at para. 12); and

(f) In considering the Noteholders' complaints of prejudice in the context of what the market is demanding for a DIP loan and in all the circumstances,

the creditors have not been materially prejudiced by the Tenor DIP Loan (at para. 84).

C. The Management Incentive Plan

[45] The supervising judge considered the Noteholders' objections to the quantum and method for providing an incentive to management, the inclusion of certain persons in the MIP, and the approval of the MIP before the negotiation of a plan.

[46] In the DIP Financing Reasons, the supervising judge observed, at para. 109, that whether employee retention provisions should be ordered in a CCAA proceeding was a matter of discretion. He noted that the provisions of the MIP had been approved by an independent committee of the board of directors with impressive qualifications, relying on the opinion of Mr. Swartz. In providing that opinion, Mr. Swartz indicated that the absolute amount of the bonus pool could be very substantial and, in allocating it, the compensation committee "may have to carefully consider the absolute amounts to be paid to each member of the Management Group in order to satisfy its fiduciary duties": see DIP Financing Reasons, at para. 108. The supervising judge also noted that Mr. Swartz had retained an independent national executive compensation consulting firm to provide expert advice.

[47] Citing *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.) and *Timminco Ltd. (Re)*, 2012 ONSC 948, the supervising judge wrote, at para. 112 of the DIP Financing Reasons, "I see no reason why the business judgment rule is not applicable, particularly when the provisions of the MIP have been approved by an independent committee of the board." He further noted, at para. 115, what appears to be the practice of approving employee retention plans before any plan has been negotiated and, at para.105, that the Tenor DIP Loan was conditional on the approval of a MIP acceptable to Crystallex and Tenor.

[48] As to who should be eligible to participate in the MIP, at para. 117, the supervising judge noted that the independent committee had exercised its business judgment on the matter and that the participants were known to Mr. Swartz . Having reviewed the evidence, the supervising judge could not "say that any of the persons included in the MIP should not be there".

V. THE PARTIES' SUBMISSIONS

A. The Noteholders' Submissions

[49] The Noteholders frame their opposition to the Tenor DIP Loan on a number of bases.

[50] They argue that s. 11.2, titled "Interim financing", only permits a supervising judge to approve financing to meet the debtor's needs while it is developing a plan to present to its creditors.

[51] The Noteholders also argue that the supervising judge's finding that the Tenor DIP Loan would enhance the prospects of a viable compromise or arrangement was unreasonable because it resulted from an error of principle, namely an improper focus on the fact that it provided financing for the arbitration.

[52] The Noteholders submit that the supervising judge misapprehended the evidence in finding that the Noteholders were not willing to match the Tenor DIP Loan, and this error affected the outcome of the motion.

[53] They argue that the supervising judge erred in deferring to the business judgment of the directors of Crystallex in approving both the Bridge Loan and the Tenor DIP Loan. They argue that directors always make a recommendation and, if Parliament had thought this was a relevant factor, it would have specifically enumerated it in s. 11.2(4) of the CCAA.

[54] They argue that the supervising judge erred in principle in focusing on what was the most expedient way to fund the arbitration (as opposed to Crystallex's needs while negotiating a plan with the Noteholders) and, in doing so, committed the same error as the motion judge in *Cliffs Over Maple Bay*.

[55] The Noteholders' position is that the Tenor DIP Loan is effectively an arrangement, in the guise of a financing, and Crystallex is misusing the CCAA to impose a restructuring without the requisite creditor approval.

[56] The Noteholders submit that this court should order Crystallex to accept the Noteholders' "matching" DIP loan offer.

[57] They also renew their objections to the MIP.

B. Crystallex's Submissions

[58] Crystallex argues that the Noteholders' appeal with respect to the Bridge Loan is moot because the loan has been advanced, spent and repaid.

[59] As to the Tenor DIP Loan, it argues that approving it was within the discretion of the supervising judge, the supervising judge exercised his discretion on a wide variety of findings of fact, capable of evidentiary support in the record, and there is no basis for this court to intervene. It relies on *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, which recently addressed the broad discretionary jurisdiction of a supervising judge under the CCAA. Crystallex also points to *Air Canada (Re)* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.), as an instance where exit financing was approved before a plan had been approved by creditors.

C. Tenor's Submissions

[60] Tenor argues that "interim financing" in the heading to s. 11.2 of the CCAA does not mean "short term", but rather refers to the interval between two points or events, and s. 11.2 does not contain anything that would fetter the discretion of the supervising judge to select an "end point" beyond the expected conclusion

of a plan. It argues that the duration of the Tenor DIP Loan is tailored to Crystallex's unique circumstance: all stakeholders acknowledge that the arbitration must be pursued in order for there to be meaningful recovery. In any event, it argues, marginal notes, such as the heading "interim financing" in s. 11.2, are not part of the statute, and their value is limited when a court must address a serious problem of statutory interpretation, citing the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 14, and *Imperial Oil Ltd. v. Canada; Inco Ltd. v. Canada*, 2006 SCC 46, [2006] 2 S.C.R. 447, at para. 57.

[61] Moreover, Tenor submits, the supervising judge was in the best position to perform the careful balancing of interests required to facilitate a successful restructuring.

VI. ANALYSIS

A. The Appeal from the Bridge Financing Order

[62] The Noteholders did not strongly pursue their appeal of the Bridge Financing Order. The relief sought at the conclusion of the hearing related to the Tenor DIP Loan and not the Bridge Loan. The Bridge Loan was disbursed, spent and repaid. I agree with the respondents that the Noteholders' appeal with respect to the Bridge Loan is moot. I will therefore confine my analysis to the Tenor DIP Loan and the MIP.

B. The Appeal from the Tenor DIP Financing Order

(1) *Century Services Inc. v. Canada (Attorney General)*

[63] The Supreme Court of Canada had occasion to interpret the CCAA for the first time in *Century Services*. It used that opportunity to make clear that the CCAA gives the courts broad discretionary powers. Those powers must, however, be exercised in furtherance of the CCAA's purposes: para. 59. Section 11, in particular, was drafted in broad language which provides that a supervising judge "may, subject to the restrictions set out in this Act … make any order that it considers appropriate in the circumstances".[3] For the majority in *Century Services*, Deschamps J. wrote:

> [69] The *CCAA* also explicitly provides for certain orders…
>
> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* – avoiding the social and economic losses resulting from liquidation of an

[3] The full text of section 11 is as follows:

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

> 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.

[64] It is with the Supreme Court's interpretation of the scope of judicial discretion under the CCAA in mind that I turn to s. 11.2 and the question of whether it permits a supervising judge to approve financing that may continue for a significant period after CCAA protection ends, without the approval of creditors.

(2) Section 11.2 of the CCAA

[65] Section 11.2 is headed "Interim Financing". Headings may be used as an aid in interpreting the meaning of a statute: R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008), at p. 394, "Interim" generally means temporary or provisional: *Canadian Oxford Dictionary*, 2d ed. The weight to be given to a heading depends on the circumstances.

[66] I agree with the Noteholders that s. 11.2 contemplates the grant of a charge, the primary purpose of which is to secure financing required by the debtor while it is expected to be subject to proceedings under the CCAA. A further purpose, however, is to enhance the prospects of a plan of compromise or arrangement that will lead to a continuation of the company, albeit in restructured form, after plan approval.

[67] Section 11.2(4)(a) directs the court to consider the period during which the debtor is expected to be subject to proceedings under the CCAA. It stops short of confining the financing to the period that the debtor is subject to the CCAA. Section 11.2(4)(d) directs the court to consider if the financing would enhance the prospects of a viable compromise or arrangement.

[68] Having regard to the broad remedial purpose of the CCAA and the broad residual authority of a supervising judge described in *Century Services*, in my view section 11.2 does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection. Indeed, although in very different circumstances, financing to be available on the debtor's emergence from CCAA protection (sometimes called "exit financing") was approved before a plan was approved in *Air Canada*.[4] Both *Century Services* and section 11.2, however, in my view, signal that it would be unusual for a court to approve exit financing where opposed by substantially all of the creditors. Exit or post-plan financing is often a key element, or a pre-requisite, of the plan voted on by creditors.

[4] In *Air Canada,* Farley J. approved a "global restructuring agreement" which included a commitment of an existing creditor to provide exit financing of approximately US $585 million on the company's emergence from CCAA. DIP financing was in place; the financing at issue was clearly recognized as exit financing. The restructuring agreement was not opposed by substantially all of the creditors. Nor was it argued that it adversely affected the ability of the creditors and the debtor to negotiate a compromise or arrangement.

[69] The question becomes whether the unique facts of this case permitted the supervising judge to approve “interim financing” that was of such duration and structure that it could well outlast the CCAA protection period. This court should not substitute its decision for that of the supervising judge. I must ask this question through the lens of the applicable standard of review.

(3) Standard of review

[70] Appellate review of a discretionary order under the CCAA is limited. Intervention is justified only for an error in principle or the unreasonable exercise of discretion: *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (C.A.), at para. 71. An appellate court should not interfere with an exercise of discretion “where the question is one of the weight or degree of importance to be given to particular factors, rather than a failure to consider such factors or the correctness, in the legal sense, of the conclusion”: *New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 26.

(4) The supervising judge did not err in principle or unreasonably exercise his discretion

[71] As detailed below, I conclude that there is no basis for interfering with the supervising judge’s exercise of discretion in approving the Tenor DIP Loan.

[72] Most significantly, in this case, the supervising judge found there could be no meaningful recovery, and therefore no successful restructuring, without the

financing of the arbitration. Although the Noteholders characterized the Tenor DIP Loan as “exit financing”, it furthered the remedial purpose of the CCAA. To that extent, it is appropriate in the first sense used by Deschamps J. in *Century Services*, even though it may well outlast the period of CCAA protection. The supervising judge’s focus on the fact that the Tenor DIP Loan provided financing for the arbitration was not, in the circumstances, an error of principle.

[73] In my view, the Noteholders’ real argument is that the *means* by which the Tenor DIP Loan was approved were not appropriate. Ideally, a CCAA supervising judge is able to assist creditors and debtors in coming to a compromise. The creditors and Crystallex have not “achieved common ground” on a very significant matter. Effectively, the Noteholders argue that the creditors have not been treated as advantageously and fairly as the circumstances permit. They are the senior creditors and their offer to provide DIP financing on terms they argue matched those of the Tenor DIP Loan was not accepted. With sufficient financing in place to fund the arbitration, their leverage in negotiating a share of the arbitration proceeds has been reduced. Moreover, the Noteholders argue, the supervising judge erred in applying the business judgment rule, and, contrary to *Cliffs Over Maple Bay*, involuntarily stayed their rights during what they characterize as a restructuring. I consider each of these arguments below.

a. The Noteholders' competing DIP loan offer

[74] The Noteholders point to their affidavit on the April motion indicating they would submit to an order to advance funds on the same terms as the Tenor DIP Loan "in the event that prior to October 1, 2012, the Court orders that such long-term financing is appropriate and necessary". The supervising judge wrote that it would have been a preferable outcome if the Noteholders had been prepared to lend at the time of the April motion on the terms of the Tenor DIP facility: DIP Financing Reasons, at para. 91. The Noteholders argue that: they were prepared to advance funds on the terms of the Tenor DIP Loan, if so ordered; the supervising judge misapprehended the evidence; and, given the supervising judge's comment that it would have been preferable if the Noteholders had been prepared to lend, that misapprehension affected the outcome of the motion.

[75] The supervising judge's comment at para. 91 of the DIP Financing Reasons makes his real concern clear. There, he stated that "at this time" the Noteholders were not prepared to lend on the terms of the Tenor DIP Loan. The Noteholders' view as of April 5, 2012 was that such long-term financing was not necessary, as the $10 million they offered to advance at that time met Crystallex's then cash requirements. The Noteholders reserved their rights to continue to oppose the approval of long term financing before they had come to an agreement with Crystallex about their entitlement, as creditors. Further hearings, and further arguments, were required. The supervising judge found, at

para. 83 of the DIP Financing Reasons, that not putting sufficient financing in place to finance the arbitration "at this stage" would impair the arbitration. There was no suggestion from counsel for the Noteholders that on April 5, 2012 the Noteholders were prepared to waive the condition permitting them to continue to oppose the approval of long term financing. I am not satisfied that the supervising judge clearly misapprehended the evidence.

b. Loss of leverage

[76] In Crystallex's view, a reduction of the Noteholders' leverage was desirable. It points to the Noteholders' competing CCAA application, seeking to cancel all of the shareholders' equity, which the supervising judge rejected as not fairly balancing the interests of all stakeholders. The Noteholders' plan, subsequently proposed, would entitle them to 46 per cent of the equity in return for giving up their Notes, which Crystallex also views as excessive.[5]

[77] Crystallex argues that the Noteholders are not contractually entitled to convert their Notes to equity, and should therefore not be entitled to do so. Moreover, they argue, in the event of bankruptcy, the Noteholders would only be entitled to recover their principal and interest at the statutory rate of 5 per cent under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and, if the

[5] The Noteholders proposed that they receive 22.9 per cent of the equity for the $36 million needed for the arbitration and 58 per cent of the equity in return for giving up their Notes, for a total of approximately 81 per cent of the equity. Assuming that the Noteholders sought a maximum total entitlement of 81 per cent, if they advanced the $36 million on the terms of the Tenor DIP Loan, as they now seek to do, the amount of equity on conversion of their notes would be 46 per cent. See the DIP Financing Reasons, at para. 77.

arbitration is realized, they will be entitled to the higher rate of interest they are contractually entitled to under the Notes. As Deschamps J. noted at para. 77 of *Century Services*, participants in a reorganization "measure the impact of a reorganization against the position they would enjoy in liquidation".

[78] The Noteholders counter that, contractually, they were entitled to be repaid on December 23, 2011 and, since they were not, and Crystallex proposes to defer repayment for several years and repay the Notes only if the arbitration is successful, the long delay entitles them to some equity participation. Moreover, contractually, Crystallex is restricted from incurring the Tenor DIP Loan, which will be senior to the Notes.

[79] Crystallex points to the terms of the Initial Order, affording the "best offer" the protection of the *Soundair* principles, and providing that "topping offers" would not be considered by the court. Crystallex points out that the Noteholders did not appeal the Initial Order and argues that accepting the Noteholders' matching offer would offend the *Soundair* principles. In Crystallex's view, the Noteholders were treated fairly.

[80] In turn, the Noteholders argue that the Initial Order authorized Crystallex to conduct an auction to raise *interim or DIP financing* pursuant to procedures approved by the Monitor. Since the outset, the Noteholders maintained their objection that the auction process sought more than interim or true DIP financing.

The supervising judge deferred consideration of their objections until the DIP facility was before the court for approval.

[81] The Noteholders are sophisticated parties. They pursued a strategy. It ultimately proved less successful than hoped. It appears that the supervising judge would have been prepared to approve the advance of funds to Crystallex by the Noteholders, on the terms of the Tenor DIP Loan, notwithstanding the *Soundair* principles, had the Noteholders agreed to do so, without condition, on April 5, 2012.

[82] The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.

c. The business judgment rule

[83] The supervising judge held that in addition to the factors in s. 11.2(4) of the CCAA, he could take into account the exercise or lack thereof of business judgment by the board of directors of a debtor corporation in considering DIP

financing: DIP Financing Reasons, at paras. 32-35. He cited *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), as authority for this proposition.[6]

[84] The fact that a debtor's board of directors recommends interim financing is not a determinative factor, and in some cases may not be a material factor, in considering whether to make an order under s. 11.2. It would be unusual if the board did not recommend the financing for which the debtor seeks approval.

[85] *Stelco* should not be read as authority for the principle that the recommendation of the directors of a debtor under CCAA protection is entitled to deference in evaluating whether financing should be approved under s. 11.2 of the CCAA where the factors outlined in s. 11.2(4) have not been complied with. In *Stelco,* the debtor did not seek court approval of a recommendation of the board. In the case of interim financing, the court must make an independent determination, and arrive at an appropriate order, having regard to the factors in s. 11.2(4). It may consider, but not defer to, and is not fettered by, the recommendation of the board.

[86] The weight given by the supervising judge to the business judgment of the board of directors of Crystallex in recommending the Tenor DIP Loan is not, however, a basis for this court to interfere with his decision: *New Skeena Forest Products*, at para. 26.

[6] An incorrect citation for *Stelco* was given in the DIP Financing Reasons, at para. 33.

d. *Cliffs Over Maple Bay* is distinguishable

[87] In *Cliffs Over Maple Bay*, the debtor was the developer of a 300 acre site intended to include residential units, a golf course and a hotel. The debtor obtained protection under the CCAA and sought approval of financing that would permit it to complete material parts of the development. It believed that the proceeds generated from the sale of units thus completed would be sufficient to fund the remaining portions of the development and that, if the development were completed, there would be sufficient sale proceeds to satisfy all of the debtor's obligations.

[88] The motion judge approved the financing; the mortgagees of the development appealed. The British Columbia Court of Appeal noted, at para. 35, that it was not suggested that the debtor intended to propose an arrangement or compromise to its creditors before embarking on its restructuring plan. The court allowed the appeal, writing:

> [37] … DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or compromise with its creditors ...
>
> [38] ... What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The CCAA was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a

> restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

[89] I agree with the supervising judge that this case can be distinguished from *Cliffs Over Maple Bay*, which turned on the court's finding that the debtor did not intend to negotiate a plan with its creditors.

[90] While Mr. Fung initially indicated that Crystallex's plan was to stay creditors' claims until the arbitration was settled or realized, his more recent evidence was that approval of the Tenor DIP Loan does not preclude further discussions about a plan with the creditors. In submissions before the supervising judge, and again before this court, counsel for Crystallex reiterated that Crystallex intended to exit from CCAA protection as soon as a plan was negotiated with the creditors and approved, and that Crystallex intended to negotiate a plan by the expiry of the stay on July 30, 2012. The supervising judge found that Crystallex intended to negotiate a plan with its creditors. There is some basis in the record for such a conclusion.

(5) The Tenor DIP Loan is not an arrangement

[91] An arrangement or compromise cannot be imposed on creditors unless it has been approved by a majority in number representing two thirds in value of the creditors: see s. 6(1) of the CCAA.

[92] The supervising judge rejected the argument that the Tenor DIP Loan was a plan of arrangement or compromise and therefore required the approval of the creditors. He held, at para. 50 of the DIP Financing Reasons:

> A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.

[93] I agree. While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. In this case it was within the discretion of the supervising judge to approve the Tenor DIP Loan.

C. The Appeal from the Management Incentive Plan Approval Order

[94] In my view, the supervising judge did not err in principle or unreasonably exercise his discretion in approving the MIP. I see no basis for this court to intervene.

[95] As the supervising judge noted, employee retention provisions are frequently authorized before a plan is negotiated. The supervising judge was alive to the exceptionally large amounts that might be paid to beneficiaries of the MIP (including Mr. Fung) in this case. The supervising judge took specific note of the issues that the Noteholders had raised in the past regarding the extent to which the independent committee of the board that recommended the MIP was truly independent, and the steps taken by that committee to address those concerns.

[96] The recommendation of an independent committee of the board that has obtained expert advice is entitled to more weight in the consideration of a MIP than is the recommendation of the board in the consideration of whether financing should be approved under s. 11.2 of the CCAA. The CCAA does not list specific factors to be considered by the court in the case of a MIP. Moreover, the board would have the best sense of which employees were essential to the success of its restructuring efforts.

[97] In addition to considering the recommendation of the independent committee of the board and Mr. Swartz, the supervising judge also reviewed the evidence to consider whether any persons had been included in the MIP who should not have been. He did not rely solely on the board's recommendation.

VII. DISPOSITION

[98] Accordingly, I would dismiss the appeals of the CCAA Bridge Financing Order, the CCAA Financing Order, and the Management Incentive Plan Approval Order.

VIII. COSTS

[99] If the parties cannot agree, I would order that Crystallex and Tenor provide their submissions on the issue of costs within 14 days, and that the Noteholders, if so advised, provide their submissions in response within 10 days thereafter. No reply submissions are to be provided without leave.

Released: June 13, 2012
"DOC"

"Alexandra Hoy J.A."
"I agree D. O'Connor A.C.J.O."
"I agree R.A. Blair J.A."

TAB 5

COURT FILE NO.: 04-CL-5306
DATE: 20040322

SUPERIOR COURT OF JUSTICE – ONTARIO
(Commercial List)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

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

BEFORE: FARLEY J.

COUNSEL: *Michael E. Barrack, James D. Gage* and *Geoff R. Hall*, for the Applicants

David Jacobs and *Michael McCreary*, for Locals 1005, 5328 and 8782 of the United Steel Workers of America

Ken Rosenberg, Lily Harmer and *Rob Centa*, for United Steelworkers of America

Bob Thornton and *Kyla Mahar*, for Ernst & Young Inc., Monitor of the Applicants

Kevin J. Zych, for the Informal Committee of Stelco Bondholders

David R. Byers, for CIT

Kevin McElcheran, for GE

Murray Gold and *Andrew Hatnay*, for Retired Salaried Beneficiaries

Lewis Gottheil, for CAW Canada and its Local 523

Virginie Gauthier, for Fleet

H. Whiteley, for CIBC

Gail Rubenstein, for FSCO

Kenneth D. Kraft, for EDS Canada Inc.

HEARD: March 5, 2004

ENDORSEMENT

[1] As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

[2] Allow me to observe that there was a great deal of debate in the materials and submissions as to the reason(s) that Stelco found itself in with respect to what Michael Locker (indicating he was "an expert in the area of corporate restructuring and a leading steel industry analyst") swore to at paragraph 12 of his affidavit was the "current crisis":

> 12. Contending with weak operating results and resulting tight cash flow, management has deliberately chosen not to fund its employee benefits. By contrast, Dofasco and certain other steel companies have consistently funded both their employee benefit obligations as well as debt service. If Stelco's management had chosen to fund pension obligations, presumably with borrowed money, *the current crisis* and related restructuring plans would focus on debt restructuring as opposed to the reduction of employee benefits and related liabilities. [Emphasis added.]

[3] For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such a as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the CCAA. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed – addressed within the CCAA process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The status quo will lead to ruination of Stelco (and its Sub Applicants) and as a result will very badly affect its stakeholder, including pensioners, employees (unionized and non-unionized), management, creditors, suppliers, customers, local and other governments and the local communities. In such situations, time is a precious commodity; it cannot be wasted; no matter how much some would like to take time outs, the clock cannot be stopped. The watchwords of the Commercial List are equally applicable in such circumstances. They are communication, cooperation and common sense. I appreciate that these cases frequently invoke emotions running high and wild; that is understandable on a human basis but it is the considered, rational approach which will solve the problem.

[4] The time to determine whether a corporation is insolvent for the purpose of it being a "debtor company" and thus able to make an application to proceed under the CCAA is the date of filing, in this case January 29, 2004.

[5] The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

[6] If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I.C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

[7] S. 2 of the CCAA defines "debtor company" as:

> "debtor company" means any company that:
>
> (a) is bankrupt or insolvent;
>
> (b) has committed an act of bankruptcy within the meaning of *Bankruptcy and Insolvency Act* ["BIA"] or deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
>
> (c) has made an authorized assignment against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or
>
> (d) is in the course of being wound-up under the *Winding-Up and Restructuring Act* because the company is insolvent.

[8] Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

[9] This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Re Kenwood Hills Development Inc.* (1995), 30 C.B.R. (3d) 44 (Ont. Gen. Div.) where at p. 45 I observed:

> The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

[10] Anderson J. in *Re MGM Electric Co. Ltd.* (1982), 42 C.B.R. (N.S.) 29 (Ont. S.C.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order would confer a benefit on anyone." This

common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *Re TDM Software Systems Inc.* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

[11] The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring – which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

[12] It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

[13] There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Re Inducon Development Corp.* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

> Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the *last* gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe.

[14] It seems to me that the phrase "death throe" could be reasonably replaced with "death spiral". In *Re Cumberland Trading Inc.* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div.), I went on to expand on this at p. 228:

> 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 reorganizational (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 spade work.

[15] I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101; 1 O.R. (3d) 280 (C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J.) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

[16] In *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) I observed at p. 32:

> One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

[17] In *Re Anvil Range Mining Corp.* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

> The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators.

[18] Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

[19] I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least $5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of $5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

[20] Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Pepplar Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

> The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised re-organization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

[21] The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

> In interpreting "debtor company", reference must be had to the definition of “insolvent person” in s. 2(1) of the *Bankruptcy and Insolvency Act* …
>
> To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies’ Creditors Arrangement Act (Canada),* 16 C.B.R. 1 [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

[22] It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

s. 2(1)…

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability 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.

[23] Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of “debtor company” as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Limited Partnership* v. *Rex*, [2002] 2 S.C.R. 559 at p. 580:

> 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.

[24] I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy – and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt’s assets (not likely involving the business carried on – and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist,

albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

[25] It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on “rescues” as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

[26] Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union’s affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

[27] On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

[28] The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Re Optical Recording Laboratories Inc.* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Re Viteway Natural Foods Ltd.* (1986), 63 C.B.R. (N.S.) 157 (B.C.S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

[29] In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx,* [2000] 1 S.C.R. 61 at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *Re King Petroleum Ltd.* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

> With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past.* I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

[30] *King* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

[31] Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

> The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:
>
> (a) identification of the debtor's stakeholders and their interests;
>
> (b) arranging for a process of meaningful communication;
>
> (c) dealing with immediate relationship issues arising from a CCAA filing;
>
> (d) sharing information about the issues giving rise to the debtor's need to restructure;

(e) developing restructuring alternatives; and

(f) building a consensus around a plan of restructuring.

[32] I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to observe that Stelco realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to prefiling liabilities (which the Union misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

> With respect to the Business Plan, the average spot market sales price per ton was $514, and the average contract business sales price per ton was $599. The Forecast reflects an average spot market sales price per ton of $575, and average contract business sales price per ton of $611. The average spot price used in the forecast considers further announced price increases, recognizing, among other things, the timing and the extent such increases are expected to become effective. The benefit of the increase in sales prices from the Business Plan is essentially offset by the substantial increase in production costs, and in particular in raw material costs, primarily scrap and coke, as well as higher working capital levels and a higher loan balance outstanding on the CIT credit facility as of January 2004.

I accept that this is generally a cancel out or wash in all material respects.

[33] I note that $145 million of cash resources had been used from January 1, 2003 to the date of filing. Use of the credit facility of $350 million had increased from $241 million on November 30, 2003 to $293 million on the date of filing. There must be a reasonable reserve of liquidity to take into account day to day, week to week or month to month variances and also provide for unforeseen circumstances such as the breakdown of a piece of vital equipment which would significantly affect production until remedied. Trade credit had been contracting as a result of appreciation by suppliers of Stelco's financial difficulties. The DIP financing of $75 million is only available if Stelco is under CCAA protection. I also note that a shut down as a result of running out of liquidity would be complicated in the case of Stelco and that even if conditions turned around more than reasonably expected, start-up costs would be heavy and quite importantly, there would be a significant erosion of the customer base (reference should be had to the Slater Hamilton plant in this regard). One does not liquidate assets which one would not sell in the ordinary course of business to thereby artificially salvage some liquidity for the purpose of the test: see *Re Pacific Mobile Corporation; Robitaille v. Les Industries l'Islet Inc. and Banque Canadienne Nationale* (1979), 32 C.B.R. (N.S.) 209 (Que. S.C.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of $80 million now to a projected loss of $192 million and cash has gone from a positive $209 million to a negative $114 million.

[34] Locker made the observation at paragraph 8 of his affidavit that:

> 8. Stelco has performed poorly for the past few years primarily due to an inadequate business strategy, poor utilization of assets, inefficient operations and generally weak management leadership and decision-making. This point is best supported by the fact that Stelco's local competitor, Dofasco, has generated outstanding results in the same period.

Table 1 to his affidavit would demonstrate that Dofasco has had superior profitability and cashflow performance than its "neighbour" Stelco. He went on to observe at paragraphs 36-37:

> 36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.
>
> 37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of CCAA protection.

I accept his constructive comments that there is room for cost reductions and that there are substantial savings to be achieved through productivity improvements. However, I do not see anything detrimental to these discussions and negotiations by having them conducted within the umbrella of a CCAA proceeding. See my comments above regarding the CCAA in practice.

[35] But I would observe and I am mystified by Locker's observations at paragraph 12 (quoted above), that Stelco should have borrowed to fund pension obligations to avoid its current financial crisis. This presumes that the borrowed funds would not constitute an obligation to be paid back as to principal and interest, but rather that it would assume the character of a cost-free "gift".

[36] I note that Mackey, without the "laundry list" he indicates at paragraph 17 of his second affidavit, is unable to determine at paragraph 19 (for himself) whether Stelco was insolvent. Mackey was unable to avail himself of all available information in light of the Union's refusal to enter into a confidentiality agreement. He does not closely adhere to the BIA tests as they are defined. In the face of positive evidence about an applicant's financial position by an experienced person with expertise, it is not sufficient to displace this evidence by filing evidence which goes no further than raising questions: see *Anvil*, *supra* at p. 162.

[37] The Union referred me to one of my decisions *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7 (Gen. Div.) where I stated as to the MacGirr affidavit:

> The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing $74 million investment. In stating his opinion MacGirr defined solvency as:

> (a) the ability to meet liabilities as they fall due; and
>
> (b) that assets exceed liabilities.
>
> On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

[38] As will be seen from that expanded quote, MacGirr gave his own definitions of insolvency which are not the same as the s. 2 BIA tests (a), (b) and (c) but only a very loose paraphrase of (a) and (c) and an omission of (b). Nor was I referred to the *King* or *Proulx* cases *supra*. Further, it is obvious from the context that "*sometime in the long run…eventually*" is not a finite time in the foreseeable future.

[39] I have not given any benefit to the $313 - $363 million of improvements referred to in the affidavit of William Vaughan at paragraph 115 as those appear to be capital expenditures which will have to be accommodated within a plan of arrangement or after emergence.

[40] It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the say and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test, clearly for the above reasons and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

[41] What about the BIA (c) test which may be roughly referred to as an assets compared with obligations test. See *New Quebec Reglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Gen. Div.) as to fair value and fair market valuation. The Union observed that there was no intention by Stelco to wind itself up or proceed with a sale of some or all of its assets and undertaking and therefore some of the liabilities which Stelco and Stephen took into account would not crystallize. However, as I discussed at the time of the hearing, the (c) test is what one might reasonably call or describe as an "artificial" or notional/hypothetical test. It presumes certain things which are in fact not necessarily contemplated to take place or to be involved. In that respect, I appreciate that it may

be difficult to get one's mind around that concept and down the right avenue of that (c) test. See my views at trial in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (S.C.J.) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (C.A.). At paragraph 33, I observed in closing:

> 33…They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in Section 100 BIA, a section which is difficult to administer when fmv [fair market value] in a notational or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notational or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized.

[42] The Court of Appeal stated at paragraphs 24-25 as follows:

> 24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.
>
> 25. The Applicants further argue that the trial judge eroded in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would have it been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial judge was one between a notational, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

[43] Test (c) deems a person to be insolvent if "the aggregate of [its] property is not, at a fair valuation, sufficient, or of disposed at a fairly conducted sale under legal process would not be sufficient to enable payment of all [its] obligations, due and accruing due." The origins of this legislative test appear to be the decision of Spragge V-C in *Davidson v. Douglas* (1868), 15 Gr. 347 at p. 351 where he stated with respect to the solvency or insolvency of a debtor, the proper course is:

> to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or a sale where the seller cannot await his opportunities, but must sell.

[44] In *Clarkson v. Sterling* (1887), 14 O.R. 460 (Div Ct.) at p. 463, Rose J. indicted that the sale must be fair and reasonable, but that the determination of fairness and reasonableness would depend on the facts of each case.

[45] The Union essentially relied on garnishment cases. Because of the provisions relating as to which debts may or may not be garnished, these authorities are of somewhat limited value when dealing with the test (c) question. However I would refer to one of the Union's cases *Bank of Montreal v. I. M. Krisp Foods Ltd.*, [1996] S.J. No. 655 (C.A.) where it is stated at paragraph 11:

> "11. Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3rd ed. defines "accruing" as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnisheed. (See Professor Dunlop's extensive research for his British Columbia Law Reform Commission's Report on Attachment of Debts Act, 1978 at 17 to 29 and is text Creditor-Debtor Law in Canada, 2nd ed. at 374 to 385.)

[46] In *Barsi v. Farcas*, [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stanton* (1883), 11 Q.B.D. 518 that: "an accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

[47] Saunders J. noted in *633746 Ont. Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72 (Ont. S.C.) at p. 81 that a sale out of the ordinary course of business would have an adverse effect on that actually realized.

[48] There was no suggestion by any of the parties that any of the assets and undertaking would have any enhanced value from that shown on the financial statements prepared according to GAAP.

[49] In *King, supra* at p. 81 Steele J. observed:

> To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: First, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is a starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it. In this case, I find no difficulty in accepting the obligations shown as liabilities because they are known. I have more difficulty with respect to the assets.

[50] To my view the preferable interpretation to be given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking *in total*; in other words, the debtor in essence is taken as having sold everything. There would be no residual assets and undertaking to pay off any obligations which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. It seems to me that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.

[51] S. 121(1) and (2) of the BIA, which are incorporated by reference in s. 12 of the CCAA, provide in respect to provable claims:

> S. 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 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.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such claim shall be made in accordance with s. 135.

[52] *Houlden and Morawetz 2004 Annotated supra* at p. 537 (G28(3)) indicates:

> The word "liability" is a very broad one. It includes all obligations to which the bankrupt is subject on the day on which he becomes bankrupt except for contingent and unliquidated claims which are dealt with in s. 121(2).

However contingent and unliquidated claims would be encompassed by the term "obligations".

[53] In *Garden v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), Mathers C.J.K.B. observed at p. 281 that "contingent claim, that is, a claim which may or may not ripen into a debt, according as some future event does or does not happen." See *In re A Debtor (No. 64 of 1992)*, [1993] 1 W.L.R. 264 (Ch. D) at p. 268 for the definition of a "liquidated sum" which is an amount which can be readily ascertained and hence by corollary an "unliquidated claim" would be one which is not easily ascertained, but will have to be valued. In *Re Leo Gagnier* (1950), 30 C.B.R. 74 (Ont. S.C.), there appears to be a conflation of not only the (a) test with the (c) test, but also the invocation of the judicial discretion not to grant the receiving order pursuant to a bankruptcy petition, notwithstanding that "[the judge was] unable to find the debtor is bankrupt". The debtor was able to survive the (a) test as he had the practice (accepted by all his suppliers) of providing them with post dated cheques. The (c) test was not a problem since the judge found that his assets should be valued at considerably more than his obligations. However, this case does illustrate that the application of the tests present some difficulties. These difficulties are magnified when one is dealing with something more significantly complex and a great deal larger than a haberdashery store – in the case before us, a giant corporation in which, amongst other things, is engaged in a very competitive history including competition from foreign sources which have recently restructured into more cost efficient structures, having shed certain of their obligations. As well, that is without taking into account that a sale would entail significant transaction costs. Even of greater significance would be the severance and termination payments to employees not continued by the new purchaser. Lastly, it was recognized by everyone at the hearing that Stelco's plants, especially the Hamilton-Hilton works, have extremely high environmental liabilities lurking in the woodwork. Stephen observed that these obligations would be substantial, although not quantified.

[54] It is true that there are no appraisals of the plant and equipment nor of the assets and undertaking of Stelco. Given the circumstances of this case and the complexities of the market, one may realistically question whether or not the appraisals would be all that helpful or accurate.

[55] I would further observe that in the notional or hypothetical exercise of a sale, then all the obligations which would be triggered by such sale would have to be taken into account.

[56] All liabilities, contingent or unliquidated would have to be taken into account. See *King, supra* p. 81; *Salvati, supra* pp. 80-1; *Maybank Foods Inc. (Trustee of) v. Proviseuers Maritimes Ltd.* (1989), 45 B.L.R. 14 (N.S.S.C.) at p. 29; *Re Challmie* (1976), 22 C.B.R. (N.S.) 78 (B.C.S.C.) at pp. 81-2. In *Challmie* the debtor ought to have known that his guarantee was very much exposed given the perilous state of his company whose liabilities he had guaranteed. It is interesting to note what was stated in *Maybank*, even if it is rather patently obvious. Tidman J. said in respect of the branch of the company at p. 29:

> Mr. MacAdam argues also that the $4.8 million employees' severance obligation was not a liability on January 20, 1986. The *Bankruptcy Act* includes as obligations both those due and accruing due. Although the employees' severance obligation was not due and payable on January 20, 1986 it was an obligation "accruing due". The Toronto facility had experienced severe financial difficulties for some time; in fact, it was the major, if not the sole cause, of Maybank's financial difficulties. I believe it is reasonable to conclude that a reasonably astute perspective buyer of the company has a going concern would have considered that obligation on January 20, 1986 and that it would have substantially reduced the price offered by that perspective buyer. Therefore that obligation must be considered as an obligation of the company on January 20, 1986.

[57] With the greatest of respect for my colleague, I disagree with the conclusion of Ground J. in *Enterprise Capital, supra* as to the approach to be taken to "due and accruing due" when he observed at pp. 139-140:

> It therefore becomes necessary to determine whether the principle amount of the Notes constitutes an obligation "due or accruing due" as of the date of this application.
>
> There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically, in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the *Dominion Winding-Up Act* had to determine whether the amount claimed as set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J. at pp. 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.R. 1 (Ont. C.A.) at p. 8:
>
> > A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: Per Lindley L.J. in *Webb v. Stenton* (1883), 11 Q.D.D. at p. 529.
>
> Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding-up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due"

> for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for the purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re* 220 B.R. 165 (U.S.N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view, the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period, but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

[58] There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

[59] It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway* below at pp. 163-4 – at least at some point in the future. Again, I would refer to my conclusion above that *every obligation* of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test. See *Optical supra* at pp. 756-7; *Re Viteway Natural Foods Ltd.* (1986), 63 C.B.R. (N.S.) 157 (B.C.S.C.) at pp. 164-63-4; *Re Consolidated Seed Exports Ltd.* (1986), 62 C.B.R. (N.S.) 156 (B.C.S.C.) at p. 163. In *Consolidated Seed,* Spencer J. at pp. 162-3 stated:

> In my opinion, a futures broker is not in that special position. The third definition of "insolvency" may apply to a futures trader at any time even though he has open long positions in the market. Even though Consolidated's long positions were not required to be closed on 10th December, the chance that they might show a profit by March 1981 or even on the following day and thus wipe out Consolidated's cash deficit cannot save it from a condition of insolvency on that day. The circumstances fit precisely within the third definition; if all Consolidated's assets had been sold on that day at a fair value, the proceeds would not have covered its obligations due and accruing due, including its

> obligations to pay in March 1981 for its long positions in rapeseed. The market prices from day to day establish a fair valuation. …
>
> The contract to buy grain at a fixed price at a future time imposes a present obligation upon a trader taking a long position in the futures market to take delivery in exchange for payment at that future time. It is true that in the practice of the market, that obligation is nearly always washed out by buying an offsetting short contract, but until that is done the obligation stands. The trader does not know who will eventually be on the opposite side of his transaction if it is not offset but all transactions are treated as if the clearing house is on the other side. It is a present obligation due at a future time. It is therefore an obligation accruing due within the meaning of the third definition of "insolvency".

[60] The possibility of an expectancy of future profits or a change in the market is not sufficient; *Consolidated Seed* at p. 162 emphasizes that the test is to be done on that day, the day of filing in the case of an application for reorganization.

[61] I see no objection to using Exhibit C to Stephen's affidavit as an aid to review the balance sheet approach to test (c). While Stephen may not have known who prepared Exhibit C, he addressed each of its components in the text of his affidavit and as such he could have mechanically prepared the exhibit himself. He was comfortable with and agreed with each of its components. Stelco's factum at paragraphs 70-1 submits as follows:

> 70. In Exhibit C to his Affidavit, Mr. Stephen addresses a variety of adjustments to the Shareholder's Equity of Stelco necessary to reflect the values of assets and liabilities as would be required to determine whether Stelco met the test of insolvency under Clause C. In cross examination of both Mr. Vaughan and Mr. Stephen only one of these adjustments was challenged – the "Possible Reductions in Capital Assets."
>
> 71. The basis of the challenge was that the comparative sales analysis was flawed. In the submission of Stelco, none of these challenges has any merit. Even if the entire adjustment relating to the value in capital assets is ignored, the remaining adjustments leave Stelco with assets worth over $600 million less than the value of its obligations due and accruing due. This fundamental fact is not challenged.

[62] Stelco went on at paragraphs 74-5 of its factum to submit:

> 74. The values relied upon by Mr. Stephen if anything, understate the extent of Stelco's insolvency. As Mr. Stephen has stated, and no one has challenged by affidavit evidence or on cross examination, in a fairly conducted sale under legal process, the value of Stelco's working capital and other assets would be further impaired by: (i) increased environmental liabilities not reflected on the financial statements, (ii) increased pension deficiencies that would be generated on a wind up of the pension plans, (iii) severance and termination claims and (iv) substantial liquidation costs that would be incurred in connection with such a sale.

> 75. No one on behalf of the USWA has presented any evidence that the capital assets of Stelco are in excess of book value on a stand alone basis. Certainly no one has suggested that these assets would be in excess of book value if the related environmental legacy costs and collective agreements could not be separated from the assets.

[63] Before turning to that exercise, I would also observe that test (c) is also disjunctive. There is an insolvency condition if the total obligation of the debtor exceed either (i) a fair valuation of its assets or (ii) the proceeds of a sale fairly conducted under legal process of its assets.

[64] As discussed above and confirmed by Stephen, if there were a sale under legal process, then it would be unlikely, especially in this circumstance that values would be enhanced; in all probability they would be depressed from book value. Stephen took the balance sheet GAAP calculated figure of equity at November 30, 2003 as $804.2 million. From that, he deducted the loss for December 2003 – January 2004 of $17 million to arrive at an equity position of $787.2 million as at the date of filing.

[65] From that, he deducted, reasonably in my view, those "booked" assets that would have no value in a test (c) sale namely: (a) $294 million of future income tax recourse which would need taxable income in the future to realize; (b) $57 million for a write-off of the Platemill which is presently hot idled (while Locker observed that it would not be prohibitive in cost to restart production, I note that neither Stephen nor Vaughn were cross examined as to the decision not to do so); and (c) the captialized deferred debt issue expense of $3.2 million which is being written off over time and therefore, truly is a "nothing". This totals $354.2 million so that the excess of value over liabilities before reflecting obligations not included in the financials directly, but which are, substantiated as to category in the notes would be $433 million.

[66] On a windup basis, there would be a pension deficiency of $1252 million; however, Stephen conservatively in my view looked at the Mercer actuary calculations on the basis of a going concern finding deficiency of $656 million. If the $1252 million windup figure had been taken, then the picture would have been even bleaker than it is as Stephen has calculated it for test (c) purposes. In addition, there are deferred pension costs of $198.7 million which under GAAP accounting calculations is allowed so as to defer recognition of past bad investment experience, but this has no realizable value. Then there is the question of Employee Future Benefits. These have been calculated as at December 31, 2003 by the Mercer actuary as $909.3 million but only $684 million has been accrued and booked on the financial statements so that there has to be an increased provision of $225.3 million. These off balance sheet adjustments total $1080 million.

[67] Taking that last adjustment into account would result in a *negative* equity of ($433 million minus $1080 million) or *negative* $647 million. On that basis without taking into account possible reductions in capital assets as dealt with in the somewhat flawed Exhibit E nor environmental and other costs discussed above, Stelco is insolvent according to the test (c). With respect to Exhibit E, I have not relied on it in any way, but it is entirely likely that a properly calculated Exhibit E would provide comparators (also being sold in the U.S. under legal process in a fairly conducted process) which tend to require a further downward adjustment. Based on test (c), Stelco is significantly, not marginally, under water.

[68] In reaching my conclusion as to the negative equity (and I find that Stephen approached that exercise fairly and constructively), please note my comments above regarding the possible

assumption of pension obligations by the purchaser being offset by a reduction of the purchase price. The 35% adjustment advocated as to pension and employee benefits in this regard is speculation by the Union. Secondly, the Union emphasized cash flow as being important in evaluation, but it must be remembered that Stelco has been negative cash flow for some time which would make that analysis unreliable and to the detriment of the Union's position. The Union treated the $773 million estimated contribution to the shortfall in the pension deficiency by the Pension Benefits Guarantee Fund as eliminating that as a Stelco obligation. That is not the case however as that Fund would be subrogated to the claims of the employees in that respect with a result that Stelco would remain liable for that $773 million. Lastly, the Union indicated that there should be a $155 million adjustment as to the negative equity in Sub Applicants when calculating Stelco's equity. While Stephen at Q. 181-2 acknowledged that there was no adjustment for that, I agree with him that there ought not to be since Stelco was being examined (and the calculations were based) on an unconsolidated basis, not on a consolidated basis.

[69] In the end result, I have concluded on the balance of probabilities that Stelco is insolvent and therefore it is a "debtor company" as at the date of filing and entitled to apply for the CCAA initial order. My conclusion is that (i) BIA test (c) strongly shows Stelco is insolvent; (ii) BIA test (a) demonstrates, to a less certain but sufficient basis, an insolvency and (iii) the "new" CCAA test again strongly supports the conclusion of insolvency. I am further of the opinion that I properly exercised my discretion in granting Stelco and the Sub Applicants the initial order on January 29, 2004 and I would confirm that as of the present date with effect on the date of filing. The Union's motion is therefore dismissed.

[70] I appreciate that all the employees (union and non-union alike) and the Union and the International have a justifiable pride in their work and their workplace – and a human concern about what the future holds for them. The pensioners are in the same position. Their respective positions can only be improved by engaging in discussion, an exchange of views and information reasonably advanced and conscientiously listened to and digested, leading to mutual problem solving, ideas and negotiations. Negative attitudes can only lead to the detriment to all stakeholders. Unfortunately there has been some finger pointing on various sides; that should be put behind everyone so that participants in this process can concentrate on the future and not inappropriately dwell on the past. I understand that there have been some discussions and interchange over the past two weeks since the hearing and that is a positive start.

J.M. Farley

Released: March 22, 20004

TAB 6

Century Services Inc. *Appellant*

v.

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

INDEXED AS: CENTURY SERVICES INC. *v.* CANADA (ATTORNEY GENERAL)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

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

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

Century Services Inc. *Appelante*

c.

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

RÉPERTORIÉ : CENTURY SERVICES INC. *c.* CANADA (PROCUREUR GÉNÉRAL)

2010 CSC 60

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

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

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

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

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

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

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« *LTA* ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« *LFI* »). Toutefois, le par. 18.3(1) de la *LACC* prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la *LACC* a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la *LFI*. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la *LTA*, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la *LACC* ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la *LACC*, de la fonction de cette loi parmi

Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event,

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édiction de ce texte législatif visait justement à

recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la *LACC* ou de la *LFI* confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la *LACC* et au par. 67(3) de la *LFI* en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la *LFI* ou la *LACC*, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(*f*) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édiction du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44*f*) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édiction du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

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

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

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

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

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

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

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

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

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

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

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

1. Facts and Decisions of the Courts Below

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

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

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

1. Faits et décisions des juridictions inférieures

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

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

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

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

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

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

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

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

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

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

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

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

2. Issues

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

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

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

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

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

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

2. Questions en litige

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

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

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

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

3. Analysis

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

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

3.1 *Purpose and Scope of Insolvency Law*

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

3. Analyse

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

[20] Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

[21] In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a

procédures en sont peu à peu venus à reconnaître et à apprécier la caractéristique propre de la loi : l'attribution, au tribunal chargé de surveiller le processus, d'une grande latitude lui permettant de rendre les ordonnances nécessaires pour faciliter la réorganisation du débiteur et réaliser les objectifs de la *LACC*. Nous verrons plus loin comment les tribunaux ont utilisé de façon de plus en plus souple et créative les pouvoirs qui leur sont conférés par la *LACC*.

[20] Ce ne sont pas seulement les tribunaux qui se sont employés à faire évoluer le droit de l'insolvabilité pendant cette période. En 1970, un comité constitué par le gouvernement a mené une étude approfondie au terme de laquelle il a recommandé une réforme majeure, mais le législateur n'a rien fait (voir *Faillite et insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970)). En 1986, un autre comité d'experts a formulé des recommandations de portée plus restreinte, qui ont finalement conduit à l'adoption de la *Loi sur la faillite et l'insolvabilité* de 1992 (L.C. 1992, ch. 27) (voir *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité* (1986)). Des dispositions à caractère plus général concernant la réorganisation des débiteurs insolvables ont alors été ajoutées à la loi canadienne relative à la faillite. Malgré l'absence de recommandations spécifiques au sujet de la *LACC* dans les rapports de 1970 et 1986, le comité de la Chambre des communes qui s'est penché sur le projet de loi C-22 à l'origine de la *LFI* a semblé accepter le témoignage d'un expert selon lequel le nouveau régime de réorganisation de la *LFI* supplanterait rapidement la *LACC*, laquelle pourrait alors être abrogée et l'insolvabilité commerciale et la faillite seraient ainsi régies par un seul texte législatif (*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule nº 15, 3e sess., 34e lég., 3 octobre 1991, 15:15-15:16).

[21] En rétrospective, cette conclusion du comité de la Chambre des communes ne correspondait pas à la réalité. Elle ne tenait pas compte de la nouvelle vitalité de la *LACC* dans la pratique contemporaine,

flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

ni des avantages qu'offrait, en présence de réorganisations de plus en plus complexes, un processus souple de réorganisation sous surveillance judiciaire par rapport au régime plus rigide de la *LFI*, fondé sur des règles préétablies. La « souplesse de la LACC [était considérée comme offrant] de grands avantages car elle permet de prendre des décisions créatives et efficaces » (Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2002), p. 50). Au cours des trois dernières décennies, la résurrection de la *LACC* a donc été le moteur d'un processus grâce auquel, selon un auteur, [TRADUCTION] « le régime juridique canadien de restructuration en cas d'insolvabilité — qui était au départ un instrument plutôt rudimentaire — a évolué pour devenir un des systèmes les plus sophistiqués du monde développé » (R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 481).

[22] While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

[22] Si les instances en matière d'insolvabilité peuvent être régies par des régimes législatifs différents, elles n'en présentent pas moins certains points communs, dont le plus frappant réside dans le modèle de la procédure unique. Le professeur Wood a décrit ainsi la nature et l'objectif de ce modèle dans *Bankruptcy and Insolvency Law* :

> [TRADUCTION] Elles prévoient toutes une procédure collective qui remplace la procédure civile habituelle dont peuvent se prévaloir les créanciers pour faire valoir leurs droits. Les recours des créanciers sont collectivisés afin d'éviter l'anarchie qui régnerait si ceux-ci pouvaient exercer leurs recours individuellement. En l'absence d'un processus collectif, chaque créancier sait que faute d'agir de façon rapide et déterminée pour saisir les biens du débiteur, il sera devancé par les autres créanciers. [p. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing,

Le modèle de la procédure unique vise à faire échec à l'inefficacité et au chaos qui résulteraient de l'insolvabilité si chaque créancier engageait sa propre procédure dans le but de recouvrer sa créance. La réunion — en une seule instance relevant d'un même tribunal — de toutes les actions possibles contre le débiteur a pour effet de faciliter la négociation avec

rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

[23] Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).

[24] With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

[25] Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

les créanciers en les mettant tous sur le même pied. Cela évite le risque de voir un créancier plus combatif obtenir le paiement de ses créances sur l'actif limité du débiteur pendant que les autres créanciers tentent d'arriver à une transaction. La *LACC* et la *LFI* autorisent toutes deux pour cette raison le tribunal à ordonner la suspension de toutes les actions intentées contre le débiteur pendant qu'on cherche à conclure une transaction.

[23] Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. De plus, l'une des caractéristiques importantes de la réforme dont ces deux lois ont fait l'objet depuis 1992 est la réduction des priorités de la Couronne (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73 et 125; L.C. 2000, ch. 30, art. 148; L.C. 2005, ch. 47, art. 69 et 131; L.C. 2009, ch. 33, art. 25; voir aussi *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*).

[24] Comme les régimes de restructuration parallèles de la *LACC* et de la *LFI* constituent désormais une caractéristique reconnue dans le domaine du droit de l'insolvabilité, le travail de réforme législative contemporain a principalement visé à harmoniser, dans la mesure du possible, les aspects communs aux deux régimes et à privilégier la réorganisation plutôt que la liquidation (voir la *Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence*, L.C. 2005, ch. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta L.R. (4th) 192, par. 19).

[25] Ayant à l'esprit le contexte historique de la *LACC* et de la *LFI*, je vais maintenant aborder la première question en litige.

3.2 *GST Deemed Trust Under the CCAA*

[26] The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

[27] The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

[28] The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims

3.2 *Fiducie réputée se rapportant à la TPS dans le cadre de la LACC*

[26] La Cour d'appel a estimé que la *LTA* empêchait le tribunal de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS, lorsqu'il a partiellement levé la suspension des procédures engagées contre le débiteur afin de permettre à celui-ci de faire cession de ses biens. Ce faisant, la cour a adopté un raisonnement qui s'insère dans un courant jurisprudentiel dominé par l'arrêt *Ottawa Senators*, suivant lequel il demeure possible de demander le bénéfice d'une fiducie réputée établie par la *LTA* pendant une réorganisation opérée en vertu de la *LACC*, et ce, malgré les dispositions de la *LACC* qui semblent dire le contraire.

[27] S'appuyant largement sur l'arrêt *Ottawa Senators* de la Cour d'appel de l'Ontario, la Couronne plaide que la disposition postérieure de la *LTA* créant la fiducie réputée visant la TPS l'emporte sur la disposition de la *LACC* censée neutraliser la plupart des fiducies réputées qui sont créées par des dispositions législatives. Si la Cour d'appel a accepté ce raisonnement dans la présente affaire, les tribunaux provinciaux ne l'ont pas tous adopté (voir, p. ex., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), autorisation d'appel accordée, 2010 QCCA 183 (CanLII)). Dans ses observations écrites adressées à la Cour, Century Services s'est fondée sur l'argument suivant lequel le tribunal pouvait, en vertu de la *LACC*, maintenir la suspension de la demande de la Couronne visant le paiement de la TPS non versée. Au cours des plaidoiries, la question de savoir si l'arrêt *Ottawa Senators* était bien fondé a néanmoins été soulevée. Après l'audience, la Cour a demandé aux parties de présenter des observations écrites supplémentaires à ce sujet. Comme il ressort clairement des motifs de ma collègue la juge Abella, cette question a pris une grande importance devant notre Cour. Dans ces circonstances, la Cour doit statuer sur le bien-fondé du raisonnement adopté dans l'arrêt *Ottawa Senators*.

[28] Le contexte général dans lequel s'inscrit cette question concerne l'évolution considérable, signalée plus haut, de la priorité dont jouit la Couronne en tant que créancier en cas d'insolvabilité. Avant les

largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as added by S.C. 1997, c. 12, s. 126).

[29] Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bankr. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

[30] Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at §2).

[31] With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property

années 1990, les créances de la Couronne bénéficiaient dans une large mesure d'une priorité en cas d'insolvabilité. Cette situation avantageuse suscitait une grande controverse. Les propositions de réforme du droit de l'insolvabilité de 1970 et de 1986 en témoignent — elles recommandaient que les créances de la Couronne ne fassent l'objet d'aucun traitement préférentiel. Une question connexe se posait : celle de savoir si la Couronne était même assujettie à la *LACC*. Les modifications apportées à la *LACC* en 1997 ont confirmé qu'elle l'était bel et bien (voir *LACC*, art. 21, ajouté par L.C. 1997, ch. 12, art. 126).

[29] Les revendications de priorité par l'État en cas d'insolvabilité sont abordées de différentes façons selon les pays. Par exemple, en Allemagne et en Australie, l'État ne bénéficie d'aucune priorité, alors qu'aux États-Unis et en France il jouit au contraire d'une large priorité (voir B. K. Morgan, « Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy » (2000), 74 *Am. Bankr. L.J.* 461, p. 500). Le Canada a choisi une voie intermédiaire dans le cadre d'une réforme législative amorcée en 1992 : la Couronne a conservé sa priorité pour les sommes retenues à la source au titre de l'impôt sur le revenu et des cotisations à l'assurance-emploi (« AE ») et au Régime de pensions du Canada (« RPC »), mais elle est un créancier ordinaire non garanti pour la plupart des autres sommes qui lui sont dues.

[30] Le législateur a fréquemment adopté des mécanismes visant à protéger les créances de la Couronne et à permettre leur exécution. Les deux plus courants sont les fiducies présumées et les pouvoirs de saisie-arrêt (voir F. L. Lamer, *Priority of Crown Claims in Insolvency* (feuilles mobiles), §2).

[31] Pour ce qui est des sommes de TPS perçues, le législateur a établi une fiducie réputée. La *LTA* précise que la personne qui perçoit une somme au titre de la TPS est réputée la détenir en fiducie pour la Couronne (par. 222(1)). La fiducie réputée s'applique aux autres biens de la personne qui perçoit la taxe, pour une valeur égale à la somme réputée détenue en fiducie, si la somme en question n'a pas été versée en conformité avec la *LTA*. La fiducie réputée vise

held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

[32] Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

[33] In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

également les biens détenus par un créancier garanti qui, si ce n'était de la sûreté, seraient les biens de la personne qui perçoit la taxe (par. 222(3)).

[32] Utilisant pratiquement les mêmes termes, le législateur a créé de semblables fiducies réputées à l'égard des retenues à la source relatives à l'impôt sur le revenu et aux cotisations à l'AE et au RPC (voir par. 227(4) de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) (« *LIR* »), par. 86(2) et (2.1) de la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23, et par. 23(3) et (4) du *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8). J'emploierai ci-après le terme « retenues à la source » pour désigner les retenues relatives à l'impôt sur le revenu et aux cotisations à l'AE et au RPC.

[33] Dans *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411, la Cour était saisie d'un litige portant sur la priorité de rang entre, d'une part, une fiducie réputée établie en vertu de la *LIR* à l'égard des retenues à la source, et, d'autre part, des sûretés constituées en vertu de la *Loi sur les banques*, L.C. 1991, ch. 46, et de la loi de l'Alberta intitulée *Personal Property Security Act*, S.A. 1988, ch. P-4.05 (« *PPSA* »). D'après les dispositions alors en vigueur, une fiducie réputée — établie en vertu de la *LIR* à l'égard des biens du débiteur pour une valeur égale à la somme due au titre de l'impôt sur le revenu — commençait à s'appliquer au moment de la liquidation, de la mise sous séquestre ou de la cession de biens. Dans *Sparrow Electric*, la Cour a conclu que la fiducie réputée de la *LIR* ne pouvait pas l'emporter sur les sûretés, au motif que, comme celles-ci constituaient des privilèges fixes grevant les biens dès que le débiteur acquérait des droits sur eux, il n'existait pas de biens susceptibles d'être visés par la fiducie réputée de la *LIR* lorsqu'elle prenait naissance par la suite. Ultérieurement, dans *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720, la Cour a souligné que le législateur était intervenu pour renforcer la fiducie réputée de la *LIR* en précisant qu'elle est réputée s'appliquer dès le moment où les retenues ne sont pas versées à la Couronne conformément aux exigences de la *LIR*, et en donnant à la Couronne la priorité sur toute autre garantie (par. 27-29) (la « modification découlant de l'arrêt *Sparrow Electric* »).

[34] The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

222. . . .

. . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed . . . .

[35] The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

[36] The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

[37] Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have,

[34] Selon le texte modifié du par. 227(4.1) de la *LIR* et celui des fiducies réputées correspondantes établies dans le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* à l'égard des retenues à la source, la fiducie réputée s'applique malgré tout autre texte législatif fédéral sauf les art. 81.1 et 81.2 de la *LFI*. La fiducie réputée de la *LTA* qui est en cause en l'espèce est formulée en des termes semblables sauf que la limite à son application vise la *LFI* dans son entier. Voici le texte de la disposition pertinente :

222. . . .

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés . . .

[35] La Couronne soutient que la modification découlant de l'arrêt *Sparrow Electric*, qui a été ajoutée à la *LTA* par le législateur en 2000, visait à maintenir la priorité de Sa Majesté sous le régime de la *LACC* à l'égard du montant de TPS perçu, tout en reléguant celle-ci au rang de créancier non garanti à l'égard de ce montant sous le régime de la *LFI* uniquement. De l'avis de la Couronne, il en est ainsi parce que, selon la *LTA*, la fiducie réputée visant la TPS demeure en vigueur « malgré » tout autre texte législatif sauf la *LFI*.

[36] Les termes utilisés dans la *LTA* pour établir la fiducie réputée à l'égard de la TPS créent un conflit apparent avec la *LACC*, laquelle précise que, sous réserve de certaines exceptions, les biens qui sont réputés selon un texte législatif être détenus en fiducie pour la Couronne ne doivent pas être considérés comme tels.

[37] Par une modification apportée à la *LACC* en 1997 (L.C. 1997, ch. 12, art. 125), le législateur

subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[38] An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

18.3 . . .

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

semble, sous réserve d'exceptions spécifiques, avoir neutralisé les fiducies réputées créées en faveur de la Couronne lorsque des procédures de réorganisation sont engagées sous le régime de cette loi. La disposition pertinente, à l'époque le par. 18.3(1), était libellée ainsi :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

Cette neutralisation des fiducies réputées a été maintenue dans des modifications apportées à la *LACC* en 2005 (L.C. 2005, ch. 47), où le par. 18.3(1) a été reformulé et renuméroté, devenant le par. 37(1) :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

[38] La *LFI* comporte une disposition analogue, qui — sous réserve des mêmes exceptions spécifiques — neutralise les fiducies réputées établies en vertu d'un texte législatif et fait en sorte que les biens du failli qui autrement seraient visés par une telle fiducie font partie de l'actif du débiteur et sont à la disposition des créanciers (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73; *LFI*, par. 67(2)). Il convient de souligner que, tant dans la *LACC* que dans la *LFI*, les exceptions visent les retenues à la source (*LACC*, par. 18.3(2); *LFI*, par. 67(3)). Voici la disposition pertinente de la *LACC* :

18.3 . . .

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

Par conséquent, la fiducie réputée établie en faveur de la Couronne et la priorité dont celle-ci jouit de ce fait sur les retenues à la source continuent de s'appliquer autant pendant la réorganisation que pendant la faillite.

[39] Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** . . .
>
> . . .
>
> (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution . . . .

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

[40] The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize

[39] Par ailleurs, les autres créances de la Couronne sont considérées par la *LACC* et la *LFI* comme des créances non garanties (*LACC*, par. 18.4(1); *LFI*, par. 86(1)). Ces dispositions faisant de la Couronne un créancier non garanti comportent une exception expresse concernant les fiducies réputées établies par un texte législatif à l'égard des retenues à la source (*LACC*, par. 18.4(3); *LFI*, par. 86(3)). Voici la disposition de la *LACC* :

> **18.4** . . .
>
> . . .
>
> (3) Le paragraphe (1) [suivant lequel la Couronne a le rang de créancier non garanti] n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :
>
> *a*) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;
>
> *b*) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation . . .

Par conséquent, non seulement la *LACC* précise que les créances de la Couronne ne bénéficient pas d'une priorité par rapport à celles des autres créanciers (par. 18.3(1)), mais les exceptions à cette règle (maintien de la priorité de la Couronne dans le cas des retenues à la source) sont mentionnées à plusieurs reprises dans la Loi.

[40] Le conflit apparent qui existe dans la présente affaire fait qu'on doit se demander si la règle de la *LTA* adoptée en 2000, selon laquelle les fiducies réputées visant la TPS s'appliquent malgré tout autre texte législatif fédéral sauf la *LFI*, l'emporte sur la règle énoncée dans la *LACC* — qui a d'abord été édictée en 1997 à l'art. 18.3 — suivant laquelle, sous réserve de certaines exceptions explicites, les fiducies réputées établies par une disposition législative sont sans effet dans le cadre de la *LACC*. Avec égards pour l'opinion contraire exprimée par mon collègue le juge Fish, je ne crois pas qu'on puisse résoudre ce conflit apparent

conflicts, apparent or real, and resolve them when possible.

[41] A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (Alta. Q.B.); *Gauntlet*).

[42] The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[43] Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy,

en niant son existence et en créant une règle qui exige à la fois une disposition législative établissant la fiducie présumée et une autre la confirmant. Une telle règle est inconnue en droit. Les tribunaux doivent reconnaître les conflits, apparents ou réels, et les résoudre lorsque la chose est possible.

[41] Un courant jurisprudentiel pancanadien a résolu le conflit apparent en faveur de la *LTA*, confirmant ainsi la validité des fiducies réputées à l'égard de la TPS dans le cadre de la *LACC*. Dans l'arrêt déterminant à ce sujet, *Ottawa Senators*, la Cour d'appel de l'Ontario a invoqué la doctrine de l'abrogation implicite et conclu que la disposition postérieure de la *LTA* devait avoir préséance sur la *LACC* (voir aussi *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (B.R. Alb.); *Gauntlet*).

[42] Dans *Ottawa Senators*, la Cour d'appel de l'Ontario a fondé sa conclusion sur deux considérations. Premièrement, elle était convaincue qu'en mentionnant explicitement la *LFI* — mais pas la *LACC* — au par. 222(3) de la *LTA*, le législateur a fait un choix délibéré. Je cite le juge MacPherson :

> [TRADUCTION] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[43] Deuxièmement, la Cour d'appel de l'Ontario a comparé le conflit entre la *LTA* et la *LACC* à celui dont a été saisie la Cour dans *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, et les a jugés [TRADUCTION] « identiques » (par. 46). Elle s'estimait donc tenue de suivre l'arrêt *Doré* (par. 49). Dans cet arrêt, la Cour a conclu qu'une disposition d'une loi de nature plus générale et récemment adoptée établissant un délai de prescription — le *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* ») — avait eu pour effet d'abroger une disposition plus spécifique

the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

[44] Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

[45] I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists

d'un texte de loi antérieur, la *Loi sur les cités et villes* du Québec, L.R.Q., ch. C-19, avec laquelle elle entrait en conflit. Par analogie, la Cour d'appel de l'Ontario a conclu que le par. 222(3) de la *LTA*, une disposition plus récente et plus générale, abrogeait implicitement la disposition antérieure plus spécifique, à savoir le par. 18.3(1) de la *LACC* (par. 47-49).

[44] En examinant la question dans tout son contexte, je suis amenée à conclure, pour plusieurs raisons, que ni le raisonnement ni le résultat de l'arrêt *Ottawa Senators* ne peuvent être adoptés. Bien qu'il puisse exister un conflit entre le libellé des textes de loi, une analyse téléologique et contextuelle visant à déterminer la véritable intention du législateur conduit à la conclusion que ce dernier ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la *LACC*, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a apporté à la *LTA*, en 2000, la modification découlant de l'arrêt *Sparrow Electric*.

[45] Je rappelle d'abord que le législateur a manifesté sa volonté de mettre un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité. Selon le par. 18.3(1) de la *LACC* (sous réserve des exceptions prévues au par. 18.3(2)), les fiducies réputées de la Couronne n'ont aucun effet sous le régime de cette loi. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. Par exemple, le par. 18.3(2) de la *LACC* et le par. 67(3) de la *LFI* énoncent expressément que les fiducies réputées visant les retenues à la source continuent de produire leurs effets en cas d'insolvabilité. Le législateur a donc clairement établi des exceptions à la règle générale selon laquelle les fiducies réputées n'ont plus d'effet dans un contexte d'insolvabilité. La *LACC* et la *LFI* sont en harmonie : elles préservent les fiducies réputées et établissent la priorité de la Couronne seulement à l'égard des retenues à la source. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la

in those Acts carving out an exception for GST claims.

[46] The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

[47] Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Alors que les retenues à la source font l'objet de dispositions explicites dans ces deux lois concernant l'insolvabilité, celles-ci ne comportent pas de dispositions claires et expresses analogues établissant une exception pour les créances relatives à la TPS.

[46] La logique interne de la *LACC* va également à l'encontre du maintien de la fiducie réputée établie dans la *LTA* à l'égard de la TPS. En effet, la *LACC* impose certaines limites à la suspension par les tribunaux des droits de la Couronne à l'égard des retenues à la source, mais elle ne fait pas mention de la *LTA* (art. 11.4). Comme les fiducies réputées visant les retenues à la source sont explicitement protégées par la *LACC*, il serait incohérent d'accorder une meilleure protection à la fiducie réputée établie par la *LTA* en l'absence de dispositions explicites en ce sens dans la *LACC*. Par conséquent, il semble découler de la logique de la *LACC* que la fiducie réputée établie par la *LTA* est visée par la renonciation du législateur à sa priorité (art. 18.4).

[47] De plus, il y aurait une étrange asymétrie si l'interprétation faisant primer la *LTA* sur la *LACC* préconisée par la Couronne était retenue en l'espèce : les créances de la Couronne relatives à la TPS conserveraient leur priorité de rang pendant les procédures fondées sur la *LACC*, mais pas en cas de faillite. Comme certains tribunaux l'ont bien vu, cela ne pourrait qu'encourager les créanciers à recourir à la loi la plus favorable dans les cas où, comme en l'espèce, l'actif du débiteur n'est pas suffisant pour permettre à la fois le paiement des créanciers garantis et le paiement des créances de la Couronne (*Gauntlet*, par. 21). Or, si les réclamations des créanciers étaient mieux protégées par la liquidation sous le régime de la *LFI*, les créanciers seraient très fortement incités à éviter les procédures prévues par la *LACC* et les risques d'échec d'une réorganisation. Le fait de donner à un acteur clé de telles raisons de s'opposer aux procédures de réorganisation fondées sur la *LACC* dans toute situation d'insolvabilité ne peut que miner les objectifs réparateurs de ce texte législatif et risque au contraire de favoriser les maux sociaux que son édiction visait justement à prévenir.

[48] Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

[49] Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

[48] Peut-être l'effet de l'arrêt *Ottawa Senators* est-il atténué si la restructuration est tentée en vertu de la *LFI* au lieu de la *LACC*, mais il subsiste néanmoins. Si l'on suivait cet arrêt, la priorité de la créance de la Couronne relative à la TPS différerait selon le régime — *LACC* ou *LFI* — sous lequel la restructuration a lieu. L'anomalie de ce résultat ressort clairement du fait que les compagnies seraient ainsi privées de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la *LACC*, régime privilégié en cas de réorganisations complexes.

[49] Les indications selon lesquelles le législateur voulait que les créances relatives à la TPS soient traitées différemment dans les cas de réorganisations et de faillites sont rares, voire inexistantes. Le paragraphe 222(3) de la *LTA* a été adopté dans le cadre d'un projet de loi d'exécution du budget de nature générale en 2000. Le sommaire accompagnant ce projet de loi n'indique pas que, dans le cadre de la *LACC*, le législateur entendait élever la priorité de la créance de la Couronne à l'égard de la TPS au même rang que les créances relatives aux retenues à la source ou encore à un rang supérieur à celles-ci. En fait, le sommaire mentionne simplement, en ce qui concerne les fiducies réputées, que les modifications apportées aux dispositions existantes visent à « faire en sorte que les cotisations à l'assurance-emploi et au Régime de pensions du Canada qu'un employeur est tenu de verser soient pleinement recouvrables par la Couronne en cas de faillite de l'employeur » (Sommaire de la L.C. 2000, ch. 30, p. 4a). Le libellé de la disposition créant une fiducie réputée à l'égard de la TPS ressemble à celui des dispositions créant de telles fiducies relatives aux retenues à la source et il comporte la même formule dérogatoire et la même mention de la *LFI*. Cependant, comme il a été souligné précédemment, le législateur a expressément précisé que seules les fiducies réputées visant les retenues à la source demeurent en vigueur. Une exception concernant la *LFI* dans la disposition créant les fiducies réputées à l'égard des retenues à la source est sans grande conséquence, car le texte explicite de la *LFI* elle-même (et celui de la *LACC*) établit ces fiducies et maintient leur effet. Il convient toutefois de souligner que ni la *LFI* ni la *LACC* ne comportent de disposition équivalente assurant le maintien en vigueur des fiducies réputées visant la TPS.

[50] It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

[51] Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

[52] I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough

[50] Il semble plus probable qu'en adoptant, pour créer dans la *LTA* les fiducies réputées visant la TPS, le même libellé que celui utilisé pour les fiducies réputées visant les retenues à la source, et en omettant d'inclure au par. 222(3) de la *LTA* une exception à l'égard de la *LACC* en plus de celle établie pour la *LFI*, le législateur ait par inadvertance commis une anomalie rédactionnelle. En raison d'une lacune législative dans la *LTA*, il serait possible de considérer que la fiducie réputée visant la TPS continue de produire ses effets dans le cadre de la *LACC*, tout en cessant de le faire dans le cas de la *LFI*, ce qui entraînerait un conflit apparent avec le libellé de la *LACC*. Il faut cependant voir ce conflit comme il est : un conflit apparent seulement, que l'on peut résoudre en considérant l'approche générale adoptée envers les créances prioritaires de la Couronne et en donnant préséance au texte de l'art. 18.3 de la *LACC* d'une manière qui ne produit pas un résultat insolite.

[51] Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Il crée simplement un conflit apparent qui doit être résolu par voie d'interprétation législative. L'intention du législateur était donc loin d'être dépourvue d'ambiguïté quand il a adopté le par. 222(3) de la *LTA*. S'il avait voulu donner priorité aux créances de la Couronne relatives à la TPS dans le cadre de la *LACC*, il aurait pu le faire de manière aussi explicite qu'il l'a fait pour les retenues à la source. Or, au lieu de cela, on se trouve réduit à inférer du texte du par. 222(3) de la *LTA* que le législateur entendait que la fiducie réputée visant la TPS produise ses effets dans les procédures fondées sur la *LACC*.

[52] Je ne suis pas convaincue que le raisonnement adopté dans *Doré* exige l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. La question principale dans *Doré* était celle de l'impact de l'adoption du *C.c.Q.* sur les règles de droit administratif relatives aux municipalités. Bien que le juge Gonthier ait conclu, dans cet arrêt, que le délai de prescription établi à l'art. 2930 du *C.c.Q.* avait eu pour effet d'abroger implicitement une disposition de la *Loi sur les cités et villes* portant sur la prescription, sa conclusion n'était pas

contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

[53] A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

[54] I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding

fondée seulement sur une analyse textuelle. Il a en effet procédé à une analyse contextuelle approfondie des deux textes, y compris de l'historique législatif pertinent (par. 31-41). Par conséquent, les circonstances du cas dont était saisie la Cour dans *Doré* sont loin d'être « identiques » à celles du présent pourvoi, tant sur le plan du texte que sur celui du contexte et de l'historique législatif. On ne peut donc pas dire que l'arrêt *Doré* commande l'application automatique d'une règle d'abrogation implicite.

[53] Un bon indice de l'intention générale du législateur peut être tiré du fait qu'il n'a pas, dans les modifications subséquentes, écarté la règle énoncée dans la *LACC*. D'ailleurs, par suite des modifications apportées à cette loi en 2005, la règle figurant initialement à l'art. 18.3 a, comme nous l'avons vu plus tôt, été reprise sous une formulation différente à l'art. 37. Par conséquent, dans la mesure où l'interprétation selon laquelle la fiducie réputée visant la TPS demeurerait en vigueur dans le contexte de procédures en vertu de la *LACC* repose sur le fait que le par. 222(3) de la *LTA* constitue la disposition postérieure et a eu pour effet d'abroger implicitement le par. 18.3(1) de la *LACC*, nous revenons au point de départ. Comme le législateur a reformulé et renuméroté la disposition de la *LACC* précisant que, sous réserve des exceptions relatives aux retenues à la source, les fiducies réputées ne survivent pas à l'engagement de procédures fondées sur la *LACC*, c'est cette loi qui se trouve maintenant à être le texte postérieur. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS.

[54] Je ne suis pas d'accord avec ma collègue la juge Abella pour dire que l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, permet d'interpréter les modifications de 2005 comme n'ayant aucun effet. La nouvelle loi peut difficilement être considérée comme une simple refonte de la loi antérieure. De fait, la *LACC* a fait l'objet d'un examen approfondi en 2005. En particulier, conformément à son objectif qui consiste à faire concorder l'approche de la *LFI* et celle de la *LACC* à l'égard de l'insolvabilité, le législateur a apporté aux deux textes des modifications allant dans le même sens en ce qui concerne les

the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

[55] In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

[56] My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

propositions présentées par les entreprises. De plus, de nouvelles dispositions ont été ajoutées au sujet des contrats, des conventions collectives, du financement temporaire et des accords de gouvernance. Des clarifications ont aussi été apportées quant à la nomination et au rôle du contrôleur. Il convient par ailleurs de souligner les limites imposées par l'art. 11.09 de la *LACC* au pouvoir discrétionnaire du tribunal d'ordonner la suspension de l'effet des fiducies réputées créées en faveur de la Couronne relativement aux retenues à la source, limites qui étaient auparavant énoncées à l'art. 11.4. Il n'est fait aucune mention des fiducies réputées visant la TPS (voir le Sommaire de la L.C. 2005, ch. 47). Dans le cadre de cet examen, le législateur est allé jusqu'à se pencher sur les termes mêmes utilisés dans la loi pour écarter l'application des fiducies réputées. Les commentaires cités par ma collègue ne font que souligner l'intention manifeste du législateur de maintenir sa politique générale suivant laquelle seules les fiducies réputées visant les retenues à la source survivent en cas de procédures fondées sur la *LACC*.

[55] En l'espèce, le contexte législatif aide à déterminer l'intention du législateur et conforte la conclusion selon laquelle le par. 222(3) de la *LTA* ne visait pas à restreindre la portée de la disposition de la *LACC* écartant l'application des fiducies réputées. Eu égard au contexte dans son ensemble, le conflit entre la *LTA* et la *LACC* est plus apparent que réel. Je n'adopterais donc pas le raisonnement de l'arrêt *Ottawa Senators* et je confirmerais que l'art. 18.3 de la *LACC* a continué de produire ses effets.

[56] Ma conclusion est renforcée par l'objectif de la *LACC* en tant que composante du régime réparateur instauré la législation canadienne en matière d'insolvabilité. Comme cet aspect est particulièrement pertinent à propos de la deuxième question, je vais maintenant examiner la façon dont les tribunaux ont interprété l'étendue des pouvoirs discrétionnaires dont ils disposent lorsqu'ils surveillent une réorganisation fondée sur la *LACC*, ainsi que la façon dont le législateur a dans une large mesure entériné cette interprétation. L'interprétation de la *LACC* par les tribunaux aide en fait à comprendre comment celle-ci en est venue à jouer un rôle si important dans le droit canadien de l'insolvabilité.

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

[57] Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

[58] *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

[59] Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a *LACC* est par nature schématique » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]'histoire du droit relatif à la LACC correspond à l'évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la *LACC* découlent souvent de l'exercice discrétionnaire de certains pouvoirs. C'est principalement au fil de l'exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la *LACC* a évolué de façon graduelle et s'est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L'exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la *LACC*. Le caractère réparateur dont j'ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l'un des premiers exemples :

> [TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu'elle fournit un moyen d'éviter les effets dévastateurs, — tant sur le plan social qu'économique — de la faillite ou de l'arrêt des activités d'une entreprise, à l'initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la *LACC* comporte plusieurs aspects. Le tribunal doit d'abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

[61] When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la *LACC* ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la *LACC*. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la *LACC*, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

[62] Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

[62] L'utilisation la plus créative des pouvoirs conférés par la *LACC* est sans doute le fait que les tribunaux se montrent de plus en plus disposés à autoriser, après le dépôt des procédures, la constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur lorsque cela est nécessaire pour que ce dernier puisse continuer d'exploiter son entreprise pendant la réorganisation (voir, p. ex., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (C. Ont. (Div. gén.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, conf. (1999), 12 C.B.R. (4th) 144 (C.S.); et, d'une manière générale, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 93-115). La *LACC* a aussi été utilisée pour libérer des tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents (voir *Metcalfe & Mansfield*). Au départ, la nomination d'un contrôleur chargé de surveiller la réorganisation était elle aussi une mesure prise en vertu du pouvoir de surveillance conféré par la *LACC*, mais le législateur est intervenu et a modifié la loi pour rendre cette mesure obligatoire.

[63] Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) What are the sources of a court's authority during *CCAA* proceedings? (2) What are the limits of this authority?

[63] L'esprit d'innovation dont ont fait montre les tribunaux pendant des procédures fondées sur la *LACC* n'a toutefois pas été sans susciter de controverses. Au moins deux des questions que soulève leur approche sont directement pertinentes en l'espèce : (1) Quelles sont les sources des pouvoirs dont dispose le tribunal pendant les procédures fondées sur la *LACC*? (2) Quelles sont les limites de ces pouvoirs?

[64] The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against

[64] La première question porte sur la frontière entre les pouvoirs d'origine législative dont dispose le tribunal en vertu de la *LACC* et les pouvoirs résiduels dont jouit un tribunal en raison de sa compétence inhérente et de sa compétence en equity, lorsqu'il est question de surveiller une réorganisation. Pour justifier certaines mesures autorisées à l'occasion de procédures engagées sous le régime de la *LACC*, les tribunaux ont parfois prétendu se fonder sur leur compétence en equity dans le but

purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

[65] I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

[66] Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

[67] The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company . . . on the application of any person interested in the

de réaliser les objectifs de la Loi ou sur leur compétence inhérente afin de combler les lacunes de celle-ci. Or, dans de récentes décisions, des cours d'appel ont déconseillé aux tribunaux d'invoquer leur compétence inhérente, concluant qu'il est plus juste de dire que, dans la plupart des cas, les tribunaux ne font simplement qu'interpréter les pouvoirs se trouvant dans la *LACC* elle-même (voir, p. ex., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, par. 45-47, la juge Newbury; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 31-33, le juge Blair).

[65] Je suis d'accord avec la juge Georgina R. Jackson et la professeure Janis Sarra pour dire que la méthode la plus appropriée est une approche hiérarchisée. Suivant cette approche, les tribunaux procédèrent d'abord à une interprétation des dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la *LACC* (voir G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2007* (2008), 41, p. 42). Selon ces auteures, pourvu qu'on lui donne l'interprétation téléologique et large qui s'impose, la *LACC* permettra dans la plupart des cas de justifier les mesures nécessaires à la réalisation de ses objectifs (p. 94).

[66] L'examen des parties pertinentes de la *LACC* et de l'évolution récente de la législation me font adhérer à ce point de vue jurisprudentiel et doctrinal : dans la plupart des cas, la décision de rendre une ordonnance durant une procédure fondée sur la *LACC* relève de l'interprétation législative. D'ailleurs, à cet égard, il faut souligner d'une façon particulière que le texte de loi dont il est question en l'espèce peut être interprété très largement.

[67] En vertu du pouvoir conféré initialement par la *LACC*, le tribunal pouvait, « chaque fois qu'une demande [était] faite sous le régime de la présente loi à l'égard d'une compagnie, [. . .] sur demande

matter, . . . subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

[68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, . . . make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

[69] The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

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

d'un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l'ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l'espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l'art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu'il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d'une demande initiale que d'une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu'elle est indiquée et qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s'agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l'objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. J'ajouterais que le critère de l'opportunité s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. Les tribunaux

stakeholders are treated as advantageously and fairly as the circumstances permit.

[71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

[72] The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

[73] In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

doivent se rappeler que les chances de succès d'une réorganisation sont meilleures lorsque les participants arrivent à s'entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[71] Il est bien établi qu'il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la *LACC* et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l'échec » (voir *Chef Ready*, p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l'ordonnance demandée contribue vraiment à la réalisation des objectifs de la *LACC*, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l'habilite à rendre à cette ordonnance.

[72] L'analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la *LACC*, le pouvoir de maintenir la suspension des procédures à l'encontre de la Couronne, une fois qu'il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[73] En Cour d'appel, le juge Tysoe a conclu que la *LACC* n'habilitait pas le tribunal à maintenir la suspension des mesures d'exécution de la Couronne à l'égard de la fiducie réputée visant la TPS après l'arrêt des efforts de réorganisation. Selon l'appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l'objectif fondamental de la *LACC* et n'a pas donné à ce texte l'interprétation téléologique et large qu'il convient de lui donner et qui autorise le prononcé d'une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d'autre choix que d'autoriser les mesures d'exécution à l'endroit de la fiducie réputée visant la TPS lorsqu'il a levé la suspension de procédures qui avait été ordonnée en application de la *LACC* afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J'ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la *LACC*. Je vais maintenant traiter de la question de savoir si l'ordonnance était autorisée par la *LACC*.

[74] It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

[74] Il n'est pas contesté que la *LACC* n'assujettit les procédures engagées sous son régime à aucune limite temporelle explicite qui interdirait au tribunal d'ordonner le maintien de la suspension des procédures engagées par la Couronne pour recouvrer la TPS, tout en levant temporairement la suspension générale des procédures prononcée pour permettre au débiteur de faire cession de ses biens.

[75] The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

[75] Il reste à se demander si l'ordonnance contribuait à la réalisation de l'objectif fondamental de la *LACC*. La Cour d'appel a conclu que non, parce que les efforts de réorganisation avaient pris fin et que, par conséquent, la *LACC* n'était plus d'aucune utilité. Je ne partage pas cette conclusion.

[76] There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament . . . that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as

[76] Il ne fait aucun doute que si la réorganisation avait été entreprise sous le régime de la *LFI* plutôt qu'en vertu de la *LACC*, la Couronne aurait perdu la priorité que lui confère la fiducie réputée visant la TPS. De même, la Couronne ne conteste pas que, selon le plan de répartition prévu par la *LFI* en cas de faillite, cette fiducie réputée cesse de produire ses effets. Par conséquent, après l'échec de la réorganisation tentée sous le régime de la *LACC*, les créanciers auraient eu toutes les raisons de solliciter la mise en faillite immédiate du débiteur et la répartition de ses biens en vertu de la *LFI*. Pour pouvoir conclure que le pouvoir discrétionnaire dont dispose le tribunal ne l'autorise pas à lever partiellement la suspension des procédures afin de permettre la cession des biens, il faudrait présumer l'existence d'un hiatus entre la procédure fondée sur la *LACC* et celle fondée sur la *LFI*. L'ordonnance du juge en chef Brenner suspendant l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS faisait en sorte que les créanciers ne soient pas désavantagés par la tentative de réorganisation fondée sur la *LACC*. Cette ordonnance avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et, de ce fait, elle contribuait à la réalisation des objectifs de la *LACC*, dans la mesure où elle établit une passerelle entre les procédures régies par la *LACC* d'une part et celles régies par la *LFI* d'autre part. Cette interprétation du pouvoir discrétionnaire du tribunal se trouve renforcée par

the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

[77] The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

[78] Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be

l'art. 20 de la *LACC*, qui précise que les dispositions de la Loi « peuvent être appliquées conjointement avec celles de toute loi fédérale [. . .] autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers », par exemple la *LFI*. L'article 20 indique clairement que le législateur entend voir la *LACC* être appliquée *de concert* avec les autres lois concernant l'insolvabilité, telle la *LFI*.

[77] La *LACC* établit les conditions qui permettent de préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde. Étant donné que, souvent, la seule autre solution est la faillite, les participants évaluent l'impact d'une réorganisation en regard de la situation qui serait la leur en cas de liquidation. En l'espèce, l'ordonnance favorisait une transition harmonieuse entre la réorganisation et la liquidation, tout en répondant à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure collective.

[78] À mon avis, le juge d'appel Tysoe a donc commis une erreur en considérant la *LACC* et la *LFI* comme des régimes distincts, séparés par un hiatus temporel, plutôt que comme deux lois faisant partie d'un ensemble intégré de règles du droit de l'insolvabilité. La décision du législateur de conserver deux régimes législatifs en matière de réorganisation, la *LFI* et la *LACC*, reflète le fait bien réel que des réorganisations de complexité différente requièrent des mécanismes légaux différents. En revanche, un seul régime législatif est jugé nécessaire pour la liquidation de l'actif d'un débiteur en faillite. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*. Toutefois, comme l'a signalé le juge Laskin de la Cour d'appel de l'Ontario dans un litige semblable opposant des créanciers garantis et le Surintendant des services financiers de l'Ontario qui invoquait le bénéfice d'une fiducie réputée, [TRADUCTION] « [l]es deux lois sont

lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

[79] The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

[80] Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition

liées » et il n'existe entre elles aucun « hiatus » qui permettrait d'obtenir l'exécution, à l'issue de procédures engagées sous le régime de la *LACC*, de droits de propriété qui seraient perdus en cas de faillite (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, par. 62-63).

[79] La priorité accordée aux réclamations de la Couronne fondées sur une fiducie réputée visant des retenues à la source n'affaiblit en rien cette conclusion. Comme ces fiducies réputées survivent tant sous le régime de la *LACC* que sous celui de la *LFI*, ce facteur n'a aucune incidence sur l'intérêt que pourraient avoir les créanciers à préférer une loi plutôt que l'autre. S'il est vrai que le tribunal agissant en vertu de la *LACC* dispose d'une grande latitude pour suspendre les réclamations fondée sur des fiducies réputées visant des retenues à la source, cette latitude n'en demeure pas moins soumise à des limitations particulières, applicables uniquement à ces fiducies réputées (*LACC*, art. 11.4). Par conséquent, si la réorganisation tentée sous le régime de la *LACC* échoue (p. ex. parce que le tribunal ou les créanciers refusent une proposition de réorganisation), la Couronne peut immédiatement présenter sa réclamation à l'égard des retenues à la source non versées. Mais il ne faut pas en conclure que cela compromet le passage harmonieux au régime de faillite ou crée le moindre « hiatus » entre la *LACC* et la *LFI*, car le fait est que, peu importe la loi en vertu de laquelle la réorganisation a été amorcée, les réclamations des créanciers auraient dans les deux cas été subordonnées à la priorité de la fiducie réputée de la Couronne à l'égard des retenues à la source.

[80] Abstraction faite des fiducies réputées visant les retenues à la source, c'est le mécanisme complet et exhaustif prévu par la *LFI* qui doit régir la répartition des biens du débiteur une fois que la liquidation est devenue inévitable. De fait, une transition ordonnée aux procédures de liquidation est obligatoire sous le régime de la *LFI* lorsqu'une proposition est rejetée par les créanciers. La *LACC* est muette à l'égard de cette transition, mais l'ampleur du pouvoir discrétionnaire conféré au tribunal par cette loi est suffisante pour établir une passerelle vers une liquidation opérée sous le régime

to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

de la *LFI*. Ce faisant, le tribunal doit veiller à ne pas perturber le plan de répartition établi par la *LFI*. La transition au régime de liquidation nécessite la levée partielle de la suspension des procédures ordonnée en vertu de la *LACC*, afin de permettre l'introduction de procédures en vertu de la *LFI*. Il ne faudrait pas que cette indispensable levée partielle de la suspension des procédures provoque une ruée des créanciers vers le palais de justice pour l'obtention d'une priorité inexistante sous le régime de la *LFI*.

[81] I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

[81] Je conclus donc que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir de lever la suspension des procédures afin de permettre la transition au régime de liquidation.

3.4 *Express Trust*

3.4 *Fiducie expresse*

[82] The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

[82] La dernière question à trancher en l'espèce est celle de savoir si le juge en chef Brenner a créé une fiducie expresse en faveur de la Couronne quand il a ordonné, le 29 avril 2008, que le produit de la vente des biens de LeRoy Trucking — jusqu'à concurrence des sommes de TPS non remises — soit détenu dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Un autre motif invoqué par le juge Tysoe de la Cour d'appel pour accueillir l'appel interjeté par la Couronne était que, selon lui, celle-ci était effectivement la bénéficiaire d'une fiducie expresse. Je ne peux souscrire à cette conclusion.

[83] Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).

[83] La création d'une fiducie expresse exige la présence de trois certitudes : certitude d'intention, certitude de matière et certitude d'objet. Les fiducies expresses ou « fiducies au sens strict » découlent des actes et des intentions du constituant et se distinguent des autres fiducies découlant de l'effet de la loi (voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 28-29, particulièrement la note en bas de page 42).

[84] Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008 sufficient to support an express trust.

[84] En l'espèce, il n'existe aucune certitude d'objet (c.-à-d. relative au bénéficiaire) pouvant être inférée de l'ordonnance prononcée le 29 avril 2008 par le tribunal et suffisante pour donner naissance à une fiducie expresse.

[85] At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

[86] The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

[87] Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear

[85] Au moment où l'ordonnance a été rendue, il y avait un différend entre Century Services et la Couronne au sujet d'une partie du produit de la vente des biens du débiteur. La solution retenue par le tribunal a consisté à accepter, selon la proposition de LeRoy Trucking, que la somme en question soit détenue séparément jusqu'à ce que le différend puisse être réglé. Par conséquent, il n'existait aucune certitude que la Couronne serait véritablement le bénéficiaire ou l'objet de la fiducie.

[86] Le fait que le compte choisi pour conserver séparément la somme en question était le compte en fiducie du contrôleur n'a pas à lui seul un effet tel qu'il suppléerait à l'absence d'un bénéficiaire certain. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à la priorité de rang, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question. Cependant, il se peut fort bien que le juge en chef Brenner ait estimé que, conformément à l'arrêt *Ottawa Senators*, la créance de la Couronne à l'égard de la TPS demeurerait effective si la réorganisation aboutissait, ce qui ne serait pas le cas si le passage au processus de liquidation régi par la *LFI* était autorisé. Une somme équivalente à cette créance serait ainsi mise de côté jusqu'à ce que le résultat de la réorganisation soit connu.

[87] Par conséquent, l'incertitude entourant l'issue de la restructuration tentée sous le régime de la *LACC* exclut l'existence d'une certitude permettant de conférer de manière permanente à la Couronne un intérêt bénéficiaire sur la somme en question. Cela ressort clairement des motifs exposés de vive voix par le juge en chef Brenner le 29 avril 2008, lorsqu'il a dit : [TRADUCTION] « Comme il est notoire que [des procédures fondées sur la *LACC*] peuvent échouer et que cela entraîne des faillites, le maintien du statu quo en l'espèce me semble militer en faveur de l'acceptation de la proposition d'ordonner au contrôleur de détenir ces fonds en fiducie. » Il y avait donc manifestement un doute quant à la question de savoir qui au juste pourrait toucher l'argent

that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

[88] I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

[89] For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J. —

I

[90] I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

[91] More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

en fin de compte. L'ordonnance ultérieure du juge en chef Brenner — dans laquelle ce dernier a rejeté, le 3 septembre 2008, la demande de la Couronne sollicitant le bénéfice de la fiducie présumée après qu'il fut devenu évident que la faillite était inévitable — confirme l'absence du bénéficiaire certain sans lequel il ne saurait y avoir de fiducie expresse.

4. Conclusion

[88] Je conclus que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne sollicitant le bénéfice de la fiducie réputée visant la TPS, tout en levant par ailleurs la suspension des procédures de manière à permettre à LeRoy Trucking de faire cession de ses biens. Ma conclusion selon laquelle le par. 18.3(1) de la *LACC* neutralisait la fiducie réputée visant la TPS pendant la durée des procédures fondées sur cette loi confirme que les pouvoirs discrétionnaires exercés par le tribunal en vertu de l'art. 11 n'étaient pas limités par la priorité invoquée par la Couronne au titre de la TPS, puisqu'il n'existe aucune priorité de la sorte sous le régime de la *LACC*.

[89] Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de déclarer que la somme de 305 202,30 $ perçue par LeRoy Trucking au titre de la TPS mais non encore versée au receveur général du Canada ne fait l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Cette somme ne fait pas non plus l'objet d'une fiducie expresse. Les dépens sont accordés à l'égard du présent pourvoi et de l'appel interjeté devant la juridiction inférieure.

Version française des motifs rendus par

LE JUGE FISH —

I

[90] Je souscris dans l'ensemble aux motifs de la juge Deschamps et je disposerais du pourvoi comme elle le propose.

[91] Plus particulièrement, je me rallie à son interprétation de la portée du pouvoir discrétionnaire conféré au juge par l'art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C.

And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

[93] In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

[94] Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

[95] Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

1985, ch. C-36 (« *LACC* »). Je partage en outre sa conclusion suivant laquelle le juge en chef Brenner n'a pas créé de fiducie expresse en faveur de la Couronne en ordonnant que les sommes recueillies au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] J'estime néanmoins devoir ajouter de brefs motifs qui me sont propres au sujet de l'interaction entre la *LACC* et la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »).

[93] En maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), et les décisions rendues dans sa foulée ont eu pour effet de protéger indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. À mon avis, il convient en l'espèce de rompre nettement avec ce courant jurisprudentiel.

[94] La juge Deschamps expose d'importantes raisons d'ordre historique et d'intérêt général à l'appui de cette position et je n'ai rien à ajouter à cet égard. Je tiens toutefois à expliquer pourquoi une analyse comparative de certaines dispositions législatives connexes vient renforcer la conclusion à laquelle ma collègue et moi-même en arrivons.

[95] Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité. Il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il ne nous appartient pas de nous interroger sur les raisons de ce choix. Nous devons plutôt considérer la décision du législateur de maintenir en vigueur les dispositions en question comme un exercice délibéré du pouvoir discrétionnaire de légiférer, pouvoir qui est exclusivement le sien. Avec égards, je rejette le point de vue suivant lequel nous devrions plutôt qualifier l'apparente contradiction entre le par. 18.3(1) (maintenant le par. 37(1)) de la *LACC* et l'art. 222 de la *LTA* d'anomalie rédactionnelle ou de lacune législative susceptible d'être corrigée par un tribunal.

II

[96] In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

[97] This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

[98] The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), where s. 227(4) *creates* a deemed trust:

(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

[99] In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person . . . equal in value to the amount so deemed to be held in trust is deemed

(*a*) to be held, from the time the amount was deducted or withheld by the person, separate and

II

[96] Dans le contexte du régime canadien d'insolvabilité, on conclut à l'existence d'une fiducie réputée uniquement lorsque deux éléments complémentaires sont réunis : en premier lieu, une disposition législative qui *crée* la fiducie et, en second lieu, une disposition de la *LACC* ou de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* ») qui *confirme* l'existence de la fiducie ou la maintient explicitement en vigueur.

[97] Cette interprétation se retrouve dans trois lois fédérales, qui renferment toutes une disposition relative aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*.

[98] La première est la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) (« *LIR* »), dont le par. 227(4) *crée* une fiducie réputée :

(4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi. [Dans la présente citation et dans celles qui suivent, les soulignements sont évidemment de moi.]

[99] Dans le paragraphe suivant, le législateur prend la peine de bien préciser que toute disposition législative fédérale ou provinciale à l'effet contraire n'a aucune incidence sur la fiducie ainsi constituée :

(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne [. . .] d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu,

apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, . . .

. . .

. . . and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[100] The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

[101] The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

[102] Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

[100] Le maintien en vigueur de cette fiducie réputée est expressément *confirmé* à l'art. 18.3 de la *LACC* :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[101] L'application de la fiducie réputée prévue par la *LIR* est également confirmée par l'art. 67 de la *LFI* :

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[102] Par conséquent, le législateur a *créé*, puis *confirmé le maintien en vigueur* de la fiducie réputée établie par la *LIR* en faveur de Sa Majesté *tant* sous le régime de la *LACC que* sous celui de la *LFI.*

[103] The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

[104] As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

[105] The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

[106] The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a

[103] La deuxième loi fédérale où l'on retrouve ce mécanisme est le *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8 (« *RPC* »). À l'article 23, le législateur crée une fiducie réputée en faveur de la Couronne et précise qu'elle existe malgré les dispositions contraires de toute autre loi fédérale. Enfin, la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23 (« *LAE* »), crée dans des termes quasi identiques, une fiducie réputée en faveur de la Couronne : voir les par. 86(2) et (2.1).

[104] Comme nous l'avons vu, le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions de la *LIR*, du *RPC* et de la *LAE* est confirmé au par. 18.3(2) de la *LACC* et au par. 67(3) de la *LFI*. Dans les trois cas, le législateur a exprimé en termes clairs et explicites sa volonté de voir la fiducie réputée établie en faveur de la Couronne produire ses effets pendant le déroulement de la procédure d'insolvabilité.

[105] La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne *confirme* pas l'existence de la fiducie — ni ne prévoit expressément le maintien en vigueur de celle-ci — dans la *LFI* ou dans la *LACC*. Le second des deux éléments obligatoires que j'ai mentionnés fait donc défaut, ce qui témoigne de l'intention du législateur de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

[106] Le texte des dispositions en cause de la *LTA* est substantiellement identique à celui des dispositions de la *LIR*, du *RPC* et de la *LAE* :

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit

security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

. . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, . . .

. . .

. . . and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

versé au receveur général ou retiré en application du paragraphe (2).

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[107] Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

[107] Pourtant, aucune disposition de la *LACC* ne prévoit le maintien en vigueur de la fiducie réputée une fois que la *LACC* entre en jeu.

[108] In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

[108] En résumé, le législateur a imposé *deux* conditions explicites — ou « composantes de base » — devant être réunies pour que survivent, sous le régime de la *LACC*, les fiducies réputées qui ont été établies par la *LIR*, le *RPC* et la *LAE*. S'il avait voulu préserver de la même façon, sous le régime de la *LACC*, les fiducies réputées qui sont établies par la *LTA*, il aurait inséré dans la *LACC* le type de disposition confirmatoire qui maintient explicitement en vigueur d'autres fiducies réputées.

[109] With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust

[109] Avec égards pour l'opinion contraire exprimée par le juge Tysoe de la Cour d'appel, je ne trouve pas [TRADUCTION] « inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception » (2009 BCCA

provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

[110] Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

[111] Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

[112] Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

[113] For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada

205, 98 B.C.L.R. (4th) 242, par. 37). *Toutes* les dispositions établissant des fiducies réputées qui sont reproduites ci-dessus font explicitement mention de la *LFI*. L'article 222 de la *LTA* ne rompt pas avec ce modèle. Compte tenu du libellé presque identique des quatre dispositions établissant une fiducie réputée, il aurait d'ailleurs été étonnant que le législateur ne fasse aucune mention de la *LFI* dans la *LTA*.

[110] L'intention du législateur était manifestement de rendre inopérantes les fiducies réputées visant la TPS dès l'introduction d'une procédure d'insolvabilité. Par conséquent, l'art. 222 mentionne la *LFI* de manière à l'*exclure* de son champ d'application — et non de l'y *inclure*, comme le font la *LIR*, le *RPC* et la *LAE*.

[111] En revanche, je constate qu'*aucune* de ces lois ne mentionne expressément la *LACC*. La mention explicite de la *LFI* dans ces textes n'a aucune incidence sur leur interaction avec la *LACC*. Là encore, ce sont les dispositions confirmatoires que l'on trouve *dans les lois sur l'insolvabilité* qui déterminent si une fiducie réputée continuera d'exister durant une procédure d'insolvabilité.

[112] Enfin, j'estime que les juges siégeant en leur cabinet ne devraient pas, comme cela s'est produit en l'espèce, ordonner que les sommes perçues au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur pendant le déroulement d'une procédure fondée sur la *LACC*. Il résulte du raisonnement de la juge Deschamps que les réclamations de TPS deviennent des créances non garanties sous le régime de la *LACC*. Le législateur a délibérément décidé de supprimer certaines superpriorités accordées à la Couronne pendant l'insolvabilité; nous sommes en présence de l'un de ces cas.

III

[113] Pour les motifs qui précèdent, je suis d'avis, à l'instar de la juge Deschamps, d'accueillir le pourvoi avec dépens devant notre Cour et devant les juridictions inférieures, et d'ordonner que la somme de 305 202,30 $ — qui a été perçue par LeRoy Trucking

be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

[114] ABELLA J. (dissenting) — The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

[115] Section 11[1] of the *CCAA* stated:

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

1 Section 11 was amended, effective September 18, 2009, and now states:

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

au titre de la TPS mais n'a pas encore été versée au receveur général du Canada — ne fasse l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne.

Version française des motifs rendus par

[114] LA JUGE ABELLA (dissidente) — La question qui est au cœur du présent pourvoi est celle de savoir si l'art. 222 de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), et plus particulièrement le par. 222(3), donnent préséance, dans le cadre d'une procédure relevant de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. À l'instar du juge Tysoe de la Cour d'appel, j'estime que tel est le cas. Il s'ensuit, à mon avis, que le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC* est circonscrit en conséquence.

[115] L'article 11[1] de la *LACC* disposait :

11. (1) Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

Pour être en mesure de déterminer la portée du pouvoir discrétionnaire conféré au tribunal par l'art. 11, il est nécessaire de trancher d'abord la question de la priorité. Le paragraphe 222(3), la disposition de la *LTA* en cause en l'espèce, prévoit ce qui suit :

1 L'article 11 a été modifié et le texte modifié, qui est entré en vigueur le 18 septembre 2009, est rédigé ainsi :

11. Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[116] Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

[116] Selon Century Services, la disposition dérogatoire générale de la *LACC*, le par. 18.3(1), l'emportait, et les dispositions déterminatives à l'art. 222 de la *LTA* étaient par conséquent inapplicables dans le cadre d'une procédure fondée sur la *LACC*. Le paragraphe 18.3(1) dispose :

18.3 (1) . . . [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3 (1) . . . [P]ar dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[117] As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory

[117] Ainsi que l'a fait observer le juge d'appel MacPherson, dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), le par. 222(3) de la *LTA* [TRADUCTION] « entre nettement en conflit » avec le par. 18.3(1) de la *LACC* (par. 31). Essentiellement, la résolution du conflit entre ces deux dispositions requiert à mon sens une

interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

[118] By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* . . . . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[119] MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

[120] The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from

opération relativement simple d'interprétation des lois : Est-ce que les termes employés révèlent une intention claire du législateur? À mon avis, c'est le cas. Le texte de la disposition créant une fiducie réputée, soit le par. 222(3) de la *LTA*, précise sans ambiguïté que cette disposition s'applique malgré toute autre règle de droit sauf la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »).

[118] En excluant explicitement une seule loi du champ d'application du par. 222(3) et en déclarant de façon non équivoque qu'il s'applique malgré toute autre loi ou règle de droit au Canada *sauf* la *LFI*, le législateur a défini la portée de cette disposition dans des termes on ne peut plus clairs. Je souscris sans réserve aux propos suivants du juge d'appel MacPherson dans l'arrêt *Ottawa Senators* :

> [TRADUCTION] L'intention du législateur au par. 222(3) de la *LTA* est claire. En cas de conflit avec « tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) », c'est le par. 222(3) qui l'emporte. En employant ces mots, le législateur fédéral a fait deux choses : il a décidé que le par. 222(3) devait l'emporter sur tout autre texte législatif fédéral et, fait important, il a abordé la question des exceptions à cette préséance en en mentionnant une seule, la *Loi sur la faillite et l'insolvabilité* [. . .] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[119] L'opinion du juge d'appel MacPherson suivant laquelle le fait que la *LACC* n'ait pas été soustraite à l'application de la *LTA* témoigne d'une intention claire du législateur est confortée par la façon dont la *LACC* a par la suite été modifiée après l'édiction du par. 18.3(1) en 1997. En 2000, lorsque le par. 222(3) de la *LTA* est entré en vigueur, des modifications ont également été apportées à la *LACC*, mais le par. 18.3(1) de cette loi n'a pas été modifié.

[120] L'absence de modification du par. 18.3(1) vaut d'être soulignée, car elle a eu pour effet de maintenir le statu quo législatif, malgré les

various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

[121] Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

demandes répétées de divers groupes qui souhaitaient que cette disposition soit modifiée pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. En 2002, par exemple, lorsque Industrie Canada a procédé à l'examen de la *LFI* et de la *LACC*, l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation ont recommandé que les règles de la *LFI* en matière de priorité soient étendues à la *LACC* (Joint Task Force on Business Insolvency Law Reform, *Report* (15 mars 2002), ann. B, proposition 71). Ces recommandations ont été reprises en 2003 par le Comité sénatorial permanent des banques et du commerce dans son rapport intitulé *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*, ainsi qu'en 2005 par le Legislative Review Task Force (Commercial) de l'Institut d'insolvabilité du Canada et de l'Association canadienne des professionnels de l'insolvabilité *et de la* réorganisation dans son *Report on the Commercial Provisions of Bill C-55*, et en 2007 par l'Institut d'insolvabilité du Canada dans un mémoire soumis au Comité sénatorial permanent des banques et du commerce au sujet de réformes alors envisagées.

[121] La *LFI* demeure néanmoins la seule loi soustraite à l'application du par. 222(3) de la *LTA*. Même à la suite de l'arrêt rendu en 2005 dans l'affaire *Ottawa Senators*, qui a confirmé que la *LTA* l'emportait sur la *LACC*, le législateur n'est pas intervenu. Cette absence de réaction de sa part me paraît tout aussi pertinente en l'espèce que dans l'arrêt *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, où la Cour a déclaré ceci :

> Le silence du législateur n'est pas nécessairement déterminant quant à son intention, mais en l'espèce, il répond à la demande pressante de Telus et des autres entreprises et organisations intéressées que la loi prévoie expressément la possibilité d'un remboursement des frais raisonnables engagés pour communiquer des éléments de preuve conformément à une ordonnance. L'historique législatif confirme selon moi que le législateur n'a pas voulu qu'une indemnité soit versée pour l'obtempération à une ordonnance de communication. [par. 42]

[122] All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

[123] Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

[124] Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

[122] Tout ce qui précède permet clairement d'inférer que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

[123] Je ne vois pas non plus de « considération de politique générale » qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur. Je ne saurais expliquer mieux que ne l'a fait le juge d'appel Tysoe les raisons pour lesquelles l'argument invoquant des considérations de politique générale ne peut, selon moi, être retenu en l'espèce. Je vais donc reprendre à mon compte ses propos à ce sujet :

> [TRADUCTION] Je ne conteste pas qu'il existe des raisons de politique générale valables qui justifient d'inciter les entreprises insolvables à tenter de se restructurer de façon à pouvoir continuer à exercer leurs activités avec le moins de perturbations possibles pour leurs employés et pour les autres intéressés. Les tribunaux peuvent légitimement tenir compte de telles considérations de politique générale, mais seulement si elles ont trait à une question que le législateur n'a pas examinée. Or, dans le cas qui nous occupe, il y a lieu de présumer que le législateur a tenu compte de considérations de politique générale lorsqu'il a adopté les modifications susmentionnées à la *LACC* et à la *LTA*. Comme le juge MacPherson le fait observer au par. 43 de l'arrêt *Ottawa Senators*, il est inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception. Je signale par ailleurs que les modifications apportées en 1992 à la *LFI* ont permis de rendre les propositions concordataires opposables aux créanciers garantis et que, malgré la plus grande souplesse de la *LACC*, il est possible pour une compagnie insolvable de se restructurer sous le régime de la *LFI*. [par. 37]

[124] Bien que je sois d'avis que la clarté des termes employés au par. 222(3) tranche la question, j'estime également que cette conclusion est même renforcée par l'application d'autres principes d'interprétation. Dans leurs observations, les parties indiquent que les principes suivants étaient, selon elles, particulièrement pertinents : la Couronne a invoqué le principe voulant que la loi « postérieure » l'emporte; Century Services a fondé son argumentation sur le principe de la préséance de la loi spécifique sur la loi générale (*generalia specialibus non derogant*).

[125] The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

[126] The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

[127] The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> . . . the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, . . . at p. 239 . . . :
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the

[125] Le principe de la préséance de la « loi postérieure » accorde la priorité à la loi la plus récente, au motif que le législateur est présumé connaître le contenu des lois alors en vigueur. Si, dans la loi nouvelle, le législateur adopte une règle inconciliable avec une règle préexistante, on conclura qu'il a entendu déroger à celle-ci (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 346-347; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3e éd. 2000), p. 358).

[126] L'exception à cette supplantation présumée des dispositions législatives préexistantes incompatibles réside dans le principe exprimé par la maxime *generalia specialibus non derogant* selon laquelle une disposition générale plus récente n'est pas réputée déroger à une loi spéciale antérieure (Côté, p. 359). Comme dans le jeu des poupées russes, cette exception comporte elle-même une exception. En effet, une disposition spécifique antérieure peut dans les faits être « supplantée » par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale (*Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862).

[127] Ces principes d'interprétation visent principalement à faciliter la détermination de l'intention du législateur, comme l'a confirmé le juge d'appel MacPherson dans l'arrêt *Ottawa Senators*, au par. 42 :

> [TRADUCTION] . . . en matière d'interprétation des lois, la règle cardinale est la suivante : les dispositions législatives doivent être interprétées de manière à donner effet à l'intention du législateur lorsqu'il a adopté la loi. Cette règle fondamentale l'emporte sur toutes les maximes, outils ou canons d'interprétation législative, y compris la maxime suivant laquelle le particulier l'emporte sur le général (*generalia specialibus non derogant*). Comme l'a expliqué le juge Hudson dans l'arrêt *Canada c. Williams*, [1944] R.C.S. 226, [. . .] à la p. 239 . . . :
>
> > On invoque la maxime *generalia specialibus non derogant* comme une règle qui devrait trancher la question. Or cette maxime, qui n'est pas une règle de droit mais un principe d'interprétation, cède le pas

legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

[128] I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

[129] It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(*f*)). It directs that new enactments not be construed as

2 The amendments did not come into force until September 18, 2009.

devant l'intention du législateur, s'il est raisonnablement possible de la dégager de l'ensemble des dispositions législatives pertinentes.

(Voir aussi Côté, p. 358, et Pierre-André Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), par. 1335.)

[128] J'accepte l'argument de la Couronne suivant lequel le principe de la loi « postérieure » est déterminant en l'espèce. Comme le par. 222(3) de la *LTA* a été édicté en 2000 et que le par. 18.3(1) de la *LACC* a été adopté en 1997, le par. 222(3) est, de toute évidence, la disposition postérieure. Cette victoire chronologique peut être neutralisée si, comme le soutient Century Services, on démontre que la disposition la plus récente, le par. 222(3) de la *LTA*, est une disposition générale, auquel cas c'est la disposition particulière antérieure, le par. 18.3(1), qui l'emporte (*generalia specialibus non derogant*). Mais, comme nous l'avons vu, la disposition particulière antérieure n'a pas préséance si la disposition générale ultérieure paraît la « supplanter ». C'est précisément, à mon sens, ce qu'accomplit le par. 222(3) de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » *sauf la LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3).

[129] Il est vrai que, lorsque la *LACC* a été modifiée en 2005[2], le par. 18.3(1) a été remplacé par le par. 37(1) (L.C. 2005, ch. 47, art. 131). Selon la juge Deschamps, le par. 37(1) est devenu, de ce fait, la disposition « postérieure ». Avec égards pour l'opinion exprimée par ma collègue, cette observation est réfutée par l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui décrit expressément l'effet (inexistant) qu'a le remplacement — sans modifications notables sur le fond — d'un texte antérieur qui a été abrogé (voir *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663, qui portait sur

2 Les modifications ne sont entrées en vigueur que le 18 septembre 2009.

"new law" unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

. . .

(*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an "enactment" as "an Act or regulation or any portion of an Act or regulation".

[130] Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[131] The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the

la disposition qui a précédé l'al. 44*f*)). Cet alinéa précise que le nouveau texte ne doit pas être considéré de « droit nouveau », sauf dans la mesure où il diffère au fond du texte abrogé :

44. En cas d'abrogation et de remplacement, les règles suivantes s'appliquent :

. . .

f) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n'est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

Le mot « texte » est défini ainsi à l'art. 2 de la *Loi d'interprétation* : « Tout ou partie d'une loi ou d'un règlement. »

[130] Le paragraphe 37(1) de la *LACC* actuelle est pratiquement identique quant au fond au par. 18.3(1). Pour faciliter la comparaison de ces deux dispositions, je les ai reproduites ci-après :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[131] L'application de l'al. 44*f*) de la *Loi d'interprétation* vient tout simplement confirmer l'intention clairement exprimée par le législateur, qu'a indiquée Industrie Canada dans l'analyse du Projet de loi C-55, où le par. 37(1) était qualifié de « modification d'ordre technique concernant le réaménagement des dispositions de la présente loi ». Par ailleurs, durant la deuxième lecture du projet de loi

Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

[132] Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

[133] This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

[134] While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request

au Sénat, l'honorable Bill Rompkey, qui était alors leader adjoint du gouvernement au Sénat, a confirmé que le par. 37(1) représentait seulement une modification d'ordre technique :

> Sur une note administrative, je signale que, dans le cas du traitement de fiducies présumées aux fins d'impôt, le projet de loi ne modifie aucunement l'intention qui sous-tend la politique, alors que dans le cas d'une restructuration aux termes de la LACC, des articles de la loi ont été abrogés et remplacés par des versions portant de nouveaux numéros lors de la mise à jour exhaustive de la LACC.

(*Débats du Sénat*, vol. 142, 1re sess., 38e lég., 23 novembre 2005, p. 2147)

[132] Si le par. 18.3(1) avait fait l'objet de modifications notables sur le fond lorsqu'il a été remplacé par le par. 37(1), je me rangerais à l'avis de la juge Deschamps qu'il doit être considéré comme un texte de droit nouveau. Mais comme les par. 18.3(1) et 37(1) ne diffèrent pas sur le fond, le fait que le par. 18.3(1) soit devenu le par. 37(1) n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure » (Sullivan, p. 347).

[133] Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. La question qui se pose alors est celle de savoir quelle est l'incidence de cette préséance sur le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC*.

[134] Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, L.R.C. 1985, ch. W-11, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi *autre* que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1) ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent,

for payment of the GST funds during the *CCAA* proceedings.

[135] Given this conclusion, it is unnecessary to consider whether there was an express trust.

[136] I would dismiss the appeal.

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

. . .

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

[135] Vu cette conclusion, il n'est pas nécessaire d'examiner la question de savoir s'il existait une fiducie expresse en l'espèce.

[136] Je rejetterais le présent pourvoi.

ANNEXE

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 13 décembre 2007)

11. (1) [Pouvoir du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

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(3) [Demande initiale — ordonnances] Dans le cas d'une demande initiale visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour une période maximale de trente jours :

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

(4) [Autres demandes — ordonnances] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime indiquée :

(*a*) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

. . .

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

(*a*) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

. . .

(6) [Preuve] Le tribunal ne rend l'ordonnance visée aux paragraphes (3) ou (4) que si :

a) le demandeur le convainc qu'il serait indiqué de rendre une telle ordonnance;

b) dans le cas de l'ordonnance visée au paragraphe (4), le demandeur le convainc en outre qu'il a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue.

11.4 (1) [Suspension des procédures] Le tribunal peut ordonner :

a) la suspension de l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents, à l'égard d'une compagnie lorsque celle-ci est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour une période se terminant au plus tard :

(i) à l'expiration de l'ordonnance rendue en application de l'article 11,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and

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

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

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

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(*a*) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

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

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) la suspension de l'exercice par Sa Majesté du chef d'une province, pour une période se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l'égard d'une compagnie, lorsque celle-ci est un débiteur visé par la loi provinciale et qu'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

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

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

(2) [Cessation] L'ordonnance cesse d'être en vigueur dans les cas suivants :

a) la compagnie manque à ses obligations de paiement pour un montant qui devient dû à Sa Majesté après l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

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

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou

as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

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

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

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

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

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

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

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

(A) has been withheld or deducted by a person from a payment to another person

d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

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

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

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

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

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

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

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

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne,

and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

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

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

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

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

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

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

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same

ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

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

(3) [Effet] Les ordonnances du tribunal, autres que celles rendues au titre du paragraphe (1), n'ont pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

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

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

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

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

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou

effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) [Deemed trusts] Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

18.3 (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

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

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

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

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

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and

18.4 (1) [Réclamations de la Couronne] Dans le cadre de procédures intentées sous le régime de la présente loi, toutes les réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail, y compris les réclamations garanties, prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

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

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

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

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

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii),

in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

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

11.02 (1) [Stays, etc. — initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. — other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

20. [La loi peut être appliquée conjointement avec d'autres lois] Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 18 septembre 2009)

11. [Pouvoir général du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

11.02 (1) [Suspension : demande initiale] Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de trente jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(2) [Suspension : demandes autres qu'initiales] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)*a*);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

(*a*) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(*b*) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

. . .

11.09 (1) [Stay — Her Majesty] An order made under section 11.02 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income*

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(3) [Preuve] Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

. . .

11.09 (1) [Suspension des procédures : Sa Majesté] L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition

Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(*a*) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

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

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

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the

législative de cette province à l'égard d'une compagnie qui est un débiteur visé par la loi provinciale, s'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

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

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

(2) [Cessation d'effet] Les passages de l'ordonnance qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*) cessent d'avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l'égard de toute somme qui devient due à Sa Majesté après le prononcé de l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

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

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la

collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

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

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

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

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

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

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection

perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

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

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

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

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

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

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

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

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens

3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

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

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

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

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

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(3) [Effet] L'ordonnance prévue à l'article 11.02, à l'exception des passages de celle-ci qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*), n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

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

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

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

37. (1) [Deemed trusts] Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured

37. (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des sommes réputées détenues en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, si, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est une province instituant un régime général de pensions au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un régime provincial de pensions au sens de ce paragraphe, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier de la compagnie et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15 (en date du 13 décembre 2007)

222. (1) [Montants perçus détenus en fiducie] La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la

creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

. . .

(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) [Montants perçus avant la faillite] Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

. . .

(3) [Non-versement ou non-retrait] Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (en date du 13 décembre 2007)

67. (1) [Biens du failli] Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

a) les biens détenus par le failli en fiducie pour toute autre personne;

b) les biens qui, à l'encontre du failli, sont exempts d'exécution ou de saisie sous le régime des lois applicables dans la province dans laquelle sont situés ces biens et où réside le failli;

b.1) dans les circonstances prescrites, les paiements au titre de crédits de la taxe sur les produits et services et les paiements prescrits qui sont faits à des personnes physiques relativement à leurs besoins essentiels et qui ne sont pas visés aux alinéas *a*) et *b*),

mais ils comprennent :

c) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération;

d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

(2) [Fiducies présumées] Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) [Exceptions] Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Exceptions] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

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

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

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

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

86. (1) [Réclamations de la Couronne] Dans le cadre d'une faillite ou d'une proposition, les réclamations prouvables — y compris les réclamations garanties — de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

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

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

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

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

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

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

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

Appeal allowed with costs, ABELLA J. *dissenting.*

Pourvoi accueilli avec dépens, la juge ABELLA *est dissidente.*

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Procureurs de l'appelante : Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

Procureur de l'intimé : Procureur général du Canada, Vancouver.

TAB 7

Lehndorff General Partner Ltd. (Re)

Ontario Judgments

Ontario Court of Justice - General Division

Toronto, Ontario

Farley J.

Heard: December 24, 1992

Judgment: January 6, 1993

Court File No. B366/92

[1993] O.J. No. 14 | 9 B.L.R. (2d) 275 | 17 C.B.R. (3d) 24 | 37 A.C.W.S. (3d) 847 | 1993 CarswellOnt 183

IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 AND IN THE MATTER OF The Courts of Justice Act, R.S.O. 1990, c. C. 43 AND IN THE MATTER OF a plan of compromise in respect of Lehndorff General Partner Ltd., in its own capacity and in its capacity as general partner of Lehndorff United Properties (Canada) Lehndorff Properties (Canada) - and - Lehndorff Properties (Canada) II and in respect of certain of their nominees Lehndorff United Properties (Canada) Ltd., Lehndorff Canadian Holdings Ltd., Lehndorff Canadian Holdings II Ltd., Baytemp Properties Limited and 102 Bloor Street West Limited and in respect of The Lehndorff Vermogensverwaltung GmbH in in its capacity as limited partner of Lehndorff United Properties (Canada) Applicants

(36 pp.)

Alfred Apps, Robert Harrison and Melissa J. Kennedy, for the Applicants. L. Crozier, for the Royal Bank of Canada. R.C. Heintzman, for the Bank of Montreal. J. Hodgson, Susan Lundy and James Hilton, for Canada Trustco Mortgage Corporation. Jay Schwartz, for Citibank Canada. Stephen Golick, for Peat Marwick Thorne Inc., proposed monitor. John Teolis, for the Fuji Bank Canada. Robert Thorton for certain of the advisory boards.

FARLEY J.

These are my written reasons relating to the relief granted the applicants on December 24, 1992 pursuant to their application under the Companies' Creditors Arrangement Act, *R.S.C. 1985, c. C-36* ("CCAA") and the Courts of Justice Act, *R.S.O. 1990, c. C. 43* ("CJA"). The relief sought was as follows:

(a) short service of the notice of application;

(b) a declaration that the applicants were companies to which the CCAA applies;

(c) authorization for the applicants to file a consolidated plan of compromise;

(d) authorization for the applicants to call meetings of their secured and unsecured creditors to approve the consolidated plan of compromise;

(e) A stay of all proceedings taken or that might be taken either in respect of the applicants in their own capacity or on account of their interest in Lehndorff United Properties (Canada) ("LUPC"), Lehndorff Properties (Canada) ("LPC") and Lehndorff Properties (Canada) II ("LPC II") and collectively (the "Limited Partnerships") whether as limited partner, as general partner or as registered titleholder to certain of their assets as bare trustee and nominee; and

(f) certain other ancillary relief.

The applicants are a number of companies within the larger Lehndorff group ("Group") which operates in Canada and elsewhere. The group appears to have suffered in the same way that a number of other property developers and managers which have also sought protection under the CCAA in recent years. The applicants are insolvent; they each have outstanding debentures issued under trust deeds; and they propose a plan of compromise among themselves and the holders of these debentures as well as those others of their secured and unsecured creditors as they deemed appropriate in the circumstances. Each applicant except THG Lehndorff Vermogensverwaltung GmbH ("GmbH") is an Ontario corporation. GmbH is a company incorporated under the laws of Germany. Each of the applicants has assets or does business in Canada. Therefore each is a "company" within the definition of s. 2 of the CCAA. The applicant Lehndorff General Partner Ltd. ("General Partner Company") is the sole general partner of the Limited Partnerships. The General Partner Company has sole control over the property and businesses of the Limited Partnerships. All major decisions concerning the applicants (and the Limited Partnerships) are made by management operating out of the Lehndorff Toronto Office. The applicants aside from the General Partner Company have as their sole purpose the holding of title to properties as bare trustee or nominee on behalf of the Limited Partnerships. LUPC is a limited partnership registered under the Limited Partnership Act, *R.S.O. 1990, c. L.16* ("Ontario LPA"). LPC and LPC II are limited partnerships registered under Part 2 of the Partnership Act, R.S.A. 1980, c. P-2 ("Alberta PA") and each is registered in Ontario as an extra provincial limited partnership. LUPC has over 2,000 beneficial limited partners, LPC over 500 and LPC II over 250, most of whom are residents of Germany. As at March 31, 1992 LUPC had outstanding indebtedness of approximately $370 million, LPC $45 million and LPC II $7 million. Not all of the members of the Group are making an application under the CCAA. Taken together the Group's indebtedness as to Canadian matters (including that of the applicants) was approximately $543 million. In the summer of 1992 various creditors (Canada Trustco Mortgage Company, Bank of Montreal, Royal Bank of Canada, Canadian Imperial Bank of Commerce and the Bank of Tokyo Canada) made demands for repayment of their loans. On November 6, 1992 Funtanua Investments Limited, a minor secured lendor also made a demand. An interim standstill agreement was worked out following a meeting of July 7, 1992. In conjunction with Peat Marwick Thorne Inc. which has been acting as an informal monitor to date and Fasken Campbell Godfrey the applicants have held multiple meetings with their senior secured creditors over the past half year and worked on a restructuring plan. The business affairs of the applicants (and the Limited Partnerships) are significantly intertwined as there are multiple instances of intercorporate debt, cross-default provisions and guarantees and they operated a centralized cash management system.

This process has now evolved to a point where management has developed a consolidated restructuring plan which plan addresses the following issues:

(a) The compromise of existing conventional, term and operating indebtedness, both secured and unsecured.

(b) The restructuring of existing project financing commitments.

(c) New financing, by way of equity or subordinated debt.

(d) Elimination or reduction of certain overhead.

(e) Viability of existing businesses of entities in the Lehndorff Group.

(f) Restructuring of income flows from the limited partnerships.

(g) Disposition of further real property assets aside from those disposed of earlier in the process.

(h) Consolidation of entities in the Group; and

(i) Rationalization of the existing debt and security structure in the continuing entities in the Group.

Formal meetings of the beneficial limited partners of the Limited Partnerships are scheduled for January 20 and 21, 1993 in Germany and an information circular has been prepared and at the time of hearing was being translated into German. This application was brought on for hearing at this time for two general reasons: (a) it had now ripened to the stage of proceeding with what had been distilled out of the strategic and consultative meetings; and (b) there were creditors other than senior secured lenders who were in a position to enforce their rights against assets of some of the applicants (and Limited Partnerships) which if such enforcement did take place would result

in an undermining of the overall plan. Notice of this hearing was given to various creditors: Barclays Bank of Canada, Barclays Bank PLC, Bank of Montreal, Citibank Canada, Canada Trustco Mortgage Corporation, Royal Trust Corporation of Canada, Royal Bank of Canada, the Bank of Tokyo Canada, Funtauna Investments Limited, Canadian Imperial Bank of Commerce, Fuji Bank Canada and First City Trust Company. In this respect the applicants have recognized that although the initial application under the CCAA maybe made on an ex parte basis (s. 11 of the CCAA; Re Langley's Ltd., (1938) O.R. 123, *(1938) 3 D.L.R. 230* (C.A.); Re Kennoch Development Ltd. *(1991), 8 C.B.R. (3d) 95* (N.S.S.C.T.D.). The court will be concerned when major creditors have not been alerted even in the most minimal fashion (Re Inducon Development Corporation *(1992), 8 C.B.R. (3d) 306* (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

"Instant" debentures are now well recognized and respected by the courts: see Re United Maritime Fisherman Co-Op *(1988), 67 C.B.R. (N.S.) 44*, at pp. 55-6, varied on reconsideration *(1988), 68 C.B.R. (N.S.) 170*, reversed on different grounds *(1988), 69 C.B.R. (N.S.) 161* at pp. 165-6; Re Stephanie's Fashions Ltd. *(1990), 1 C.B.R. (3d) 248* (B.C.S.C.) at pp. 250-1; Elan Corp. v. Comiskey *(1990), 1 O.R. (3d) 289*, *1 C.B.R. (3d) 101* (C.A.) per Doherty J.A., dissenting on another point, at pp. 306-310 (O.R.); Ultracare Management Inc. v. Gammon *(1990), 1 O.R. (3d) 321* (Gen. Div.) at p. 327. The applicants would appear to me to have met the technical hurdle of s. 3 and as defined s. 2) of the CCAA in that they are debtor companies since they are insolvent, they have outstanding an issue of debentures under a trust deed and the compromise or arrangement that is proposed includes that compromise between the applicants and the holders of those trust deed debentures. I am also satisfied that because of the significant intertwining of the applicants it would be appropriate to have a consolidated plan. I would also understand that this court (Ontario Court of Justice (General Division)) is the appropriate court to hear this application since all the applicants except GmbH have their head office or their chief place of business in Ontario and GmbH, although it does not have a place of business within Canada, does have assets located within Ontario.

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 seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 6, 7, 8 and 11 of the CCAA; in Re Companies' Creditors Arrangement Act; A.G. Can. v. A.G. Que., (1934) S.C.R. 659 at p. 661; *16 C.B.R. 1*; *(1934) 4 D.L.R. 75*; Meridian Developments Inc. v. Toronto-Dominion Bank; Meridian Developments Inc. v. Nu-West Group Ltd., *(1984) 5 W.W.R. 215* at pp. 219-20; Norcen Energy Resources v. Oakwood Petroleums Limited. et al. *(1988), 72 C.B.R. (N.S.) 1*, *63 Alta. L.R. (2d) 361* (Alta., Q.B.), at pp. 12-13 (C.B.R.); Re Ouintette Coal Limited *(1990), 2 C.B.R.(3d) 303* (B.C.C.A), at pp. 310-1, affirming Ouintette Coal Limited v. Nippon Steel Corporation et al. *(1990) 2 C.B.R. (3d) 291*, 47 B.C.L.R. 193 (B.C.S.C.), leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.).; Elan, supra at p. 307 (O.R.); Fine's Flowers v. Creditors of Fine's Flowers *(1992), 7 O.R. (3d) 193* (Gen. Div.), at p. 199 and "Re-Organizations under the Companies' Creditors Arrangement Act", Stanley E. Edwards, (1947), 25 Cdn. Bar Rev. 587 at p. 592.

The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. See Elan, supra at pp. 297 and p. 316; Stephanie's, supra, at pp. 251-2 and Ultracare, supra, at p. 328 and p. 330. 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. 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 will succeed: see Meridian, supra, at p. 220 (W.W.R.). The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and all of the creditors: see Ouintette, supra, at pp. 108-110; Chef Ready Foods Ltd. v. Hongkong Bank of

Canada *(1990), 4 C.B.R. (3d) 311*, *51 B.C.L.R. (2d) 84* (B.C.C.A.), at pp. 315-318, (C.B.R.) and Stephanie's, supra, at pp. 251-2.

One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors. Unlike the Bankruptcy Act, *R.S.C. 1985, c. B-3*, before the amendments effective November 30, 1992 to transform it into the Bankruptcy and Insolvency Act ("BIA"), it is possible under the CCAA to bind secured creditors it has been generally speculated that the CCAA will be resorted to by companies that are generally larger and have a more complicated capital structure and that those companies which make an application under the CCAA will be generally smaller and have a less complicated structure. Reorganization may include partial liquidation where it is intended as part of the process of a return to long term viability and profitability. See Chef Ready, supra, at p. 318 and Re Assoc. Investors of Can. Ltd. *(1987), 67 C.B.R. (N.S.) 237* at pp. 245; rev'd on other grounds at (1988), 71 C.B.R. 72. It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See Assoc. Investors, supra, at p. 318; Re Amirault Co. (1951), 32 C.B.R. 1986, (1951) 5 D.L.R. 203 (N.S.S.C.) at pp. 187-8 (C.B.R.).

It strikes me that each of the applicants in this case has a realistic possibility of being able to continue operating, although each is currently unable to meet all of its expenses albeit on a reduced scale. This is precisely the sort of circumstance in which all of the creditors are likely to benefit from the application of the CCAA and in which it is appropriate to grant an order staying proceedings so as to allow the applicant to finalize preparation of and file a plan of compromise and arrangement.

Let me now review the aspect of the stay of proceedings. Section 11 of the CCAA provides as follows:

> 11. Notwithstanding anything in the Bankruptcy Act or the Winding-up Act, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the Bankruptcy Act and the Winding-up Act or either or them;
>
> (b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affects the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See Norcen, supra at pp. 12-7 (C.B.R.) and Ouintette, supra, at pp. 296-8 (B.C.S.C.) and pp. 312-4 (B.C.C.A.) and Meridian, supra, at pp. 219 ff. Further the court has the power to order a stay that is effective in respect of the rights arising in favour of secured creditors under all forms of commercial security: see Chef Ready, supra, at p. 320 where Gibbs J.A. for the Court stated:

> The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word creditor occurs, it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.

The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services,

from doing so: see Wynden Canada Inc. v. Gaz Métropolitain Inc. (1982), 44 C.B.R. (N.S.) 285 (Que. S.C. in Bankruptcy) at pp. 290-1 and Ouintette, supra, at pp. 311-2 (B.C.C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see Re Northland Properties Limited et al. *(1988), 73 C.B.R. (N.S.) 141* (B.C.S.C.) or to prevent landlords from terminating leases, or otherwise enforcing their rights thereunder (see In Re Nathan Feifer et al. v. Frame Manufacturing Corporation (1947), 28 C.B.R. 124 (Qué. C.A.)). Amounts owing to landlords in respect of arrears of rent or unpaid rent for the unexpired portion of lease terms are properly dealt with in a plan of compromise or arrangement: see Sklar-Peppler Furniture Corporation *(1992), 8 C.B.R. (3d) 312* (Ont. Gen. Div.) especially at p. 318. The jurisdiction of the court to make orders under the CCAA in the interest of protecting the debtor company so as to enable it to prepare and file a plan is effective notwithstanding the terms of any contract or instrument to which the debtor company is a party. Section 8 of the CCAA provides:

> 8. This act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

The power to grant a stay may also extend to prevent persons from exercising any right of set off in respect of the amounts owed by such a person to the debtor company, irrespective of whether the debtor company has commenced any action in respect of which the defense of set off might be formally asserted: see Ouintette, supra, at pp. 312-4 (B.C.C.A.).

It was submitted by the applicants that the power to grant a stay of proceedings may also extend to a stay of proceedings against non-applicants who are not companies and accordingly do not come within the express provisions of the CCAA. In support thereof they cited a CCAA order which was granted staying proceedings against individuals who guaranteed the obligations of a debtor-applicant which was a qualifying company under the terms of the CCAA: see In the Matter of the Proposal of Norman Slavik, unreported, *[1992] B.C.J. No. 341*. However in the Slavik situation the individual guarantors were officers and shareholders of two companies which had sought and obtained CCAA protection. Vickers J. in that case indicated that the facts of that case included the following unexplained and unamplified fact:

> 5. The order provided further that all creditors of Norvik Timber Inc. be enjoined from making demand for payment upon that firm or upon any guarantor of an obligation of the firm until further order of the Court.

The CCAA reorganization plan involved an assignment of the claims of the creditors to "Newco" in exchange for cash and shares. However the basis of the stay order originally granted was not set forth in this decision.

It appears to me that Dickson J. in International Donut Corp. v. 050863 N.B. Ltd., unreported, (1992) N.B.J. No. 339 (N.B.Q.B.T.D.) was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated:

> In August 1991 the limited partnership, through its general partner the plaintiff, applied to the Court under the Companies' Creditors Arrangement Act, R.S.C., c. C-36 for an order delaying the assertion of claims by creditors until an opportunity could be gained to work out with the numerous and sizable creditors a compromise of their claims. An order was obtained but it in due course expired without success having been achieved in arranging with creditors a compromise. That effort may have been wasted, because it seems questionable that the federal Act could have any application to a limited partnership in circumstances such as these. (Emphasis added).

I am not persuaded that the words of s. 11 which are quite specific as relating as to a company can be enlarged to encompass something other than that. However it appears to me that Blair J. was clearly in the right channel in his analysis in Campeau v. Olympia & York Developments Ltd. unreported, (1992) O.J. No. 1946 at pp. 4-7.

> The Power to Stay
>
> The Court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see Canada Systems Group (Est) Ltd. v. Allendale Mutual Insurance Co. *(1982), 29 C.P.C. 60* (H.C.), and cases

referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the Courts of Justice Act, *R.S.O. 1990, Chap. C. 43*, which provides as follows:

> s. 106 A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": Arab Monetary Fund v. Hashim (unreported), *[1992] O.J. No. 1330*.

Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the Court is specifically granted the power to stay in a particular context, by virtue of statute or under the Rules of Civil Procedure. The authority to prevent multiplicity of proceedings in the same court, under Rule 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the CCAA, is an example of the former. Section 11 of the CCAA provides as follows:

...

The Power to Stay in the Context of CCAA Proceedings:

By its formal title the CCAA is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

In this respect it has been observed that the CCAA is "to be used as a practical and effective way of restructuring corporate indebtedness.": see the case comment following the report of Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. *(1988), 72 C.B.R. (N.S.) 1* (Q.B.), and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in Quintette Coal Ltd. v. Nippon Steel Corp. *(1990), 51 B.C.L.R. (2d) 105* at p. 113 (B.C.C.A.).

> Gibbs J.A. continued with this comment:
>
> To the extent that a general principle can be extracted from the new cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is a discretionary power to restrain judicial or extra judicial conduct against the debtor company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period (emphasis added).

I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement. (In this respect, see also Sairex GmbH v. Prudential Steel Ltd. *(1991), 8 C.B.R. (3d) 62* (Ont. Gen. Div.) at p. 77).

I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the Court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance, supra (a "Mississauga Derailment" case), at pp. 65-66. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The Court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff.

It is quite clear from Empire-Universal Films Limited et al. v. Rank et al., (1947) O.R. 775 (H.C.) that McRuer C.J.H.C. considered that the Judicature Act then [and now the CJA] merely confirmed a statutory right that previously had been considered inherent in the jurisdiction of the court with respect to its authority to grant a stay of

proceedings. See also McCordic et al. v. Township of Bosanquet *(1974) 5 O.R. (2d) 53* (H.C.) and Canada Systems Group (Est) Ltd. v. Allendale Mutual Insurance Co. *(1982) 29 C.P.C. 60* (H.C.) at pp. 65-6.

Montgomery J. in Canada Systems, supra, at pp. 65-6 indicated:

> Goodman J. (as he then was) in McCordic v. Bosanquet *(1974), 5 O.R. (2d) 53* in granting a stay reviewed the authorities and concluded that the inherent jurisdiction of the Court to grant a stay of proceedings may be made whenever it is just and reasonable to do so. "This court has ample jurisdiction to grant a stay whenever it is just and reasonable to do so." (Per Lord Denning M.R. in Edmeades v. Thames Board Mills Ltd., [1969] 2 Q.B. 67 at 71, [1969] 2 All E.R. 127 (C.A.)). Lord Denning's decision in Edmeades was approved by Lord Justice Davies in Lane v. Willis; Lane v. Beach (Executor of Estate of George William Willis), [1972] 1 All E.R. 430, [1972] 1 W.L.R. 326 (sub nom. Lane v. Willis; Lane v. Beach) (C.A.).
>
> ...
>
> In Weight Watchers Int. Inc. v. Weight Watchers of Ont. Ltd. *(1972), 25 D.L.R. (3d) 419*, *5 C.P.R. (2d) 122*, appeal allowed by consent without costs (sub nom. Weight Watchers of Ont. Ltd. v. Weight Watchers Inc. Inc.) 42 D.L.R. (3d) 320n, 10 C.P.R. (2d) 96n (Fed. C.A.), Mr. Justice Heald on an application for stay said at p. 426 [25 D.L.R.]:
>
> > "The principles which must govern in these matters are clearly stated in the case of Empire Universal Films Ltd. et al. v. Rank et al., *[1947] O.R. 775* at p. 779, as follows [quoting St. Pierre et al. v. South American Stores (Gath & Chaves), Ltd. et al., [1936] 1 K.B. 382 at p. 398]:
> >
> > '(1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.'"

Thus it appears to me that the inherent power of this court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Is it appropriate to do so in the circumstances? Clearly there is jurisdiction under s. 11 of the CCAA to grant a stay in respect of any of the applicants which are all companies which fit the criteria of the CCAA. However the stay requested also involved the limited partnerships to some degree either (i) with respect to the applicants acting on behalf of the Limited Partnerships or (ii) the stays being effective vis-a-vis any proceedings taken by any party against the property assets and Undertaking of the Limited Partnerships in respect of which they hold a direct interest (collectively the "Property") as set out in the terms of the stay provisions of the order paragraphs 4 through 18 inclusive attached as an appendix to these reasons. I believe that an analysis of the operations of a limited partnership in this context would be beneficial to an understanding of how there is a close inter-relationship to the applicants involved in this CCAA proceedings and how the Limited Partnerships and their Property are an integral part of the operations previously conducted and the proposed restructuring.

A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Depburn, Limited Partnerships, De Boo (1991), at p. 1-2 and 1-12. I would note here that the limited partnership provisions of the Alberta PA are roughly equivalent to those found in the Ontario LPA with the interesting side aspect that the Alberta legislation in s. 75 does allow for judgment against a limited partner to be charged against the limited partner's interest in the limited partnership. A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: see Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their

contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the Bankruptcy Act (now the BIA) sections 85 and 142.

A general partner is responsible to defend proceedings against the limited partnership in the firm name, so in procedural law and in practical effect, a proceeding against a limited partnership is a proceeding against the general partner. See Ontario Rules of Civil Procedure, O. Reg. 560/84 Rules 8.01 and 8.02.

It appears that the preponderance of case law supports the contention that contention that a partnership including a limited partnership is not a separate legal entity. See Lindley on Partnership, 15th ed. (1984), at p. 33-5; Seven Mile Dam Contractors v. R. in Right of British Columbia *(1979), 13 B.C.L.R. 137* (S.C.) affirmed *(1980), 25 B.C.L.R. 183* (C.A.) and "Extra-Provincial Liability of the Limited Partner", Brad E. Milne, (1985) 23 Alta. Law Rev. 345, at p. 350-1. Milne in that article made the following observations:

> The preponderance of case law therefore supports the contention that a limited partnership is not a separate legal entity. It appears, nevertheless, that the distinction made in Re Thorne between partnerships and trade unions could not be applied to limited partnerships which, like trade unions, must rely on statute for their validity. The mere fact that limited partnerships owe their existence to the statutory provision is probably not sufficient to endow the limited partnership with the attribute of legal personality as suggested in Ruzicks unless it appeared that the Legislature clearly intended that the limited partnership should have a separate legal existence. A review of the various provincial statutes does not reveal any procedural advantages, rights or powers that are fundamentally different from those advantages enjoyed by ordinary partnerships. The legislation does not contain any provision resembling section 15 of the Canada Business Corporation Act [S.C. 1974-75, c. 33] which expressly states that a corporation has the capacity, both in and outside of Canada, of a natural person. It is therefore difficult to imagine that the Legislature intended to create a new category of legal entity.

It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an "ordinary" partnership vehicle). For a lively discussion of the question of "control" in a limited partnership as contrasted with shareholders in a corporation, see R. Flannigan, The Control Test of Investor Liability in Limited Partnerships (1983), 21 Alta L. Rev. 303; E. Apps, Limited Partnerships and the "Control" Prohibition: Assessing the Liability of Limited Partners (1991), 70 Can. Bar. Rev. 611; R. Flannigan, Limited Partner Liability: A Response (1992), 11 Can. Bar Rev. 552. The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process. It seems to me that there must be afforded a protection of the whole since the applicants' individual interest therein cannot be segregated without in effect dissolving the partnership arrangement. The limited partners have two courses of action to take if they are dissatisfied with the general partner or the operation of the limited partnership as carried on by the general partner - the limited partners can vote to (a) remove the general partner and replace it with another or (b) dissolve the limited partnership. However Flannigan strongly argues that an unfettered right to remove the general partner would attach general liability for the limited partners (and especially as to the question of continued enjoyment of favourable tax deductions) so that it is prudent to provide this as a conditional right: Control Test, (1992), supra, at pp. 524-5. Since the applicants are being afforded the protection of a stay of proceedings in respect to allowing them time to advance a reorganization plan and complete it if the plan finds favour, there should be a stay of proceedings (vis-a-vis) any action which the limited partners may wish to take as to replacement or dissolution) through the period of allowing the limited partners to vote on the reorganization plan itself.

It seems to me that using the inherent jurisdiction of this court to supplement the statutory stay provisions of s. 11 of the CCAA would be appropriate in the circumstances; it would be just and reasonable to do so. The business operations of the applicants are so intertwined with the limited partnerships that it would be impossible for relief as to a stay to be granted to the applicants which would affect their business without at the same time extending that stay to the undivided interests of the limited partners in such. It also appears that the applicants are well on their way to presenting a reorganization plan for consideration and a vote; this is scheduled to happen within the month so there would not appear to be any significant time inconvenience to any person interested in pursuing proceedings. While it is true that the provisions of the CCAA allow for a cramdown of a creditor's claim (as well as an interest of any other person), those who wish to be able to initiate or continue proceedings against the applicants may utilize the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain that particular stay. I seems to me that in such a comeback motion the onus would be upon the applicants to show that in the circumstances it was appropriate to continue the stay.

The order is therefore granted as to the relief requested including the proposed stay provisions.

FARLEY J.

* * * * *

APPENDIX A

THE STAY

4. THIS COURT ORDERS that each of the Applicants shall remain in possession of its property, assets and undertaking and of the property, assets and undertaking of the Limited Partnerships in which they hold a direct interest (collectively the "Property") until March 15, 1993 (the "Stay Date") and shall be authorized, but not required, to make payment to Conventional Mortgage Creditors and to trade creditors incurred in the ordinary course prior to this Order including, without limitation, fees owing to professional advisors, wages, salaries, employee benefits, crown claims, unremitted source deductions in respect of income tax payable, Canada Pension Plan contributions payable, unemployment insurance contributions payable, realty taxes, and other taxes, if any, owing to any taxing authority and shall continue to carry on its business in the ordinary course, except as otherwise specifically authorized or directed by this Order, or as this Court may in future authorize or direct.

5. THIS COURT ORDERS that without in any way restricting the generality of paragraph 4 hereof, each of the Applicants, whether on behalf of a Limited Partnership or otherwise, be and is hereby authorized and empowered, subject to the existing rights of Creditors and any security granted in their favour, to:

   (a) borrow such additional sums as it may deem necessary,

   (b) grant such additional security as it may deem necessary to any lender providing new advances subsequent to the date of this Order provided that such additional security expressly states that it ranks subsequent in priority to all then existing security including all floating charges, whether crystallized or uncrystallized,

   (c) grant such additional security as it may deem necessary to any lender providing new advances subsequent to the date of this Order which may rank ahead of existing security if the consent is obtained of all secured creditors having an interest in the collateral in respect of which the additional security is granted to the granting of the additional security, and

   (d) dispose of any of its Property subject, however, to the terms of any security affecting same, provided that no disposition of any Property charged in favour of any secured lender shall be made unless such secured lender consents to such disposition and to the manner in which the proceeds derived from such disposition are distributed,

the whole on at least three (3) business days' prior notice to all of the Senior Creditors and the Monitor and on such terms as to notice to any other affected creditor as this Court may direct, but nothing in this Order shall prevent any Applicant, whether on behalf of a Limited Partnership or otherwise, from borrowing further funds or granting further security against the Londonderry Mall substantially in accordance with any existing agreements in order to fund the project completion and leasing costs of the Londonderry Mall and nothing in this Order shall prevent any Senior Creditor from advancing further funds to any of the Applicants or the Limited Partnerships under any existing security, subject to the existing rights of such Senior Creditor and any subordinate creditor including pursuant to any postponements or subordinations as may be extant in respect thereof.

6. THIS COURT ORDERS that, until the Stay Date, the General Partner Company and LUPC shall cause the monthly interest and, as applicable, amortization owing by LUPC under CT1 and CT3, but not the arrears thereof, to be paid as and when due and to cause LUPC to perform all of its obligations to CT in respect of CT2 under its existing arrangement in respect of the segregation and application of the net operating income of the Northgate Mall.

7. THIS COURT ORDERS that, subject to paragraphs 4 and 6 and to subparagraph 5(d) hereof, the Applicants and Limited Partnerships be and are hereby directed, until further Order of this Court:

   (a) to make no payments, whether of capital, interest thereon or otherwise, on account of amounts owing by the Applicants to the Affected Creditors, as defined in the Plan, as of this date; and

   (b) to grant no mortgages, charges or other security upon or in respect of the Property other than for the specific purpose of borrowing new funds as provided for in paragraph 5 hereof.

but nothing in this Order shall prevent the General Partner Company or LUPC from making payments to Senior Creditors of interest and/or principal in accordance with existing agreements and nothing in this Order shall prevent the General Partner Company or the Limited Partnerships from making any funded monthly interest payments for loans secured against the Londonderry Mall.

8. THIS COURT ORDERS that until the Stay Date, the existing collateral position of Creditors in respect of marketable securities loans or credit facilities shall be frozen as at the date of this Order and all margin requirements in respect of such loans or credit facilities shall be suspended.

9. THIS COURT ORDERS that the Applicants shall be authorized to continue to retain and employ the agents, servants, solicitors and other assistants and consultants currently in its employ with liberty to retain such further assistants and consultants as they acting reasonably deem necessary or desirable in the ordinary course of their business or for the purpose of carrying out the terms of this Order or, subject to the approval of this Court.

10. THIS COURT ORDERS that, subject to paragraph 13 hereof, until the Stay Date or further Order of this Court:

    (a) any and all proceedings taken or that may be taken by any of the Creditors, any other creditors, customers, clients, suppliers, lessors (including ground lessors), tenants, co-tenants, governments, limited partners, co-venturers, partners or by any other person, firm, corporation or entity against or in respect of any of the Applicants or the Property, as the case may be, whether pursuant to the Bankruptcy and Insolvency Act, S.C. 1992, c. 27, the Winding up Act, *R.S.C. 1985, c. W-11* or otherwise shall be stayed and suspended;

    (b) the right of any person, firm, corporation or other entity to take possession of, foreclose upon or otherwise deal with any of the Property, or to continue such actions or proceedings if commenced prior to the date of this Order, is hereby restrained;

    (c) the right of any person, firm, corporation or other entity to commence or continue realization in respect of any encumbrance, lien, charge, mortgage, attornment of rents or other security held in relation to the Property, including the right of any Creditor to take any step in asserting or perfecting any right against any Applicant or Limited Partnership, is hereby restrained, but the foregoing shall not prevent any Creditor from effecting any registrations with respect to existing

security granted or agreed to prior to the date of this Order or from obtaining any third party consents in relation thereto;

(d) the right of any person, firm, corporation or other entity to assert, enforce or exercise any right, option or remedy available to it under any agreement with any of the Applicants or in respect of any of the Property, as the case may be, arising out of, relating to or triggered by the making or filing of these proceedings, or any allegation contained in these proceedings including, without limitation, the making of any demand, the sending of any notice or the issuance of any margin call is hereby restrained;

(e) no suit, action or other proceeding shall be proceeded with or commenced against any of the Applicants or in respect of any of the Property, as the case may be;

(f) all persons, firms, corporations and other entities are restrained from exercising any extra-judicial right or remedy against any of the Applicants or in respect ,of any of the Property, as the case may be;

(g) all persons, firms, corporations and other entities are restrained from registering or re-registering any of the Property which constitutes securities into the name of such persons, firms, corporations or other entities or their nominees, the exercise of any voting rights attaching to such securities, any right of distress, repossession, set off or consolidation of accounts in relation to amounts due or accruing due in respect of or arising from any indebtedness or obligation as at the date hereof; and

(h) notwithstanding paragraph 9(g) hereof, a Creditor may set off against its indebtedness to an Applicant, as the case may be, pursuant to any existing interest rate swap agreement any corresponding indebtedness of such Applicant, as the case may be, to such Creditor under the same interest rate swap agreement,

but nothing in this Order shall prevent suppliers of goods and services involved in completing the construction of the Londonderry Mall from commencing or continuing with any construction lien claims they may have in relation to the Londonderry Mall and nothing in this Order shall prevent the Bank of Montreal ("BMO") and the Applicants from continuing to operate the existing bank accounts of the Applicants and of the Limited Partnerships maintained with BMO, in the same manner as those bank accounts were operated prior to the date of this Order including any rights of set off in relation to monies deposited therein and nothing in this Order shall prevent CIBC from realizing upon its security in respect of CIBC1 and nothing in this Order shall prevent or affect either FB or CT in the enforcement of the security it holds on the Sutton Place Hotel and the Carleton Place Hotel, respectively.

11. THIS COURT ORDERS that no Creditor shall be under any obligation to advance or re-advance any monies after the date of this Order to any of the Applicants or to any of the Limited Partnerships, as the case may be, provided, however, that cash placed on deposit by any Applicant with any Creditor from and after this date, whether in an operating account or otherwise and whether for its own account or for the account of a Limited Partnership, shall not be applied by such Creditor, other than in accordance with the terms of this Order, in reduction or repayment of amounts owing as of the date of this Order or which may become due on or before the Stay Date or in satisfaction of any interest or charges accruing in respect thereof.

12. THIS COURT ORDERS that all persons, firms, corporations and other entities having agreements with an Applicant or with a Limited Partnership, as the case may be, whether written or oral, for the supply or purchase of goods and/or services to such Applicant or Limited Partnerships, as the case may be, including, without limitation, ground leases, commercial leases, supply contracts, and service contracts, are hereby restrained from accelerating, terminating, suspending, modifying or cancelling such agreements without the written consent of such Applicant or Limited Partnership, as the case may be, or with the leave of this Court. All persons, firms, corporations and other entities are hereby restrained until further order of this Court from discontinuing, interfering or cutting off any utility (including telephone service at the present numbers used by any of the Applicants or Limited

Partnerships, as the case may be, whether such telephone services are listed in the name of one or more of such Applicants or Limited Partnerships, as the case may be, or in the name of some other person), the furnishing of oil, gas, water, heat or electricity, the supply of equipment or other services so long as such Applicant or Limited Partnerships, as the case may be, pays the normal prices or charges for such goods and services received after the date of this Order, as the same become due in accordance with such payment terms or as may be hereafter negotiated by such Applicant or Limited Partnerships, as the case may be, from time to time. All such persons, firms, corporations or other entities shall continue to perform and observe the terms and conditions contained in any agreements entered into with an Applicant or Limited Partnerships, as the case may be, and, without further limiting the generality of the foregoing, all persons, firms, corporations and other entities including tenants of premises owned or operated by any of the Applicants or Limited Partnerships, as the case may be, be and they are hereby restrained until further order of this Court from terminating, amending, suspending or withdrawing any agreements, licenses, permits, approvals or supply of services and from pursuing any rights or remedies arising thereunder.

13. THIS COURT ORDERS that, upon the failure by any of the Applicants to perform their obligations pursuant to this Order, any Creditor affected by such failure may, on at least one day's notice to each of the Applicants and to all Senior Creditors and the Monitor, bring a motion to have the provisions of paragraphs 10, 11 or 12 of this Order set aside or varied, either in whole or in part.

14. THIS COURT ORDERS that from 9:00 o'clock a.m. on December 24, 1992 to the time of the granting of this Order, any act or action taken or notice given by any Creditors receiving such Notice of Application in furtherance of their rights to commence or continue realization, will be deemed not to have been taken or given, as the case may be, subject to the right of such Creditors to further apply to this Court in respect of such act or action or notice given, provided that the foregoing shall not apply to prevent any Creditor who, during such period, effected any registrations with respect to security granted prior to the date of this Order or who obtained third party consents in relation thereto.

15. THIS COURT ORDERS that all floating charges granted by any of the Applicants prior to the date of this Order, whether granted on behalf of any of the Limited Partnerships or otherwise, shall be crystallized, and shall be deemed to be crystallized, effective for all purposes immediately prior to the granting of this Order.

16. THIS COURT ORDERS that the Applicants shall be entitled to take such steps as may be necessary or appropriate to discharge any construction, builders, mechanics or similar liens registered against any of their property including, without limitation, the posting of letters of credit or the making of payments into Court, as the case may be, and no lender to any Applicant shall be prevented from doing likewise or from making such protective advances as may be necessary or appropriate, in which case such lender, in respect of such advances, shall be entitled to the benefit of any existing security in its favour as of the date of this Order in accordance with its terms.

17. THIS COURT ORDERS that the Applicants on or before January 1, 1993, shall provide the Senior Creditors with projections as to the monthly general, administrative and restructuring ("GAR") costs for the months of January, February and March, 1993, together with a cash-flow projection for LUPC for the period commencing on January 1, 1993 through to April 30, 1993 inclusive.

18. THIS COURT ORDERS that, notwithstanding the terms of this Order, the gross operating cash flow generated during the period commencing on the date of this Order to and until the Stay Date (the "Interim Period") by the Londonderry Mall shall be reserved and expended on the property in accordance with existing agreements, but all property management or other similar fees payable to any Applicant shall continue to be paid therefrom subject to the terms of any existing loan agreements affecting same.

End of Document

TAB 8

CITATION: Nelson Education Limited (Re), 2015 ONSC 3580
COURT FILE NO.: CV15-10961-00CL
DATE: 20150602

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NELSON EDUCATION LTD. AND NELSON EDUCATION HOLDINGS LTD.

Applicants

BEFORE: Newbould J.

COUNSEL: *Robert J. Chadwick, Caroline Descours and Sydney Young*, for the Applicants

D.J. Miller and Kyla E.M. Mahar, for the Royal Bank of Canada

Kevin J. Zych, for the First Lien Lenders

Jay Swartz and Robin Schwill, for Alvarez & Marsal Canada Inc.

HEARD: May 29, 2015

ENDORSEMENT

[1] On May 12, 2015, Nelson Education Ltd. ("Nelson") and its parent company, Nelson Education Holdings Ltd. sought and obtained an initial order pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "CCAA"). Notice had been given to RBC only late the day before and RBC took the position that it had not had sufficient time to consider or prepare a response to the application. The resulting initial order was pared

down from what was sought by the applicants and it provided that on the comeback date the hearing was to be a true comeback hearing and that in moving to set aside or vary any provisions of the initial order, a moving party did not have to overcome any onus of demonstrating that the order should be set aside or varied.

[2] On the comeback date, RBC moved to have Alvarez & Marsal Canada Inc. ("A&M Canada") replaced with FTI Consulting Canada Inc. ("FTI") as the Monitor, and for other relief. At the conclusion of the hearing, I ordered that FTI replace A&M Canada as Monitor for reasons to be delivered. These are my reasons.

Relevant History

[3] Nelson is a Canadian education publishing company, providing learning solutions to universities, colleges, students, teachers, professors, libraries, government agencies, schools, professionals and corporations across the country.

[4] The business and assets of Nelson were acquired by an OMERS entity and certain other funds from the Thomson Corporation in 2007 together with U.S. assets of Thomson for U.S. $7.75 billion, of which US$550 million was attributed to the Canadian business. The purchase was financed with first lien debt of approximately US$311.5 million and second lien debt of approximately US$171.3 million.

[5] The first lien debt is currently approximately US$269 million plus accrued interest. There are 22 first lien lenders. RBC is a first lien lender holding approximately 12% of the principal amount outstanding. The first lien debt matured on July 3, 2014. It has not been repaid.

[6] The second lien debt is currently approximately US$153 million plus accrued interest. RBC is a second lien lender, holding the largest share of the principal amounts outstanding, and is the second lien agent for all second lien lenders. The maturity date is July 3, 2015 subject to acceleration.

[7] According to Mr. Greg Nordal, the CEO of Nelson, the business of Nelson has been affected by a general decline in the education markets over the past few years. In the past year, overall revenues in the K-12 market have declined by 13% and in the higher education market by 3%.

[8] Notwithstanding the industry decline over the past few years, Nelson according to Mr. Nordal has maintained strong EBITDA, which is a credit I am sure to the efforts of Mr. Nordal and the management of Nelson. Nelson's EBITDA has remained positive over the last several years. For the fiscal year ended June 30, 2011 it was $47.4 million, for the fiscal year ended June 30, 2012 it was approximately $37.3 million and for the year ended June 30, 2013 it was approximately $40.9 million.

[9] Mr. Nordal is of the view that Nelson is well positioned to take care of increasing future opportunities in the digital educational market.

[10] Nelson had a leverage ratio of debt to EBITDA of approximately 17:1 for the fiscal year 2015. Its first lien debt matured and has not repaid and it has made no interest payments on the second lien debt since March 31, 2014.

[11] Nelson's efforts to deal with this situation have led to a proposed sale transaction under which the business of Nelson would be sold to the first lien lenders by way of a credit bid and the second lien lenders would be wiped out. In their application requesting an initial order, the applicants proposed a hearing date to be held nine days after the Initial Order to approve this sale transaction. That request was not granted.

[12] In March 2013, Nelson engaged Alvarez and Marsal Canada Securities ULC ("A&M") as its financial advisor to assist the Company in reviewing and considering potential strategic alternatives, including a refinancing and/or restructuring of its credit agreements.

[13] Commencing in April 2013, Nelson, with the assistance of A&M and legal advisors, entered into discussions with a number of stakeholders, including RBC as the second lien agent, the first lien steering committee, and their advisors, in connection with potential alternatives to address Nelson's debt obligations. A number of without prejudice and confidential proposed transaction term sheets were discussed between August 2013 and September 2014, without any agreement being reached.

[14] During this time, interest continued to be paid on the first lien debt. In March, 2014 Nelson did not paid interest on the second lien debt. In return for a short cure period to May 9, 2014, a partial payment of US$350,000 towards interest was paid on the second lien debt. A further cure period to May 30, 2014 was given on the second lien debt but nothing was paid on it by that date. No further cure period was agreed and no further interest has been paid. Initially during the discussions that took place with the second lien lenders' agent, the professional fees of the advisors to the second lien lenders were paid by Nelson but these were stopped in August, 2014 after there was no agreement regarding further extensions of the second lien debt or agreement on any term sheet.

[15] On September 10, 2014, Nelson announced to the first lien lenders Nelson's proposed transaction framework on the terms set out in the First Lien Term Sheet dated September 10, 2014 (the "First Lien Term Sheet") for a sale or restructuring of the business and sought the support of all of its first lien lenders.

[16] In connection with the First Lien Term Sheet, Nelson entered into a support agreement (the "First Lien Support Agreement") with first lien lenders representing approximately 88% of the principal amounts outstanding under the first lien credit agreement. The consenting first lien lenders comprise 21 of the 22 first lien lenders, the only first lien lender not consenting being RBC. Consent fees of approximately US$12 million have been paid to the consenting first lien lenders.

[17] Pursuant to the terms of the First Lien Term Sheet and the First Lien Support Agreement, Nelson, with the assistance of its financial advisor, A&M, commenced on September 22, 2014, a sale and investment solicitation process (the "SISP") to identify one or more potential purchasers of, or investors in, the Nelson business, which process was conducted over a period of several months. According to Mr. Nordal, Nelson and A&M conducted a thorough canvassing of the market and are satisfied that all alternatives and expressions of interest were properly and thoroughly pursued.

[18] The SISP did not result in an executable transaction acceptable to the first lien lenders holding at least 66 2/3% of the outstanding obligations under the first lien credit agreement. Accordingly, pursuant to the First Lien Support Agreement Nelson wishes to proceed with a transaction pursuant to which the first lien lenders will exchange and release all of the indebtedness owing under the first lien credit agreement for: (i) 100% of the common shares of a newly incorporated entity that will own 100% of the common shares of the purchaser to which substantially all of the Nelson's assets would be transferred, and (ii) the obligations under a new US$200 million first lien term facility to be entered into by the purchaser.

[19] The proposed transaction provides for:

(a) the transfer of substantially all of Nelson's assets to the purchaser;

(b) the assumption by the purchaser of substantially all of Nelson's trade payables, contractual obligations (other than certain obligations in respect of former employees, obligations relating to matters in respect of the second lien credit agreement, and a Nelson promissory note) and employment obligations incurred in the ordinary course and as reflected in the Nelson's balance sheet; and

(c) an offer of employment by the purchaser to all of Nelson's employees.

[20] Under the proposed transaction, with the exception of the obligations owing under the second lien debt and intercompany amounts, substantially all of the liabilities of Nelson are

being paid in full in the ordinary course or are otherwise being assumed by the purchaser. The purchaser will not assume Nelson's obligations to the second lien lenders.

[21] On September 10, 2014, pursuant to the First Lien Support Agreement Nelson agreed not to make further payments in connection with the second lien debt, including any payment for fees, costs or expenses to any legal, financial or other advisor to RBC, the second lien agent, without the consent of the consenting first lien lenders.

Role of A&M Securities

[22] Nelson engaged A&M, an affiliate of Alvarez & Marsal Canada Inc., as its financial advisor in March, 2013. A&M has been operating as a financial advisor to Nelson for more than two years prior to the date of the Initial Order.

[23] The scope of A&M's engagement in 2013 included the following:

(a) Analyze and evaluate Nelson's financial condition;

(b) Assist Nelson to prepare its 5-year financial model, including balance sheet, income statement and cash flow statement and its 5-year business plan;

(c) Assist Nelson to respond to questions from its lenders regarding Nelson's business plan and financial model;

(d) If requested by management, attend and participate in meetings of the board of directors with respect to matters on which A&M was engaged to advise Nelson; and

(e) Other activities as approved by management or the board of Nelson and agreed to by A&M.

[24] In September 5, 2014 A&M was further engaged to act as the exclusive lead advisor for the transaction that has led to the proposed transaction, including the SISP process undertaken by Nelson. A&M's goal was identified as completing a successful transaction in the most expedient manner. Under this second engagement, A&M's compensation was described as being based on time billed at standard hourly rates and "subject to any other arrangements agreed upon among Nelson, the lenders and A&M". The word "lenders" referred only to the first lien lenders.

[25] In undertaking its mandate under the 2013 and 2014 engagements, A&M was authorized to utilize the services of employees of its affiliates under common control with A&M and subsidiaries. The sample accounts provided by A&M indicate that a substantial number of hours were billed to the A&M engagement for work of the personnel who are intended to act on behalf of the Monitor in this proceeding. A total of approximately $5.5 million plus HST and disbursements have been billed by A&M for its services to Nelson.

[26] An affiliate of A&M was engaged in 2013 to advise Cengage Learnings, the name of the U.S. operations of Thomson that was changed when Thomson sold its business. The 2013 and 2014 engagements of A&M by Nelson sought Nelson's waiver of any conflict of interest in connection with an A&M affiliate's engagement with Cengage. At the time of the 2013 engagement, A&M U.S. was engaged by Cengage to provide restructuring and financial advisory services and Cengage and Nelson had common shareholders. At the time of the September 2014 engagement, an A&M affiliate was providing financial advisory and financial management services to Cengage. Nelson maintains a strong relationship with Cengage and is the exclusive distributor for Cengage educational content in Canada pursuant to an agreement that expires on January 1, 2018. Cengage also provides certain operational support to Nelson. According to Mr. Nordal, Cengage is a preferred and key business partner of Nelson.

[27] A&M was present at the meetings of Nelson's board of directors wherein the decision was made by that board to not make interest payments to the second lien lenders on March 20, 2014, March 27, 2014, April 7, 2014 and June 27, 2014. A&M was also involved in discussions

with RBC and its financial advisors in connection with the extension of the cure period for payment of interest to the second lien lenders as the financial advisor to Nelson.

Analysis

[28] In its factum, RBC asserted that the application by Nelson was not an appropriate use of the CCAA as it was intended to be a nine-day proceeding to bless a quick flip credit bid by the first lien lenders to acquire the business of Nelson and extinguish the second lien lenders interest in the assets. RBC however also took the position that it would support a CCAA proceeding on the basis that there would be a neutral Monitor. I must say that in reviewing the circumstances of this application, I can see the issues raised by RBC as to whether this CCAA proceeding was an appropriate use of the CCAA. However in light of the position taken by RBC and my ruling that A&M Canada should be replaced by FTI as Monitor, I make no further comment or finding on the issue.

[29] This is a true comeback motion with no onus on RBC to establish that A&M Canada should not be the Monitor. Rather the situation is that it is Nelson who is required to establish that A&M Canada is an appropriate monitor.

[30] The problem is that Nelson has proposed a quick court approval of a transaction in which the first lien lenders will acquire the business of Nelson and in which essentially all creditors other than the second lien lenders will be taken care of. Nelson has asserted in its material that the SISP process undertaken by Nelson prior to the CCAA proceedings has established that there is no value in the Nelson business that could give rise to any payout to the second lien lenders. The SISP process was taken on the advice of A&M and under their direction. It was put in Nelson's factum that:

> The Applicants, with the assistance of their advisors, conducted a comprehensive SISP which did not result in an executable transaction that would result in proceeds sufficient to repay the obligations under the First Lien Credit Agreement in full or would otherwise be supported by the First Lien Lenders;

[31] Nelson intends to request Court approval of the proposed transaction. An issue that will be front and centre will be whether the SISP process prior to this CCAA proceeding can be relied on to establish that there is no value in the security of the second lien lenders and whether other steps could have been taken to obtain financing to assist Nelson in continuing in business other than a credit bid by the first lien lenders. A&M was centrally involved in that process. It is in no position to be providing impartial advice to the Court on the central issue before the Court.

[32] There is no suggestion that A&M are not professional or not aware of their responsibilities to act independently in the role of a monitor. A&M is frequently involved in CCAA matters and is understandably proud of its high standard of professionalism. However, that is not the issue. In my view, A&M should not be put in the position of being required to step back and give advice to the Court on the essential issue before the Court in light of its central role in the whole process that will be considered.

[33] In an article in the Commercial Insolvency Reporter, (LexisNexis, August 2010), entitled *Musings (a.k.a. Ravings) about the Present Culture of Restructurings,* former Justice James Farley, the doyen of the Commercial List for many years and no stranger to CCAA proceedings, had this to say about the role of a monitor:

> I mean absolutely no disrespect or negative criticism towards any monitor when I observe that they are only human. I think it is time to consider whether a monitor can truly be objective and neutral under present circumstances- it would take a true saint to stand firm under the pressures now prevailing. It should be appreciated that monitors are in fact hired by the debtor applicant (aided by perhaps a party providing interim financing, possibly in the role of the power behind the throne) and retained to advise the debtor well before the application is made. Is it not human nature for a monitor to subconsciously wonder where the next appointment will come from if it crosses swords with its hirer?

[34] Mr. Farley went on to suggest that the role of a monitor be split in two. That may be a laudable objective, but would require legislation. In this case, I do not think it would be appropriate in light of the extremely extensive work done by A&M over the course of two years.

[35] A monitor is an officer of the Court with fiduciary duties to all stakeholders and is required to assist the Court as requested. It has often been said that a monitor is the eyes and ears of the Court. It is critical that in this role a monitor be independent of the parties and be seen to be independent. I can put it no better than Justice Topolniski in *Winalta Inc. (Re),* 2011 ABQB 399 in which she said:

> **67** A monitor appointed under the *CCAA* is an officer of the court who is required to perform the obligations mandated by the court and under the common law. A monitor owes a fiduciary duty to the stakeholders; is required to account to the court; is to act independently; and must treat all parties reasonably and fairly, including creditors, the debtor and its shareholders.
>
> **68** Kevin P. McElcheran describes the monitor's role in the following terms in *Commercial Insolvency in Canada* (Markham, Ont.: LexisNexis Butterworths, 2005) at p. 236:
>
> > The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

[36] In this case, A&M is in no position to comment independently on the activities of Nelson in regards to the very issue in this case, namely the reliability of the SISP program in determining whether the second lien lenders' security has any value.

[37] There is also a question of the appearance of a lack of impartiality. During the two years that A&M was engaged prior to this CCAA proceeding, for which it billed over $5 million, it was involved in advising Nelson during negotiations with the interested parties, including RBC, and in participating in those negotiations with RBC on behalf of Nelson. This history can cause an appearance of impartiality, something to be avoided in order to provide public confidence that the insolvency system is impartial. See *Winalta* at para. 82. It was this concern of a perception of bias that led to the prohibition being added to section 11.7(2) of the CCAA preventing an auditor of a company acting as a monitor of the company.

[38] The issue of an appropriate monitor requires the balancing of interests. This is not like some cases in which a financial advisor has had some advisory role with the debtor and then becomes a monitor, usually with no objection being raised. Often it may be appropriate for that to occur taken the knowledge of the debtor acquired by the advisor. This case is different in that the financial advisor has been front row and centre in the very sales process that will be the subject of debate in these proceedings and has engaged in negotiations on behalf of Nelson.

[39] In all of the circumstances of this case, I concluded that it would be preferable for another monitor to be appointed and for that reason replaced A&M Canada as Monitor with FTI.

Other issues

[40] In the Initial Order, RBC was directed to continue its cash management system. There was no charge provided in favour of RBC. RBC says that it should not be required to continue the cash management system without the protection of a charge. During this hearing, Mr. Chadwick on behalf of Nelson said that it might be possible to satisfy RBC by requiring some minimum balance in the accounts, failing which a charge would be provided in favour of RBC. I take it that this issue will be worked out.

[41] In the draft Initial Order that accompanied the CCAA application at the outset, a paragraph was included that provided that Nelson could not pay any amounts owing by Nelson to its creditors except in respect of interest, expenses and fees, including consent fees, payable to the first lien lenders and fees and expenses payable to the first lien agent under the support agreement. That provision was deleted from the Initial Order. It was replaced with a provision that Nelson could pay expenses and satisfy obligations in the ordinary course of business.

[42] RBC takes the position that there should be a level playing field for the second lien lenders consistent with the treatment of the first lien lenders in this CCAA process, and that if interest is to be paid to the first lien lenders and expenses of their financial and legal advisors paid, the same should happen to the second lien lenders.

[43] RBC points out that it was Nelson who decided in June, 2014 to stop paying interest on the second lien debt and a little later reduce paying RBC's advisors in light of Nelson's view that there was not sufficient progress in negotiations with RBC. Payment of these professional fees was stopped in August, 2014. In September 2014 Nelson agreed in the First Lien Support Agreement not to make further payments in connection with the second lien debt, including any payment for fees, costs or expenses to any legal, financial or other advisor to RBC, the second lien agent, without the consent of the consenting first lien lenders. The consenting first lien lenders are opposed to any interest or expenses being paid to the second lien lenders.

[44] The second lien credit agreement provides for interest to be paid on the debt and in section 10.03 for all costs of the second lien agent, RBC, arising out of CCAA proceedings. The intercreditor agreement between the first and second lien agents provides in section 3.1(f) that nothing in the agreement save section 4 shall prevent receipt by the second lien agent payments for interest, principal and other amounts owed on the second lien debt. Section 4 provides that any collateral or proceeds of sale of the collateral shall be paid to the first lien agent until the first lien debt has been repaid and then to the second lien agent. As there has been no sale of the collateral, there is nothing in the intercreditor agreement that prevents payment of interest and expenses of the second lien lenders. The second lien lenders are contractually entitled to receive payment of their interest, costs, expenses and professional fees.

[45] No determination has been made in these proceedings that there is no value available for the second lien lenders. RBC disputes the applicants' views on this point. RBC contends that these CCAA proceedings should not commence with the Court accepting as a *fait accompli* that the second lien lenders should not be paid in the proceeding when every other stakeholder is being paid.

[46] There is no evidence that Nelson has not been in a position to pay the interest, costs, expenses and professional fees of the second lien lenders since it made a decision in 2014 to stop paying these amounts. Since the First Lien Support Agreement with the consenting first lien

lenders, the decision has been taken out of the hands of Nelson and turned over to the consenting first lien lenders.

[47] In my view, on the basis of the evidence, there is no justification to pay all of the interest, costs and expenses of the first lien lenders but not pay the same to the second lien lenders. In the circumstances, it is only fair that pending further order, Nelson be prevented from paying any interest or other expenses to the first lien lenders unless the same payments owing to the second lien lenders are made, and it is so ordered.

[48] RBC has requested costs of the comeback motion and I believe other costs. A request for costs may be made in writing by RBC within 10 days, along with a proper cost outline, and the parties against whom costs are claimed shall have 10 days to file a response to the cost request.

Newbould J.

Date: June 2, 2015

TAB 9

TAB A

COUR SUPÉRIEURE

(Chambre commerciale)

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

Nº : 500-11-061657-223

DATE : 21 novembre 2022

SOUS LA PRÉSIDENCE DE L'HONORABLE MICHEL A. PINSONNAULT, J.C.S.

DANS L'AFFAIRE DE LA *LOI SUR LES ARRANGEMENTS AVEC LES CRÉANCIERS DES COMPAGNIES*, L.R.C. (1985), CH. C-36, TELLE QU'AMENDÉE

GROUPE SÉLECTION INC.
et
LES AUTRES ENTITÉS LISTÉES À L'ANNEXE « A » DES PRÉSENTES
Débitrices/Demanderesses
et.
LES SOCIÉTÉS EN COMMANDITE LISTÉES À L'ANNEXE « B » DES PRÉSENTES
Mises-en-cause
et
FTI CONSULTING CANADA INC.
Contrôleur proposé
et
BANQUE NATIONALE DU CANADA
Créancière garantie/Requérante pour l'émission d'une Ordonnance initiale
et
PRICEWATERHOUSECOOPERS INC.
Contrôleur proposé

JUGEMENT SUR DEMANDES POUR L'ÉMISSION D'UNE ORDONNANCE INITIALE ET D'UNE ORDONNANCE INITIALE AMENDÉE ET REFORMULÉE
(Articles 9, 11, 11.2, 11.52, 23 et 36 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. (1985), ch. C-36**)**

APERÇU

[1] Groupe Sélection inc. (« **GS** ») œuvrant, entre autres, par l'entremise de quelque 81 sociétés[1] et de 56 sociétés en commandite[2] (collectivement les « **Débitrices** ») requière la protection de la Cour en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* (la « **LACC** ») afin de lui permettre de procéder à un redressement de leurs affaires à l'abri de leurs créanciers et propose la nomination de FTI Consulting Canada inc. (« **FTI** ») à titre de contrôleur (la « **Demande GS** »).

[2] D'emblée, il s'agit d'un dossier inusité, voire extraordinaire, dont les circonstances fort particulières comportent des ramifications et soulèvent des enjeux complexes tant pour GS et les Débitrices[3] que pour leurs créanciers, partenaires d'affaires et les autres parties prenantes dont les milliers de citoyens ainés qui résident dans les diverses résidences pour personnes âgées (les « **RPA** ») détenues en tout ou en partie par GS et dont la gestion quotidienne est assurée par les employés de GS.

[3] Par ailleurs, la Banque Nationale du Canada (« **BNC** ») qui représente un syndicat bancaire composé de la Banque Canadienne Impériale de Commerce (« **CIBC** »), la Fédération des Caisses Desjardins (« **Desjardins** »), la Banque Toronto Dominion (« **TD** »), la Banque de Montréal (« **BMO** »), la Banque HSBC Canada (« **HSBC** »), Briva Finance (Équité) s.e.c. (« **Briva** ») et Fiera FP Business Financing Fund, L.P. (« **Fiera** ») (collectivement le « **Syndicat** ») à qui il est dû plus de 272 M$ depuis le 28 octobre 2022, conteste vigoureusement la Demande GS dont le plan de redressement proposé par GS et la nomination de FTI à titre de contrôleur et ce, bien que le Syndicat soit en accord sur la nécessité de procéder dans la mesure du possible au redressement des affaires de GS sous l'égide de la LACC.

[4] En réaction à la notification qualifiée de hautement irrégulière de la Demande GS effectuée le dimanche 13 novembre 2022 vers 23h45, laquelle était présentable d'urgence le lendemain à 14h00, le Syndicat a déposé quelques minutes avant le début de l'audience de 14h00, sa propre Demande pour l'émission d'une ordonnance initiale[4] (la « **Demande BNC** ») proposant son propre plan de redressement ainsi que la nomination de PricewaterhouseCoopers inc. (« **PwC** ») à titre de contrôleur à qui seraient confiés des pouvoirs accrus pour mener à bien l'élaboration et la mise en œuvre du plan de redressement des affaires de GS à être approuvé par le Tribunal dans un contexte particulier et complexe.

[5] Le Syndicat précise que lors de négociations qui ont eu lieu entre les parties le dimanche matin 13 novembre 2022 pour tenter de trouver un terrain d'entente mutuellement acceptable, entre autres, quant au financement additionnel requis par GS,

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[1] Identifiées à l'Annexe A ci-jointe.
[2] Identifiées à l'Annexe B ci-jointe.
[3] Dorénavant, lorsque le Tribunal référera à GS cela inclura et visera également les Débitrices, lorsqu'applicables.
[4] On appelle communément une « *competing application* ».

les représentants de GS n'ont jamais indiqué qu'ils entendaient déposer la Demande GS dans les prochaines heures, un comportement qui selon le Syndicat, n'a fait que miner irrémédiablement la confiance qu'il portait à l'endroit des dirigeants de GS.

[6] Le Syndicat allègue que ses membres ont été pris au dépourvu avec le dépôt inattendu de la Demande GS dans la nuit de dimanche à lundi sans préavis raisonnable. Il considère que cette tactique déployée par GS est au détriment de leurs intérêts et de ceux d'un nombre important de partenaires d'affaires de GS dont il sera question plus loin et ce, sans oublier les parties prenantes dont les résidents des RPA et d'autres édifices multi-résidentiels relevant de GS.

[7] Pour l'essentiel, le Syndicat reproche à GS de ne pas avoir respecté ses engagements contractuels relativement au remboursement des sommes avancées depuis 2021 et d'être en défaut de lui rembourser plus de 272 M$ qui sont dus et exigibles depuis le 28 octobre 2022.

[8] En fait, selon le Syndicat, GS se retrouve dans une situation financière hautement précaire, voire critique, en continuant d'engendrer des pertes de quelque 7 M$ chaque mois, et ce, depuis plusieurs mois, ce qui a suscité l'octroi d'avances additionnelles de 64,5 M$ depuis le mois d'avril 2022[5] sans que la situation financière de GS ne s'améliore, bien au contraire.

[9] Bref, GS éprouve un manque chronique de liquidités de quelque 7M$ de mois en mois sans perspective d'amélioration à court terme pour faire face à ses obligations financières courantes.

[10] Le Syndicat, prêteur principal de GS, a perdu confiance à l'endroit de son équipe de direction et de ses dirigeants ce qui s'est soldé par le retrait de son support financier le 28 octobre 2022.

[11] Cette perte de confiance s'est également répercutée sur les principaux partenaires d'affaires de GS qui à l'audience, ont manifesté auprès du Tribunal leur opposition à ce que le Tribunal accueille la Demande GS.

[12] En effet, les avocats de Revera inc., du Groupe Montoni, du Fonds de solidarité FTQ, de la Fédération des Caisses Desjardins, de Timbercreek Capital et de 7813040 Canada inc., de la Banque CIBC et de la Banque de Nouvelle-Écosse (Scotia) sont tous intervenus au cours de l'audience pour confirmer la perte de confiance de leurs clientes respectives envers la direction et les gestionnaires de GS. Leurs clientes appuient entièrement la Demande BNC, l'approche proposée à l'audience par le Syndicat pour l'élaboration d'un plan de redressement des affaires de GS ainsi que le choix de PwC à titre de contrôleur proposé.

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[5] Premier rapport du Contrôleur proposé PwC daté du 14 novembre 2022 (**A-5A**) (ci-après le « **Rapport PwC** ») par. 48.

[13] Pour sa part, Investissement Québec, un autre partenaire majeur qui a cautionné une portion significative de l'endettement de GS envers le Syndicat, a informé le Tribunal qu'elle s'en remettait à la décision du Tribunal, mais qu'elle souhaitait néanmoins réitérer qu'elle tient à cœur avant tout la sécurité et le bien-être des résidents des RPA.

[14] Somme toute, GS n'a plus accès à aucun crédit lui permettant de combler son déficit d'opération mensuel de quelque 7 M$ qui est récurrent et par conséquent, n'est plus en mesure d'honorer ses obligations courantes envers ses créanciers et partenaires ce qui place ces entreprises en situation d'insolvabilité d'où le dépôt de la Demande GS.

[15] Le dépôt de la Demande GS constitue un aveu d'insolvabilité de la part de GS et des Débitrices que GS a choisies d'inclure dans sa procédure. Il ne fait donc aucun doute que GS et les Débitrices sont insolvables dans le contexte actuel ce qui explique que le 14 novembre dernier, le Tribunal a émis une Ordonnance intérimaire en vertu des dispositions de la LACC suspendant essentiellement toutes procédures à l'encontre des Débitrices[6] et de leurs Biens[7] jusqu'à ce que jugement intervienne sur la Demande GS et la Demande BNC.

[16] Pour sa part, le Syndicat reproche à GS de tenter de poursuivre, sous le couvert de la LACC, ses opérations essentiellement sur une base de « *business as usual* » à l'abri de ses divers créanciers, de ses partenaires d'affaires et de diverses parties prenantes en finançant celles-ci au moyen d'un financement temporaire de 50 M$ offert par monsieur Herbert Black (« **M. Black** » ou le « **Prêteur DIP**[8] ») comportant des conditions considérées grandement désavantageuses pour l'ensemble des créanciers garantis sans conférer à GS et aux parties prenantes un avantage ou un bénéfice concret sauf de permettre de gagner du temps tout en nourrissant l'espoir que les conditions économiques s'amélioreront.

[17] Le financement temporaire de 50 M$ favorisé par GS s'inscrit dans un contexte de redressement où le maintien du *statu quo* serait essentiellement l'approche préconisée en espérant que la valeur des actifs de GS s'appréciera et permettra une monétisation de ceux-ci à des conditions plus favorables à plus ou moins court terme.

[18] GS envisage d'éventuellement mettre en place un processus d'investissement et de sollicitation d'offres, mais le Syndicat craint qu'en fonction de l'approche préconisée par GS cumulée au passage du temps et à l'accroissement du déficit d'opération qui serait comblé par les 50 MS avancés par le Prêteur DIP, l'équité des actifs de GS et par conséquent, la valeur des sûretés qu'il détient va continuer de s'éroder significativement et va mettre à risque le remboursement de sa créance.

[19] Outre le Syndicat, les autres créanciers garantis qui ont avancé des sommes substantielles par voie de prêts hypothécaires grevant des immeubles détenus en tout ou

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[6] Tel que défini dans l'Ordonnance intérimaire du 14 novembre 2022.
[7] *Ibid*.
[8] **D**ebtor **I**n **P**ossession (**DIP**).

en partie par GS, lesquels se sont manifestés à l'audience, soutiennent que l'approche préconisée par GS risque d'entrainer rapidement une réduction significative de la valeur des sûretés qu'ils détiennent avec un financement temporaire prioritaire de 50 M$ qui servirait principalement à éponger l'hémorragie financière que vit GS au fil des mois.

[20] Toujours selon le Syndicat, le redressement envisagé nécessite de stabiliser sur une base urgente les opérations de GS en déterminant, entre autres, les mesures qui pourraient être raisonnablement prises pour limiter, sinon éliminer, ce besoin récurrent de liquidités que les entreprises Débitrices n'ont tout simplement pas.

[21] Par ailleurs, à l'audience, les avocats du Syndicat ont fait valoir à plus d'une reprise que les membres de leur client considèrent comme tout à fait prioritaires la sécurité et le bien-être des résidents des RPA dont les services ne doivent pas être affectés par le processus de redressement qui doit s'engager sous la supervision du Tribunal.

[22] À cet égard, le financement temporaire de quelque 20 M$[9] que le Syndicat offre d'avancer servira, entre autres, à combler tout besoin financier ponctuel visant à assurer le maintien des services auxquels les résidents des RPA sont en droit de s'attendre.

[23] Les avocats du Syndicat ont également laissé entendre au Tribunal que si les besoins financiers liés principalement au maintien des services offerts aux résidents des RPA requéraient l'injection de capitaux additionnels en sus des 20 M$ proposés initialement, les membres du Syndicat considéreraient favorablement une telle contribution sujette évidemment à l'accord du Tribunal et aux conditions qu'ils pourraient alors imposer, le cas échéant.

[24] Somme toute, le débat sur les Demande GS et Demande BNC, qui a suscité quatre jours d'audience, soulève essentiellement les principaux enjeux suivants :

- L'élaboration et la mise en œuvre du processus de redressement de GS doivent-elles être confiées aux dirigeants et à la direction de GS qui n'ont plus la confiance du Syndicat et des principaux partenaires d'affaires ou au contrôleur PwC proposé par le Syndicat dont les pouvoirs seraient accrus ?

- Est-il opportun d'approuver l'engagement de 9372-9804 Québec inc. (« **9372** » ou le « **CRO** ») représentée par monsieur Yanick Blanchard[10] (« **M. Blanchard** ») à titre de Chef de la restructuration proposé par GS comportant une Charge du chef de la restructuration de 3 M$, malgré l'opposition du Syndicat et des principaux partenaires d'affaires ?

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[9] L'offre de financement temporaire du Syndicat prévoit que les 20 M$ seront avancés essentiellement en deux tranches avec une tranche initiale de 10 M$ si la Demande BNC est accueillie ainsi que son offre de financement temporaire conformément aux dispositions prévues aux Pièces **A-38** et **A-39**.

[10] **R-25**.

- Est-il opportun d'approuver le financement temporaire de 50 M$ de M. Black préconisé par GS lequel comporterait une Charge du prêteur temporaire de 60 M$ ayant priorité sur toutes les sûretés détenues par les divers créanciers garantis de GS ou le financement temporaire de 20 M$ offert par le Syndicat ?

[25] Pour les motifs qui suivent, en exerçant la discrétion judiciaire que lui confèrent les dispositions de la LACC, le Tribunal estime qu'il doit rejeter la Demande GS, accueillir la Demande BNC et émettre l'Ordonnance initiale demandée par le Syndicat sujet à certaines modulations.

1. CONTEXTE

[26] Avant d'aborder les enjeux identifiés ci-devant, il est utile de brosser un tableau du contexte actuel.

[27] À l'audience, tous ont convenu que la présente affaire est tout à fait exceptionnelle et comporte des circonstances et des enjeux majeurs et complexes tout autant exceptionnels qui vont compliquer significativement non seulement le déroulement futur des présentes procédures, mais également le processus de redressement qui s'enclenche avec le présent jugement.

[28] Les 137 Débitrices qui ont requis avec GS la protection de la Cour sous la LACC ne constituent qu'une partie des sociétés œuvrant sous la direction de GS lesquelles ne seront pas assujetties directement à l'Ordonnance initiale émise aux termes du présent jugement.

[29] À l'audience, on a indiqué, à juste titre, que l'organigramme des sociétés de GS était plus complexe que le plan du métro de Londres.

1.1 LES RPA

[30] GS détient des intérêts et exploite quelque 50 RPA situées aux quatre coins du Québec et ce, en sus de propriétés multi-résidentielles.

[31] Le Tribunal comprend que GS exploite et gère quelque 14 000 unités d'habitation principalement au sein des RPA.

[32] Le Tribunal comprend également que la très grande majorité des milliers de résidents qui occupent les RPA sont d'âge vénérable et qu'ils dépendent grandement des divers services qui leur sont offerts quotidiennement par les gestionnaires de chaque établissement.

[33] Aux yeux du Tribunal, les RPA constituent l'activité principale (*core business*) de GS et ce, même si la majeure partie du manque de liquidités est suscitée par les sociétés

qui acquièrent des terrains pour y construire de nouveaux édifices devant principalement, mais non exclusivement servir de RPA, dont il sera question plus loin.

[34] À l'heure actuelle, une majorité des RPA ne génèrent pas suffisamment de revenus pour couvrir leurs dépenses d'exploitation courantes, ce qui nécessite des injections de fonds régulièrement pour pouvoir maintenir les services.

[35] Bien que la situation semble se résorber lentement, la pandémie a eu un impact négatif important sur le taux d'occupation des RPA, ce qui a affecté par le fait même les revenus générés par une occupation insuffisante.

[36] Or, sur les 50 RPA, GS n'en détient que 6 à part entière[11], toutes les autres résidences sont détenues conjointement avec des partenaires d'affaires tels Revera inc. (« **Revera** »), Blackstone (« **Blackstone** ») et Lokia (« **Lokia** ») pour ne nommer que les principaux.

[37] Selon PwC, au 31 mai 2022, sur les 50 RPA, 28 (56%) étaient déficitaires et avaient besoin d'injections de capitaux de la part de GS et de ses partenaires pour financer leurs opérations. Le taux moyen d'occupation était d'environ 80 %.[12]

[38] Ainsi, les RPA détenues en tout ou en partie et gérées par GS sont majoritairement déficitaires (56%) et requièrent près de 2 M$ de liquidités additionnelles par mois malgré les frais de gestion perçus.[13]

[39] Le Tribunal comprend que la situation actuelle demeure essentiellement inchangée même si à certains endroits le taux d'occupation a augmenté légèrement depuis le mois de mai dernier.

[40] Le fait de ne pas combler les déficits mensuels d'exploitation des RPA met en péril les services rendus quotidiennement aux résidents, d'où l'importance cruciale d'avancer les fonds requis en temps opportun.

[41] Par ailleurs, le manque récurrent de liquidités éprouvé par GS force ses partenaires comme Revera à combler la part des déficits d'exploitation des RPA qui normalement devrait être assumée par GS, ce qui accentue les tensions entre les divers partenaires d'affaires qui s'attendent à ce que GS assume et honore non seulement ses obligations financières envers eux aux termes de leurs ententes contractuelles, mais également ses obligations envers les résidents des RPA.

[42] Or, là où le bât blesse est le modèle d'affaires de GS qui ne se limite pas à la détention d'intérêts à taux variables dans les RPA existantes et à la gestion de ceux-ci.

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[11] Le Rapport PwC, par. 110.
[12] *Ibid*., par. 39.
[13] *Ibid*., par. 41.

1.2 L'ACQUISITION DE TERRAINS ET LA CONSTRUCTION D'ÉDIFICES

[43] GS acquiert de temps à autre des terrains en vue d'y construire des édifices devant servir principalement de RPA ou parfois d'édifices à vocation multi-résidentielle.

[44] Au fil du temps, GS s'est impliquée dans des projets de plus en plus importants et complexes comme l'Espace Montmorency à Laval et le développement du terrain Molson à Montréal qui requièrent des investissements majeurs sans pour autant générer aucun revenu pour l'instant. En fait, GS est présentement en défaut de combler sa quote-part des appels d'avance lancés dans ces deux projets majeurs impliquant principalement le Groupe Montoni et le Fonds de solidarité FTQ.

[45] Dans la poursuite de ce modèle d'affaires, après avoir acquis un terrain, GS tente ensuite de s'associer à un partenaire qui deviendra copropriétaire indivis en fonction d'un pourcentage convenu ponctuellement dont le taux variera selon chaque projet. Cette approche permet à GS de partager les coûts relatifs au maintien et à la conservation du terrain.

[46] Le Tribunal comprend qu'il y a présentement environ 15 projets en développement dont 7 tours de logements locatifs qui sont soit toujours en construction ou en voie d'être complétés.

[47] Autre élément d'importance, GS assure également la construction des installations sur les terrains en question en partageant toujours avec le partenaire, dans les proportions convenues, les coûts afférents à la réalisation du projet de construction.

[48] À cette fin, certaines des sociétés de GS assurent, entre autres, les rôles d'entrepreneur général et de sous-traitants pour réaliser les projets.

[49] GS assume ensuite la gestion de l'édifice une fois la construction complétée.

[50] Inutile de préciser que tant et aussi longtemps que la construction n'est pas terminée et que l'édifice n'est pas suffisamment occupé pour générer des revenus adéquats, ces projets de construction constituent une source majeure de dépenses et de coûts fixes requérant des liquidités.

[51] Selon PwC, les dépenses de construction fixes comprenant principalement des salaires et des frais de consultants s'élèvent à plus de 7 M$ par mois. À ce jour, ce niveau de dépenses est encouru, peu importe le niveau d'activité.[14]

[52] Ainsi, les activités de construction de GS sont déficitaires et engendrent à elles seules des frais fixes mensuels estimés à 7 M$ par PwC. Quelque 30 M$ de liquidités ont été engloutis de janvier à juin 2022 à ce chapitre.[15]

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[14] *Ibid*., par. 25.
[15] *Ibid*., par. 31.

[53] PwC conclut qu'au niveau des activités reliées à la construction, GS est sous-capitalisée, ayant investi plus de 136 M$ au cours des 18 mois terminés le 30 juin 2022, soit l'équivalent de 7,5 M$ par mois.

[54] Or, ce montant a été financé à 100% par des emprunts provenant du financement offert par le Syndicat ou du produit provenant de diverses monétisations qui devaient être réalisées en vertu des conventions de crédit intervenues avec le Syndicat pour réduire son endettement.[16]

[55] Incidemment, la monétisation des projets de GS est la source convenue de remboursement de la dette due au Syndicat selon un échéancier convenu qui n'a pas été respecté, à tort ou à raison. Bien que GS ait pu monétiser certains projets, la très grande proportion des sommes remboursées ont été remplacées cette année au moyen d'avances visant à couvrir les besoins urgents de liquidités de GS.

[56] Bref, le montant de la dette du Syndicat est essentiellement remonté au niveau auquel il se trouvait avant les remboursements effectués par GS provenant des projets monétisés avec comme résultat pratique que l'assiette des sûretés détenues par le Syndicat pour sécuriser ses avances s'est rétrécie avec la vente de certains actifs.

[57] Qui plus est, dans la mesure où GS est incapable de contribuer sa quote-part des coûts reliés à la construction des projets en cours, ceux-ci sont placés à risque, à moins que le partenaire affecté n'assume l'entièreté de ces coûts donc la quote-part de GS ce qui risque de diluer son intérêt dans de tels projets au détriment de ses créanciers.

[58] Mais, il y a plus.

[59] Comme la majorité des sous-traitants est constituée de sociétés faisant partie de GS, la situation risque de se compliquer significativement si GS n'a pas les liquidités nécessaires pour rémunérer les divers ouvriers œuvrant sur ses chantiers de construction.

[60] GS emploie présentement environ 3 000 employés globalement bien que certaines mises à pied auraient été effectuées tout récemment.

[61] Bref, face à un tel constat, il n'est pas étonnant que les avocats des principaux partenaires qui se sont manifestés à l'audience aient fait écho quant à la perte de confiance de leurs clients respectifs à l'endroit de la direction et des dirigeants de GS et qu'ils se soient déclarés contre la Demande GS, l'approbation du CRO, le plan de financement temporaire de 50 M$ de M. Black ainsi que le contrôleur FTI tous proposés par GS.

[16] *Ibid*., par. 35.

[62] Ils ont plutôt appuyé sans réserve la Demande BNC ainsi que le financement temporaire de 20 M$ et PwC à titre de contrôleur proposé par le Syndicat.

[63] Il importe de préciser que la plupart de ces partenaires ne sont pas nécessairement des créanciers garantis de GS, mais plutôt des partenaires d'affaires ayant à cœur de maintenir les services offerts aux résidents des RPA ou à cœur de compléter les projets de construction déjà entamés pour la plupart.

1.3 L'ENDETTEMENT DE GROUPE SÉLECTION

[64] Le Syndicat détient une créance de **272 227 164,84 $** sécurisée par divers éléments d'actifs de certaines des Débitrices.[17]

[65] La structure complexe adoptée par GS et les intérêts variés, tangibles et intangibles, détenus par ses diverses sociétés dans une kyrielle d'actifs et la nature des sûretés détenues par le Syndicat qui se distingue à certains égards des sûretés traditionnellement consenties par un emprunteur, contribuent à complexifier significativement le mécanisme de réalisation des sûretés en question.

[66] Cette situation n'est cependant pas seulement propre au Syndicat à titre de créancier garanti.

[67] Il n'est donc pas étonnant qu'à l'audience, le Syndicat se soit déclaré favorable à l'élaboration d'un plan de redressement raisonnable et réaliste des affaires de GS sous l'égide de la LACC par l'entremise du contrôleur proposé, PwC.

[68] Par ailleurs, selon la Demande GS, en sus de son endettement envers le Syndicat, GS devrait une somme additionnelle d'environ **925 M$** aux divers prêteurs hypothécaires ayant financé jusqu'à environ 2 milliards de dollars les portefeuilles immobiliers que GS détient soit en propre ou avec d'autres partenaires en équité.[18]

[69] À ce sujet, GS mentionne que les sociétés débitrices aux termes de ces divers prêts hypothécaires ne font pas toutes parties des sociétés qui bénéficient de la protection de la LACC :

> 87. Bien qu'en date des présentes, les sociétés débitrices aux termes des diverses conventions de crédit conclues avec les créanciers hypothécaires ci-dessus ne sont pas toutes des Parties LACC auxquelles il est proposé que les Procédures sous la LACC s'appliquent, les Débitrices réservent néanmoins leurs droits de demander la protection de cette Cour à l'égard de ces autres sociétés.

[17] Demande BNC, par. 23-27.
[18] Demande GS, par. 85.

[70] Quant aux « *fournisseurs et autres créanciers* », le paragraphe 88 de la Demande GS du 13 novembre 2022 révèle un endettement de **118 059 000 $** au 30 juin 2022.[19]

[71] Étonnamment, à la fin de l'audience de quatre jours, les avocats de SG ont annoncé qu'ils allaient déposer une Demande GS modifiée datée du 17 novembre 2022. Or, l'endettement des Débitrices sur une base consolidée de **118 059 000 $** au 30 juin 2022 mentionné au paragraphe 88 est passé à « **environ 63,3 M$** » au 13 novembre 2022 :

> 88. Sur la base de l'information financière fournie par le Groupe Sélection, au 13 novembre 2022, un montant d'environ 63.3 millions$ était dû par les Parties LACC, sur une base consolidée, à des créanciers ordinaires et d'autres fournisseurs, dans la proportion suivante :
>
> (a) 2,9 millions$ payable par Master Immo (ou ses filiales);
>
> (b) 53,8 millions$ payable par Master Corpo (ou ses filiales); et
>
> (c) 6,6 millions $ de chèques en circulation ou en arrêt de paiement.
>
> À la même date, les comptes recevables de projets externes des Parties LACC totalisaient 24,9 millions $.

[72] Quant aux employés, les Débitrices allèguent leur devoir environ **1 078 000 $** à titre de rémunération régulière ainsi que **5 703 240 $** au chapitre des vacances :

> 90. […] Le montant estimé des vacances accumulées et non utilisées et des salaires au 31 octobre 2022 est d'environ 4 625 600$ pour les employés travaillant pour les RPA, 486 500$ pour les employés travaillant dans les opérations de construction et 591 140$ pour les employés travaillant au niveau corporatif.

[73] Par ailleurs, les sommes dues aux agences fiscales seraient nominales.

[74] Enfin, dans le cadre des projets immobiliers en cours et en partenariat avec les partenaires financiers dont il a été fait mention précédemment, certaines des sociétés de GS sont appelées à contribuer de temps à autre leur quote-part des coûts par voie de mises de fonds. Or, ces sociétés s'attendent à faire l'objet d'appels de fonds jusqu'à concurrence d'environ **20 M$** au cours des prochains mois, sommes qu'elles allèguent ne pas être en mesure d'avancer dans le contexte actuel. Ces appels de fonds s'inscrivent, entre autres, pour les projets majeurs de l'Espace Montmorency[20] à Laval et du terrain Molson[21] à Montréal.

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[19] *Ibid*., par 88.
[20] Impliquant le Groupe Montoni, le Fonds de Solidarité FTQ et Montez.
[21] Impliquant le Groupe Montoni et le Fonds de Solidarité FTQ.

[75] Somme toute, l'endettement des sociétés de GS est massif et leur détention de multiples actifs immobiliers nécessite des injections de capitaux importantes sur une base régulière que GS n'a tout simplement pas les ressources ou les liquidités financières d'effectuer sans le soutien d'un prêteur.

[76] Malheureusement, l'équité dont dispose GS n'est de peu d'assistance en l'espèce, car sa structure corporative complexe et la nature particulière des intérêts et des actifs que l'ensemble de ses sociétés détiennent peuvent difficilement générer des prêts additionnels dont GS a absolument besoin en l'absence de tout prêteur institutionnel qui est en mesure ou prêt à leur faire confiance dans le contexte actuel.

[77] Force est de constater qu'en raison de son modèle d'affaires combiné aux défis qu'a suscité la pandémie et que continuent de susciter l'inflation, la hausse des taux d'intérêt et les difficultés éprouvées au niveau des chaines d'approvisionnement, l'état actuel de la situation financière de GS et de ses multiples sociétés est malheureusement critique.

[78] Avec égards pour l'opinion contraire, cet état critique requiert non seulement la protection de la Cour, mais également une révision majeure et réaliste du modèle d'affaires de GS en priorisant en particulier les emplois et les RPA; ce qui implique le maintien des services offerts quotidiennement milliers de résidents qui occupent déjà les édifices dont la gestion est assurée par les employés de GS, sans oublier la nécessité d'assurer leur sécurité et leur bien-être.

2. ANALYSE

[79] D'emblée, il ne fait aucun doute que GS et les Débitrices sont insolvables étant incapables d'honorer leurs obligations au fur et à mesure de leurs échéances. C'est pourquoi elles ont choisi d'avoir recours à la protection de la LACC pour leur permettre de procéder au redressement important qui manifestement s'impose dans les circonstances.

[80] Tel que mentionné précédemment, le Tribunal a déjà prononcé une Ordonnance intérimaire le 14 novembre dernier, leur accordant une protection temporaire. L'Ordonnance initiale qui va être prononcée en vertu du présent jugement va prolonger cette protection sujet à certaines modulations suscitées par les interventions et commentaires des parties à l'audience.

2.1 L'élaboration et la mise en œuvre du processus de redressement de GS doivent-elles être confiées aux dirigeants et à la direction de GS qui n'ont plus la confiance du Syndicat et des principaux partenaires

d'affaires ou au contrôleur PwC proposé par le Syndicat dont les pouvoirs seraient accrus ?

[81] Cette première question suscite des objections majeures de la part des avocats de GS tant au niveau de l'intérêt du Syndicat de présenter la Demande BNC que le choix de PwC à titre de contrôleur proposé dont l'impartialité est mise en doute dans le contexte actuel.

2.1.1 Le Syndicat a-t-il l'intérêt nécessaire pour formuler la Demande BNC?

[82] GS conteste le droit du Syndicat et le caractère approprié pour celui-ci à titre de créancier garanti de formuler la Demande BNC dans le cadre de la LACC dont l'objectif principal est de favoriser le redressement d'une société insolvable.

[83] L'émission d'une ordonnance initiale a essentiellement pour but de permettre à une société débitrice insolvable et éligible de procéder à son redressement sous la protection de la LACC et non pas de permettre à un créancier de procéder à une mise sous séquestre déguisée au moyen d'un contrôleur nommé par la Cour comme tente de le faire le Syndicat.

[84] Selon les avocats de GS, l'émission d'une ordonnance initiale en vertu de la LACC à la demande d'un créancier doit constituer une mesure exceptionnelle qui ne s'applique pas en l'espèce.

[85] Le Tribunal partage entièrement ces principes directeurs, mais pas nécessairement les conclusions qu'ils tirent.

[86] Les avocats de GS ont insisté que tout ce que recherchait réellement le Syndicat est de réaliser ses sûretés en liquidant GS ni plus ni moins tout en procédant à son démembrement complet, ce qui est contraire à l'esprit de la LACC.

[87] Le Rapport de PwC et le témoignage de monsieur Christian Bourque (« **M. Bourque** ») de PwC à titre de représentant du contrôleur proposé par le Syndicat auraient alimenté leurs craintes à cet égard.

[88] Or, le Tribunal a non seulement eu l'opportunité de prendre connaissance de la Demande GS et de la Demande BNC, des pièces invoquées à leur soutien, des rapports soumis par les contrôleurs proposés FTI et PwC ainsi que des plans d'argumentation soumis de part et d'autre.

[89] Le Tribunal a également eu l'avantage d'entendre divers témoignages au cours des quatre jours d'audience, une durée inusitée en matière d'émission d'une ordonnance initiale en présence d'une quarantaine d'avocats représentant une vingtaine de clients.

[90] Tout cela reflète le caractère tout à fait exceptionnel sinon unique de la présente affaire impliquant 137 entités possédant des intérêts variables dans de multiples actifs d'importance dont une cinquantaine de RPA, lesquelles doivent collectivement à leurs créanciers près de 1,5 milliards de dollars alors que GS encoure un manque récurrent de liquidités d'environ 7 M$ mensuellement et dont les entrées de fonds depuis le début de l'année ont à peine réussi à combler les pertes récentes encourues sans pouvoir rembourser les montants convenus au Syndicat.

[91] En d'autres termes, les montants empruntés au Syndicat par GS au cours de la dernière année ont servi à éponger les pertes d'exploitation récentes ou à couvrir les pertes significatives qui continuent de s'accumuler mensuellement. Le Syndicat n'est plus disposé à continuer à se prêter à ce jeu qui ne mène nulle part dans le contexte actuel.

[92] Il presse le Tribunal de permettre au contrôleur PwC d'élaborer un plan de redressement visant initialement à arrêter l'hémorragie financière, à stabiliser les entreprises Débitrices et à repenser le modèle d'affaires de GS afin de lui permettre de retrouver la santé financière.

[93] Tout porte à croire qu'au fil des années, l'actionnaire principal monsieur Réal Bouclin (« **M. Bouclin** »), encouragé par les succès de ses diverses entreprises, a commencé à prendre des bouchées de plus en plus grandes qui ont malheureusement engendré les conséquences financières que ses sociétés vivent présentement.

[94] Le Tribunal est saisi d'un dossier d'insolvabilité d'une complexité extraordinaire en raison de la structure corporative adoptée par la direction de GS, – ce qui ne constitue pas un reproche – du nombre et de la nature particulière des sûretés consenties à de nombreux créanciers garantis en sus du Syndicat portant sur une kyrielle d'actifs dont plusieurs ne sont pas détenus en propre par les Débitrices ce qui implique la présence des partenaires d'affaires ayant également des intérêts dans ces actifs.

[95] En réalité, une liquidation pure et simple de GS et des Débitrices est difficilement envisageable sans risque d'entrainer un chaos juridique certain vu la diversité des intérêts en jeu.

[96] En fait, après quatre jours d'audience, le Tribunal est plutôt convaincu que le présent dossier se prête bien à un processus de redressement en vertu de la LACC, en raison de sa complexité et des enjeux qui impliquent, notamment les milliers de résidents des RPA.

[97] Un processus de redressement qui s'entame en vertu de la LACC n'implique pas qu'une compagnie débitrice va nécessairement conserver tous ses éléments d'actifs et qu'elle va émerger intacte du processus de redressement avec un fardeau d'endettement allégé. Le processus de redressement est évolutif en fonction des circonstances et des événements qui vont survenir au fil du temps.

[98] Le processus de la LACC possède l'avantage de se dérouler sous la supervision du Tribunal qui – dans le respect des dispositions de la LACC - s'assurera, entre autres, du caractère raisonnable et approprié des pistes de redressement envisagées tant du point de vue des sociétés débitrices que des créanciers garantis et ordinaires ainsi que des parties prenantes dont les milliers de résidents des RPA.

[99] Qui plus est, le Tribunal s'attend à ce que la bonne foi anime tous les intervenants qui participeront à ce processus et que la direction de GS collaborera pleinement avec le contrôleur dans la recherche de pistes de solutions viables et raisonnables.

[100] Ces quatre jours d'audience ont permis au Tribunal de constater une évolution qu'il qualifierait de positive de la perspective des principaux créanciers et partenaires d'affaires quant au plan de redressement à favoriser initialement, quant au support financier qui pourrait être offert pour permettre l'élaboration et la mise en exécution d'un plan de redressement et quant aux prochaines étapes à franchir.

[101] Force est de constater que le Syndicat et ses membres ont bien entendu, compris et répondu aux préoccupations du Tribunal pour la suite des choses quant au respect des milliers de personnes vulnérables qui sont à risque d'être affectées par le déroulement du processus de redressement qui s'entame aux termes du présent jugement. Ceci implique qu'une attention toute particulière soit également apportée sur les employés de GS qui se dévouent quotidiennement pour assurer les services offerts aux résidents.

[102] Bref, les circonstances et le contexte fort particulier actuel constituent précisément une situation tout à fait exceptionnelle permettant à un créancier intéressé au sens de l'article 11 LACC, tel le Syndicat, de formuler la Demande BNC.

[103] Avec égards, l'approche de « *business as usual* » vraisemblablement préconisée par GS aux termes de la Demande GS n'apparaît ni raisonnable, ni réaliste, ni équitable dans les circonstances, et ce, même avec l'ajout du CRO Blanchard proposé qui, incidemment, œuvre déjà au sein de l'entreprise depuis juin 2022.

[104] Il n'est ni raisonnable ni réaliste d'envisager une forme de « *business as usual* » sous le couvert de la LACC en se servant d'un prêt temporaire de 50 M$ dont certaines des conditions suscitent de sérieux doutes dans l'esprit du Tribunal d'autant plus que certaines exigences risquent de causer un préjudice important à plusieurs créanciers hypothécaires dont leurs débitrices ne bénéficieront aucunement des sommes qui seront alors avancées à GS vu la nature de leurs sûretés, des dettes qu'elles sécurisent.

[105] Avec égards, aux fins d'obtenir une protection globale en vertu de la LACC, l'avantage de jumeler près de 150 sociétés disposant d'actifs et de créanciers différents – sans oublier qu'elles risquent d'avoir des intérêts divergents les unes par rapport aux autres - peut comporter également certains désavantages lorsqu'il est question d'accorder une priorité de rang à un prêteur temporaire qui désire sécuriser ses nouvelles

avances en grevant essentiellement tous leurs actifs, surtout si le financement temporaire ne servira pas nécessairement de la même façon à chacune des sociétés visées.

[106] Il n'est donc pas étonnant qu'à première vue, un créancier hypothécaire ayant avancé des fonds substantiels à une société spécifique laquelle a grevé son immeuble en sa faveur ait de sérieuses réserves quant à l'octroi par le Tribunal d'une charge prioritaire sur ce même immeuble au montant de 60 M$, par surcroît.

[107] La perte de confiance du Syndicat et de ses membres qualifiée par ceux-ci d'irrémédiable à l'endroit de la direction de GS - que cette perte de confiance soit justifiée ou non - est une autre réalité incontournable que le Tribunal doit considérer vu l'ampleur de la dette de plus de 272 M$ qui lui est due et l'impossibilité pour GS de trouver le financement crucial d'une autre source similaire pour couvrir ses pertes mensuelles qui vont continuer à s'accumuler si rien n'est fait.

[108] Obtenir la protection de la LACC pour continuer, somme toute, les opérations de GS en se servant du prêt temporaire proposé de 50 M$ et pour tenter de soumettre au Tribunal d'ici au 23 décembre 2022[22] un processus d'investissement et de sollicitation de vente sans identifier immédiatement les éléments d'actifs qui génèrent ces pertes récurrentes démesurées et sans poser rapidement les gestes raisonnablement nécessaires pour réduire ces pertes récurrentes à tout le moins, dans la mesure du possible, n'apparaît pas être une formule permettant de maximiser la valeur des actifs de GS au bénéfice des créanciers et autres parties prenantes de GS, bien au contraire.

[109] Le prêt de 50 M$ servira principalement à éponger les pertes mensuelles récurrentes sans conférer aucune *plus-value* aux actifs de GS. Le Syndicat n'a pas tort de prétendre qu'une telle approche impliquant l'octroi d'une Charge du prêteur temporaire de 60 M$ va avoir comme effet direct de réduire significativement la valeur des actifs assujettis aux sûretés qu'il détient pour assurer le remboursement de sa créance de plus de 272 M$, sans parler de l'impact négatif sur les sûretés détenues par les autres créanciers garantis de GS.

[110] Enfin, il ne faut pas oublier que les autres dettes de GS dépassent le milliard de dollars.

[111] Que dire des principaux partenaires financiers identifiés précédemment qui ont également manifesté leur perte de confiance tout en appuyant les démarches du Syndicat ? Leur opinion doit être également considérée par le Tribunal.

[112] Somme toute, l'audience de quatre jours s'est révélée bénéfique aux yeux du Tribunal et lui a permis de constater, au fil du déroulement de l'audience, l'ouverture du Syndicat et de ses membres relativement à l'élaboration et la mise en place d'un processus de redressement de GS en misant avant tout sur le « *core business* » de GS soit sur les quelque 50 RPA, les employés qui se dévouent quotidiennement au bénéfice

[22] Une exigence du prêt temporaire de 50 M$ (**R-26**).

des milliers de résidents, les fournisseurs de service et autres qui approvisionnent et desservent ces RPA, le tout afin d'assurer et de maintenir la sécurité ainsi que le bien-être de ces résidents qui ne devraient pas être privés des services qu'ils ont payés et auxquels ils ont droit de s'attendre.

[113] Dans cette optique, le Syndicat s'est dit disposé à offrir un prêt temporaire jusqu'à concurrence de 20 M$ à des conditions beaucoup plus favorables que le financement temporaire de M. Black préconisé par GS.

[114] Qui plus est, le financement temporaire proposé par le Syndicat ne suscite pas l'opposition des mêmes créanciers hypothécaires qui ont émis de sérieuses réserves relativement au financement temporaire de M. Black.

[115] Le Tribunal a également pris acte de l'engagement des membres du Syndicat manifesté par l'entremise de leurs avocats quant à leur ouverture de considérer favorablement d'avancer des fonds additionnels si le processus de redressement le requiert surtout en ce qui concerne le maintien des opérations et des services offerts par les RPA.

[116] En conclusion, le Syndicat à titre de créancier de GS, même s'il n'est pas créancier de tout un chacun des sociétés et sociétés en commandite qui ont requis la protection de la LACC, possède l'intérêt voulu pour formuler la Demande BNC.

[117] Avec respect, les avocats de GS sont malvenus d'opposer au Syndicat la présence parmi les Débitrices de sociétés qui ne sont pas débitrices du Syndicat, pour tenter de faire échec à la Demande BNC.

[118] De toute façon, une telle approche des avocats de GS s'inscrit nécessairement dans un contexte où ces avocats ont tenu pour acquis que l'exercice proposé par le Syndicat dans la Demande BNC se voulait essentiellement une réalisation déguisée de ses sûretés, ce qui n'est pas le cas aux yeux du Tribunal.

[119] Après tout, le redressement tel qu'envisagé par le Syndicat impliquera sans aucun doute une réduction du fardeau financier de GS en continuant la monétisation de ses actifs comme il est également prévu dans la Demande GS. Cet exercice peut être fait sous la supervision du Tribunal sans que le Syndicat ne doive réaliser formellement ses sûretés.

2.2 Le processus de redressement doit-il être confié à la direction de GS et à FTI le contrôleur proposé dans la Demande GS?

[120] Pour répondre à cette question, les avocats de GS proposent au Tribunal de porter son regard vers le futur plutôt que sur les agissements du passé et par conséquent, de permettre au dirigeant, M. Bouclin, de procéder au redressement requis avec son équipe assistée du CRO Blanchard et du contrôleur FTI.

[121] Avec égards, les circonstances et enjeux exceptionnels de l'espèce militent malheureusement à l'encontre d'une telle proposition.

[122] L'ampleur de l'endettement combinée à l'hémorragie financière récurrente qui mine gravement GS, la complexité extraordinaire de l'organigramme des sociétés assujetties au présent processus, la diversité des actifs d'importance qui sont détenus en partie pour la plupart par des partenaires financiers, le type de sûretés grevant ces actifs et le nombre important de créanciers garantis et de partenaires financiers ayant à bien des égards des intérêts divergents, la sécurité et le bien-être des milliers de personnes logées dans quelque 50 RPA requièrent l'implication d'experts spécialisés en redressement d'entreprises.

[123] Qui plus est, l'équipe de direction actuelle ne bénéficie plus de la confiance du Syndicat, de ses membres et des principaux partenaires d'affaires de GS.

[124] Selon le Rapport PwC et à la lumière du témoignage fort convaincant de M. Bourque, un professionnel de l'insolvabilité œuvrant au sein de PwC qui a été appelé à conseiller diverses institutions financières au sujet des affaires de GS depuis 2019 dont le Syndicat à l'heure actuelle, M. Bouclin est l'actionnaire principal qui ultimement contrôle et gère directement ou indirectement les diverses sociétés Débitrices.

[125] À sa connaissance, M. Bouclin a toujours pris les décisions clés à l'égard de GS, que ce soit de nature stratégique ou opérationnelle, incluant la gestion du financement contracté auprès du Syndicat.[23]

[126] Voici un des constats faits par M. Bourque :

> 15. En résumé, GS:
>
> > i. Encours des pertes opérationnelles significatives chaque mois pour les raisons plus amplement décrites ci-haut;
> >
> > ii. De manière continue;
> >
> > iii. A été incapable d'exécuter les divers plans de monétisations qu'elle a proposés;
> >
> > iv. Ne peut rencontrer ses obligations envers les Prêteurs et divers partenaires dans un nombre important de projets immobiliers; et
> >
> > v. Est incapable d'assurer le service de la dette envers ses Prêteurs;
>
> En étant sous-capitalisé, GS dépend présentement du Financement Syndiqué offert par les Prêteurs.

[23] Rapport PwC, par. 2.

> 16. GS est désormais dans une situation où elle a mis en vente ses actifs, ultimement grevés en faveur des Prêteurs, pour financer ses pertes opérationnelles plutôt que rembourser sa dette, le tout alors que la valeur des actifs et de l'entreprise de GS diminue et apparaît maintenant insuffisante pour rencontrer l'ensemble de ses obligations. Sans un changement de cap, cette spirale vers le bas devrait continuer, prendre de l'ampleur chaque mois et augmenter la perte pour les Prêteurs. De plus, la pérennité des opérations et des affaires de GS est sérieusement à risque, et ce au détriment de l'ensemble des parties prenantes de la Compagnie.[24]
>
> [Soulignements ajoutés]

[127] Un autre constat fait par M. Bourque interpelle particulièrement le Tribunal.

[128] M. Bourque a relaté que depuis son implication dans le dossier, une instabilité très importante a pu être observée au niveau de la direction financière de GS. GS est incapable de produire de l'information financière, historique, fiable et ponctuelle.[25]

[129] Dans le Rapport PwC, M. Bourque remarque ainsi que l'instabilité et l'inefficacité de la fonction finance au sein de GS est une source d'inquiétude importante[26] et conclut:

> 86. En résumé, il est incompréhensible et inacceptable qu'une organisation de la taille et de la complexité de GS ne soit pas en mesure de générer de l'information financière fiable, tant historique que prévisionnelle. Cette situation cause un préjudice à tous les partenaires financiers de GS.[27]

[130] M. Bourque a également remarqué que GS a dû faire appel à des consultants externes afin d'effectuer des tâches qui sont courantes et inhérentes à une fonction financière normale. GS ne dispose pas des ressources et compétences internes pour produire des prévisions financières en temps opportun.

[131] En fait, cet été, la gestion financière a dû être confiée à Raymond Chabot Grant Thornton (« **RCGT** ») :

> 92. La gestion de la trésorerie a également dû être prise en charge par la firme Raymond Chabot Grant Thornton, l'équipe de trésorerie étant incapable d'assurer un suivi sur les recettes et débours en temps opportun. À cet effet, les consultants externes de GS ont dû mettre en place des comités hebdomadaires de gestion de trésorerie afin d'assurer un suivi et une gestion saine de la trésorerie au sein de GS. Ces tâches sont habituellement routinières dans une entreprise de la taille de GS disposant d'une fonction finance.

[24] *Ibid*., par. 15-16.
[25] *Ibid*., par. 78 et témoignage en cour.
[26] Rapport PwC, par. 79-94.
[27] *Ibid*.

> 93. Bien que l'embauche de consultants externes puisse sembler régler divers problèmes précités, l'instabilité chronique de la fonction finance depuis des années a rendu la tâche ardue et a occasionné des délais significatifs, de sorte que les diverses parties prenantes ont dû se contenter d'informations partielles, incomplètes et souvent mal fondées pour tenter de prendre des décisions financières importantes.

[132] M. Bourque conclut avec ce constat fort révélateur quant à l'état de la gestion financière au sein de GS :

> 94. En résumé, la désorganisation, le manque de compétence et la désinvolture de GS quant à la génération et la compréhension d'informations financières de base pour ses secteurs d'activités sont incompréhensibles.

[133] Le Tribunal comprend que RCGT n'agit plus au sein de GS et que la firme de comptables a choisi de ne pas agir comme contrôleur proposé, d'où la proposition du contrôleur FTI.

[134] Les lacunes majeures identifiées au niveau de la gestion financière de GS par M. Bourque préoccupent grandement le Tribunal lorsque vient le temps de déterminer l'identité de la ou des personnes qui devraient assumer la responsabilité d'élaborer un plan de redressement et de gérer la mise en œuvre du processus de redressement qui doit définitivement avoir lieu dans les plus brefs délais.

[135] Normalement, cette responsabilité échoit à l'équipe de gestionnaires mis en place par les dirigeants de l'entreprise insolvable sous la supervision d'un contrôleur nommé par la Cour. En certaines instances, la direction retient également les services d'un CRO « *Chief Restructuring Officer* » pour diriger et mener à bien le plan de redressement convenu tout dépendant de la complexité du processus envisagé.

[136] En telles circonstances, le CRO choisi est un professionnel expérimenté en matière de redressement d'entreprises dans un contexte d'insolvabilité.

[137] Or, force est de constater qu'une telle équipe n'existe pas au sein de GS et qu'avec grands égards, le CRO Blanchard ne possède pas l'expérience pratique requise en matière de redressement et d'insolvabilité pour répondre aux besoins criants de GS.

[138] Il y a également lieu de souligner que selon la lettre d'engagement du 11 novembre 2022 signée par M. Bouclin[28] (la « **Lettre d'engagement** »), M. Blanchard doit se rapporter directement à M. Bouclin dans l'exécution de son mandat.

[139] Certains éléments de cette lettre, dont le programme de rémunération qui y est proposé, suscitent aussi des préoccupations dans l'esprit du Tribunal qui lui permettent de douter du détachement et du niveau minimal d'impartialité que M. Blanchard devrait

[28] **R-25**.

avoir dans l'accomplissement de son mandat de CRO dont les décisions ne seraient pas toujours susceptibles de plaire ou de convenir à M. Bouclin.

[140] Qui plus est, dans un contexte où le Syndicat et les principaux partenaires d'affaires ont perdu totalement confiance dans la direction de GS pour mener à bien le processus de redressement approprié requis, force est de constater que la venue de M. Blanchard, un ancien banquier ayant travaillé pendant quelque 20 années au sein de la BNC, n'a pas permis en six mois de « rétablir les ponts » entre GS et le Syndicat et ainsi restaurer un certain niveau de confiance entre les parties.

[141] En fait, le Syndicat, ses membres et les principaux partenaires d'affaires qui sont intervenus ne favorisent aucunement que le Tribunal approuve la nomination de M. Blanchard à titre de CRO que ce soit aux termes de la Lettre d'engagement ou autrement.

[142] Avec grand respect à l'endroit de M. Blanchard dont la compétence et l'intégrité ne sont aucunement remises en question, le Tribunal considère que le Syndicat, ses membres et les principaux partenaires d'affaires qui sont intervenus ont raison.

[143] Avec égards, M. Blanchard n'est pas la personne appropriée pour agir comme CRO dans la présente affaire qui présente des enjeux majeurs et complexes dans un contexte où il existe des lacunes majeures, voire inquiétantes, au niveau de la gestion financière de GS d'autant plus que la direction de GS assurée par M. Bouclin n'envisage pas le processus de redressement requis de la même façon que les principaux créanciers et partenaires financiers.

[144] Une autre préoccupation soulevée par M. Bourque dans le Rapport PwC est le manque de transparence dont a fait preuve M. Bouclin – qui incidemment a toujours refusé de rencontrer le représentant du Syndicat, malgré les maintes demandes de M. Bourque à cet effet, sauf une seule foi dans les derniers jours précédents la présentation de la Demande GS – à l'endroit des sociétés liées[29] à ses enfants et des divers paiements majeurs effectués régulièrement à ces deux sociétés malgré l'ampleur des difficultés financières de GS[30].

[145] À ce sujet, un autre élément déterminant aux yeux du Tribunal est la découverte fortuite au matin du 15 novembre dernier qu'au moment de présenter la Demande GS devant le soussigné ou dans les heures qui ont précédé, GS a transféré, entre autres, 1 503 694 $ à Gaia[31]. Le 10 novembre 2022, 904 921 $ avaient été également transférés à Gaia.[32]

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[29] 9419-1780 Québec inc. faisant affaire sous la raison sociale de Gaia (« **Gaia** ») et Groupe Conseil Evolia inc. (« **Evolia** »).
[30] Rapport PwC, par. 109.
[31] **A-41**.
[32] *Ibid*.

[146] Alors que GS allègue au paragraphe de la Demande GS modifiée au 17 novembre 2022 « *avoir 6,6 millions $ de chèques en circulation ou en arrêt de paiement* ». GS verse non seulement 2,4 M$ à Gaia, mais également 500 000 $ à M. Black le prêteur intérimaire proposé et 200 000 $ aux conseillers juridiques de ce dernier[33].

[147] Le Tribunal a été informé que ces paiements à M. Black et à ses conseillers juridiques totalisant 700 000 $ effectués le 14 novembre 2022 ne sont pas remboursables, et ce, même si le Tribunal n'approuve pas le Prêt DIP de M. Black. GS n'avait certainement pas le luxe de perdre 700 000 $ dans de telles conditions assez inusitées.

[148] Enfin, ce n'est qu'à la mi-journée du mercredi 16 novembre 2022 que les avocats de GS ont déposé un tableau fort succinct[34] identifiant les bénéficiaires des 2,4 M$ transférés à Gaia depuis le 10 novembre 2022, en sus de ceux mentionnés ci-devant.

[149] Étonnamment, des 2,4 M$, Gaia aurait transféré 1 198 000 $[35] à Evolia l'autre société liée appartenant aux deux enfants de M. Bouclin qui aurait effectué divers paiements à certains fournisseurs de service et aux autorités fiscales sans fournir aucune autre explication au cours du procès[36].

[150] Avec égards, le défaut de GS au cours du procès d'agir proactivement afin de divulguer en temps opportun une information pertinente, complète et fiable plutôt que de réagir aux « découvertes » faites par le Syndicat ou par PwC ne fait que renforcer dans l'esprit du Tribunal les lacunes majeures de GS au niveau financier constatées par M. Bourque et le manque de transparence – à moins d'y être obligé - dont semble faire preuve M. Bouclin et son équipe.

[151] Malheureusement, M. Bouclin, l'âme dirigeante du Groupe GS, n'a pas témoigné à l'audience pour rassurer non seulement le Tribunal, mais surtout le Syndicat, ses membres et les divers partenaires financiers présents quant à sa vision et la justesse du plan de redressement qu'il envisage.

[152] Avec égards, les avocats de GS devaient présenter le témoignage de M. Bouclin dans le contexte actuel plutôt que de reprocher aux avocats du Syndicat de ne pas avoir requis son témoignage à l'audience.

[153] Ceci étant dit, le Tribunal se questionne également si M. Blanchard possède la distanciation et l'indépendance voulues face à M. Bouclin et à son équipe de direction pour signaler, par exemple, que les divers paiements effectués en toute apparence *in extremis* le 14 novembre 2022 étaient inappropriés dans les circonstances alors qu'un

[33] **A-41** et **R-33**.
[34] **R-33**.
[35] **R-33**.
[36] *Ibid*.

bon nombre de chèques transmis à d'autres récipiendaires « moins privilégiés » ont vu ceux-ci faire l'objet d'arrêts de paiement.

[154] En rétrospective, le Tribunal aurait souhaité que M. Blanchard en fasse mention au cours de son témoignage et fournisse volontairement toutes les explications requises pour idéalement éliminer tout doute qui pourrait surgir dans l'esprit du Tribunal sans oublier le Syndicat, ses membres et les principaux partenaires financiers présents à l'audience. L'information risquait de sortir un jour ou l'autre.

[155] Une telle approche favorisant une transparence crucialement nécessaire dans les circonstances aurait dû être priorisée par M. Blanchard qui avait déjà accepté d'agir comme CRO.

[156] Par contre, le Tribunal ne pourrait tenir rigueur à M. Blanchard si au moment de témoigner, celui-ci ignorait l'existence des transactions bancaires qui venaient ou qui se déroulaient alors. Si tel était le cas, son implication à titre de CRO serait de peu d'utilité.

[157] Le Tribunal n'insinue pas pour autant qu'aucun paiement ne devait être effectué le 14 novembre 2022. C'est plutôt l'approche *en catimini* qui jette une douche froide sur la crédibilité de l'équipe de GS qui voudrait se voir confier la responsabilité du processus de redressement qui s'entame aujourd'hui.

2.3 La nomination de PwC à titre de contrôleur

[158] Au final, les circonstances exceptionnelles de l'espèce et les enjeux qui ont déjà été identifiés requièrent l'implication d'une personne expérimentée disposant des ressources nécessaires pour élaborer d'urgence un plan de redressement en consultation avec l'équipe de direction de GS et soumettre celui-ci à l'approbation du Tribunal tout en conservant à l'esprit les préoccupations que le soussigné a fait valoir tout au long de l'audience lesquelles s'inscrivent dans un contexte favorisant le redressement des affaires de GS dans la mesure du possible évidemment.

[159] Le Tribunal est d'avis qu'à l'heure actuelle, la personne tout à fait désignée pour assumer ce rôle est M. Bourque et l'équipe de PwC. Le Tribunal s'attend à ce que M. Bourque joue son rôle en consultation lorsque requis avec l'équipe de direction de GS.

[160] Vu les circonstances exceptionnelles de l'espèce, il est tout à fait indiqué que M. Bourque joue son rôle par le truchement de certains pouvoirs additionnels qui seront accordés au contrôleur choisi par le Tribunal, soit PwC dont M. Bourque est le représentant.

[161] Les avocats de GS ont manifesté leur opposition au choix de PwC et de M. Bourque considérant qu'en raison des mandats confiés par différentes institutions financières depuis 2019, M. Bourque sera en conflit d'intérêts et n'aura pas la

distanciation et l'indépendance requise pour exercer adéquatement son rôle de contrôleur en vertu de la LACC.

[162] Avec égards, le Tribunal ne partage cet avis.

[163] D'emblée, M. Bourque est un professionnel de l'insolvabilité compétent et expérimenté qui a déjà agi à maintes reprises à titre de contrôleur en vertu de la LACC, un rôle qu'il doit exercer de façon impartiale devenant à compter du moment de sa nomination les yeux et les oreilles du Tribunal qui va compter sur son assistance franche et complète tout au long du processus de redressement qui s'entame aujourd'hui.

[164] En acceptant le présent mandat du Tribunal, M. Bourque prendra le pouls de la situation et verra à formuler auprès du Tribunal, après consultation avec l'équipe de direction de GS, les recommandations nécessaires pour stabiliser la situation financière de GS et recommander un plan de redressement qui aura, dans la mesure du possible et du raisonnable l'adhésion de la direction de GS et des autres parties prenantes.

[165] En ce faisant, M. Bourque devra, entre autres, tenter de considérer et de concilier si possible les préoccupations et les attentes des parties intéressées.

[166] Bref, jusqu'à preuve du contraire, le Tribunal n'a aucun doute que dorénavant, en sa nouvelle qualité de contrôleur, M. Bourque agira avec impartialité ce qui lui permettra de conseiller le Tribunal dans l'exécution de son nouveau mandat dans le respect des dispositions de la LACC.

[167] En raison des conclusions tirées par le Tribunal ci-devant, il n'y a pas lieu de nommer FTI à titre de contrôleur.

[168] Le Tribunal tient néanmoins à préciser que cette décision ne doit aucunement s'interpréter comme portant ombrage de quelque façon que ce soit à l'endroit de FTI et plus particulièrement à l'endroit de messieurs Nigel Meakin et Martin Franco qui sont tous deux des professionnels en insolvabilité compétents et expérimentés.

[169] Étant nouveaux au dossier, leur courbe d'apprentissage a fait obstacle à l'urgence d'agir imposée par les circonstances et le contexte fort particulier actuel, ce qui n'était pas le cas pour PwC.

2.4 Le financement temporaire proposé par le Syndicat

[170] Bien que le montant global de 20 M$ offert par le Syndicat à titre de financement temporaire soit moindre que celui offert par M. Black, le Tribunal considère qu'en fonction des représentations et assurances offertes par les avocats du Syndicat, les conditions du prêt temporaire offert sont plus favorables par rapport à celles du financement offert par M. Black et que les montants qui seront mis à la disposition de GS seront suffisants pour permettre l'élaboration d'un plan de redressement et de stabiliser initialement les opérations de GS tout en mettant l'emphase sur les résidents des RPA.

[171] De plus, le Tribunal est sensible à l'ouverture manifestée par le Syndicat et ses membres, par l'entremise de leurs avocats, de considérer favorablement, si requise, une augmentation du prêt temporaire dans le cadre de la mise en œuvre du plan de redressement alors approuvé.

[172] Qui plus est, ce financement temporaire a reçu l'aval de tous les créanciers et partenaires d'affaires qui se sont manifestés à l'audience.

[173] En définitive, vu la structure particulière corporative de GS et la nature des multiples sûretés portant souvent sur des actifs comportant des intérêts détenus conjointement avec des tiers, un plan de redressement favorisant le maintien du « *core business* » de GS tout en poursuivant de façon raisonnable, réaliste et ordonnée, le processus de monétisation des actifs de GS devrait être beaucoup plus porteur qu'une simple liquidation tant du point de vue de GS que de ses créanciers dont le Syndicat sans oublier les partenaires d'affaires et les autres parties prenantes dont les milliers de résidents qui ont accordé leur confiance à GS et qui dépendent des services qui leur sont offerts quotidiennement par un personnel dévoué.

CONCLUSION

[174] Ainsi, pour les motifs qui précèdent, il y a lieu de rejeter la Demande d'émission d'une ordonnance initiale présentée par GS et d'accueillir la Demande BNC du Syndicat suivant les conclusions recherchées aux termes de l'Ordonnance initiale jointe au présent jugement.

POUR CES MOTIFS, LE TRIBUNAL :

[175] **REJETTE** la Demande amendée pour l'émission d'une ordonnance initiale et d'une ordonnance initiale amendée et reformulée des Demanderesses et Mises-en-cause datée du 17 novembre 2022;

[176] **ACCUEILLE** la Demande intitulée « *Application for an Initial Order, an Amended and Restated Initial Order and Other Relief* » de la Banque Nationale du Canada datée du 14 novembre 2022 suivant les conclusions de l'Ordonnance initiale jointe au présent jugement;

[177] **LE TOUT,** sans frais de justice.

MICHEL A. PINSONNAULT, J.C.S.

Me Guy P. Martel
Me Joseph Reynaud
Me Danny Duy Vu
Stikeman Elliott s.e.n.c.r.l., s.r.l.
Avocats des Débitrices Groupe Sélection inc. *et al* et des Mises-en-cause

Me Luc Morin
Me Arad Mojtahedi
Me Guillaume Pierre Michaud
Me Noah Zucker
Norton Rose Fulbright
Avocats de la Requérante Banque Nationale du Canada représentant le Syndicat bancaire

Me Gabriel Faure
Me Alain Tardif
McCarthy Tétrault s.e.n.c.r.l., s.r.l.
Avocats pour le contrôleur proposé FTI CONSULTING INC.

Me Alain Riendeau
Fasken Martineau DuMoulin SENCRL, s.r.l.
Avocats pour le contrôleur proposé PRICEWATERHOUSECOOPERS INC

Me Luc Béliveau
Me Marc-André Morin
Fasken Martineau DuMoulin SENCRL, s.r.l.
Avocats pour la Banque CIBC

Me Christian Lachance
Davies Ward Phillips & Vineberg s.e.n.c.r.l, s.r.l
Avocats pour la Fédération des Caisses Desjardins pour Otéra inc.

Me Nicolas Brochu
Fishman Flanz Meland Paquin s.e.n.c.r.l.
Avocats pour Banque de Montréal

Me François Viau
Me Geneviève Cloutier
Gowling WLG (Canada) S.E.N.C.R.L., s.r.l.
Avocats pour Briva Finance et Fiera Dette Privée

Me Neil G. Oberman
Spiegel, Sohmer, inc.
Avocats pour MCAP Financial Corporation

Me Matthew Cressatti
Osler, Hoskin & Harcourt, S.E.N.C.R.L./s.r.l.
Avocats pour Banque Royale du Canada

Me Alexandre Bayus
Me Nicolas Mancini
Fasken Martineau DuMoulin SENCRL, s.r.l.
Avocats pour Banque de Nouvelle-Écosse (Scotia)

Me Joshua Bouzaglou
Woods s.e.n.c.r.l.
Représentants proposés pour les résidents des RPA

Me Gabriel Lepage
Davies Ward Phillips & Vineberg s.e.n.c.r.l, s.r.l.
Avocats pour le Fonds de Solidarité (FTQ)

Me Avram Fishman
Fishman Flanz Meland Paquin s.e.n.c.r.l.
Avocats pour la Kingsett Capital

Me Nicholas Sheib
Scheib Legal
Me Sean Zweig
Me Mark Rasile
Me Aiden Nelms
Bennett Jones LLP
Avocats pour le mis-en-cause Herbert Black

Me Denis Ferland
Me Louis-Martin O'Neill
Me Benjamin Jarvis
Davies Ward Phillips & Vineberg s.e.n.c.r.l, s.r.l
Avocats pour Revera inc.

Me Kim Sheppard
Me Rim Afegrouch
Ministère de la Justice Canada
Avocats pour l'Agence du revenu du Canada

Me Daniel Cantin
Me Vincenzo Carrozza
Me Frédéric Tessier
Revenu Québec
Avocats pour l'Agence du revenu du Québec

Me Bernard Boucher
Me Christina Cataldo
Blake, Cassels & Graydon s.e.n.c.r.l.
Avocats pour Investissement Québec

Me Sandra Abitan
Me Julien Morissette
Osler, Hoskin & Harcourt, S.E.N.C.R.L./s.r.l.
Avocats pour Groupe Montoni

Dates d'audience : 14, 15, 16 et 17 novembre 2022

ANNEXE "A"
LISTE DES DÉBITRICES

1. GROUPE SELECTION INC.
2. 9411-3594 QUÉBEC INC.
3. 8504750 CANADA INC.
4. 10067628 CANADA INC.
5. 10067601 CANADA INC.
6. 9281-8343 QUÉBEC INC.
7. 10437042 CANADA INC.
8. 9395-8379 QUÉBEC INC.
9. 10437123 CANADA INC.
10. 10437387 CANADA INC.
11. 10442364 CANADA INC.
12. 10442259 CANADA INC.
13. 10442500 CANADA INC.
14. 10442437 CANADA INC.
15. 10437492 CANADA INC.
16. 10442453 CANADA INC.
17. 10437433 CANADA INC.
18. 9408-3581 QUÉBEC INC.
19. 9408-3789 QUÉBEC INC.
20. 9650261 CANADA INC.
21. 11349945 CANADA INC.
22. 9357-2006 QUÉBEC INC.
23. 9851267 CANADA INC.
24. 9357-2014 QUÉBEC INC.
25. 11075900 CANADA INC.
26. 10702030 CANADA INC.
27. 9357-2030 QUÉBEC INC.
28. 9394-6127 QUÉBEC INC.
29. 9399-6049 QUÉBEC INC.
30. 9399-6072 QUÉBEC INC.
31. 10067644 CANADA INC.
32. 10067636 CANADA INC.
33. 10212440 CANADA INC.
34. 9413-5449 QUÉBEC INC.
35. 9415-4580 QUÉBEC INC.
36. 9409-4794 QUÉBEC INC.
37. 9411-9252 QUÉBEC INC.
38. 9408-6824 QUÉBEC INC.
39. 9410-5475 QUÉBEC INC.
40. 9245-0519 QUÉBEC INC.
41. 10619817 CANADA INC.
42. 9328-2887 QUÉBEC INC.
43. 8504776 CANADA INC.
44. 9497722 CANADA INC.
45. 8788537 CANADA INC.
46. 9094-8951 QUÉBEC INC.
47. 9286861 CANADA INC.
48. 12781948 CANADA INC.
49. 9408-1577 QUÉBEC INC.
50. GESTION CH 2015 INC.
51. 9390-8697 QUÉBEC INC.
52. CONCEPTION HABITAT 2015 INC.
53. 9352-0252 QUÉBEC INC.
54. 9319-7473 QUÉBEC INC.
55. GROUPE RÉSEAU SÉLECTION CONSTRUCTION INC.
56. STRUCTURE ISO 2015 INC.
57. 9280-2842 QUÉBEC INC.
58. 8468834 CANADA INC.
59. 9408-2328 QUÉBEC INC.
60. 9408-2369 QUÉBEC INC.
61. 9408-2401 QUÉBEC INC.
62. 8788383 CANADA INC.
63. 9462-9037 QUÉBEC INC.
64. 9408-1585 QUÉBEC INC.
65. 9408-1593 QUÉBEC INC.
66. 9408-1601 QUÉBEC INC.
67. ÉBÉNISTERIE BOSCO INC.
68. TOITURES FD INC.
69. 9383-3572 QUÉBEC INC.
70. 9383-3507 QUÉBEC INC.
71. CONSTRUCTION DELAUMAR INC.
72. BMD ÉLECTRIQUE INC.
73. 9334-9652 QUÉBEC INC.
74. 9395-8387 QUÉBEC INC.
75. 9395-4956 QUÉBEC INC.
76. 9395-5094 QUÉBEC INC
77. 9463-6297 QUÉBEC INC.
78. 9463-8749 QUÉBEC INC.
79. 9851321 CANADA INC.
80. 9650270 CANADA INC.
81. 9387-2604 QUÉBEC INC.

ANNEXE "B"
LISTE DES SOCIÉTÉS EN COMMANDITE

1. SOCIÉTÉ EN COMMANDITE GROUPE SÉLECTION IMMOBILIER
2. SOCIÉTÉ EN COMMANDITE CORPORATION GROUPE SÉLECTION
3. SOCIÉTÉ EN COMMANDITE ROSEMONT
4. SOCIÉTÉ EN COMMANDITE INVESTISSEURS CONDOS ROSEMONT II
5. SOCIÉTÉ EN COMMANDITE INVESTISSEURS CONDOS LACHENAIE
6. SOCIÉTÉ EN COMMANDITE INVESTISSEURS LOGEMENT LACHENAIE
7. SOCIÉTÉ EN COMMANDITE INVESTISSEURS LACHENAIE II
8. SOCIÉTÉ EN COMMANDITE INVESTISSEURS LACHENAIE III
9. SOCIÉTÉ EN COMMANDITE INVESTISSEURS LACHENAIE IV
10. SOCIÉTÉ EN COMMANDITE INVESTISSEURS GATINEAU
11. SOCIÉTÉ EN COMMANDITE INVESTISSEURS SÉLECTION MONTMORENCY
12. SOCIÉTÉ EN COMMANDITE INVESTISSEURS DISTRICT DES BRASSEURS
13. SOCIÉTÉ EN COMMANDITE INVESTISSEURS LACHENAIE V
14. SOCIÉTÉ EN COMMANDITE INVESTISSEURS LACHENAIE VI
15. SOCIÉTÉ EN COMMANDITE INVESTISSEURS ROSEMONT III
16. SOCIÉTÉ EN COMMANDITE COMMANDITAIRE GROUPE SÉLECTION
17. SOCIÉTÉ EN COMMANDITE GS IMMOBILIER 2
18. SOCIÉTÉ EN COMMANDITE INVESTISSEURS CONDOS ROSEMONT
19. SOCIÉTÉ EN COMMANDITE RÉSIDENCE GATINEAU
20. SOCIÉTÉ EN COMMANDITE TOURS RIMOUSKI COMMERCIAL
21. SOCIÉTÉ EN COMMANDITE RIMOUSKI
22. SOCIÉTÉ EN COMMANDITE INVESTISSEURS REPENTIGNY
23. SOCIÉTÉ EN COMMANDITE RÉSEAU SÉLECTION INVESTISSEMENT
24. SOCIÉTÉ EN COMMANDITE INVESTISSEURS STJ
25. SOCIÉTÉ EN COMMANDITE INVESTISSEURS DEUX-MONTAGNES
26. SOCIÉTÉ EN COMMANDITE INVESTISSEURS RV
27. SOCIÉTÉ EN COMMANDITE RÉSIDENCE VANIER
28. SOCIÉTÉ EN COMMANDITE RÉSIDENCE LE JARDIN DES SOURCES
29. SOCIÉTÉ EN COMMANDITE INVESTISSEURS CHÂTEAUGUAY
30. SOCIÉTÉ EN COMMANDITE CONDOS ROSEMONT
31. SOCIÉTÉ EN COMMANDITE GS IMMOBILIER
32. SOCIÉTÉ EN COMMANDITE IMMEUBLE CHAMBLY
33. COMMANDITÉ SÉLECTION S.E.C.
34. SOCIÉTÉ EN COMMANDITE GS GESTION
35. SOCIÉTÉ EN COMMANDITE GESTION IMMO SÉLECTION
36. SOCIÉTÉ EN COMMANDITE GESTION IMMO SÉLECTION SC
37. SOCIÉTÉ EN COMMANDITE GS DEV
38. SOCIÉTÉ EN COMMANDITE SÉLECTION DÉVELOPPEMENT
39. SOCIÉTÉ EN COMMANDITE SÉLECTION DÉVELOPPEMENT INTERNATIONAL
40. SOCIÉTÉ EN COMMANDITE CONDOS ROSEMONT II

41. SOCIÉTÉ EN COMMANDITE RÉSIDENCE VAUDREUIL
42. SOCIÉTÉ EN COMMANDITE RÉSIDENCE VALLEYFIELD
43. SOCIÉTÉ EN COMMANDITE ROSEMONT II
44. SOCIÉTÉ EN COMMANDITE ROSEMONT III
45. SOCIÉTÉ EN COMMANDITE RÉSIDENCE VICTORIAVILLE
46. SOCIÉTÉ EN COMMANDITE PROJET CHÂTEAUGUAY
47. SOCIÉTÉ EN COMMANDITE RÉSIDENCE CHICOUTIMI
48. SOCIÉTÉ EN COMMANDITE RÉSIDENCE INNES ROAD
49. SOCIÉTÉ EN COMMANDITE COMPLEXE LÉVIS ST-NICOLAS
50. SOCIÉTÉ EN COMMANDITE INVESTISSEURS VAUDREUIL HOOP
51. SOCIÉTÉ EN COMMANDITE INVESTISSEURS ST-HYACINTHE
52. SOCIÉTÉ EN COMMANDITE SÉLECTION MONTMORENCY
53. SOCIÉTÉ EN COMMANDITE DISTRICT DES BRASSEURS
54. SOCIÉTÉ EN COMMANDITE CONDOS LACHENAIE
55. SOCIÉTÉ EN COMMANDITE MIRABEL
56. SOCIÉTÉ EN COMMANDITE INVESTISSEUR VALLEYFIELD

TAB B

[Unofficial Translation]

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

Nº: 500-11-061657-223

DATE: November 21, 2022

PRESIDING: THE HONOURABLE MICHEL A. PINSONNAULT, J.S.C.

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

GROUPE SÉLECTION INC.
and
THE OTHER ENTITIES LISTED IN SCHEDULE "A" HERETO
Debtors/Plaintiffs
and
THE LIMITED PARTNERSHIPS LISTED IN SCHEDULE "B" HERETO
Impleaded Parties
and
FTI CONSULTING CANADA INC.
Proposed Monitor
and
NATIONAL BANK OF CANADA
Secured Creditor/Petitioner for the issuance of an Initial Order
and
PRICEWATERHOUSECOOPERS INC.
Proposed Monitor

JUDGMENT ON APPLICATIONS FOR AN INITIAL ORDER AND AN AMENDED AND RESTATED INITIAL ORDER

(Sections 9, 11, 11.2, 11.52, 23 and 36 of the *Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36*)

JP1736

OVERVIEW

[1] Groupe Sélection Inc. ("**GS**") operating, among others, through 81 companies[1] and 56 limited partnerships[2] (collectively, the "**Debtors**") requests protection from the Court pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**"), in order to allow it to proceed with the restructuring of its affairs while being protected from creditors and proposes the appointment of FTI Consulting Canada Inc. ("**FTI**") as Monitor (the "**GS Application**").

[2] First, this is an unusual, even extraordinary, case whose very particular circumstances have ramifications and raise complex issues both for GS and the Debtors[3] as for their creditors, business partners and the other stakeholders, including the thousands of senior citizens who reside in various seniors' residences ("**RPAs**") owned in whole or in part by GS and whose day-to-day management is carried out by GS employees.

[3] Furthermore, National Bank of Canada ("**NBC**"), which represents a banking syndicate comprised of Canadian Imperial Bank of Commerce ("**CIBC**"), Fédération des Caisses Desjardins ("**Desjardins**"), Toronto Dominion Bank ("**TD**"), Bank of Montreal ("**BMO**"), HSBC Bank Canada ("**HSBC**"), Briva Finance (Équité) S.E.C. ("**Briva**") and Fiera FP Business Financing Fund, L.P. ("**Fiera**") (collectively, the "**Syndicate**"), to which is owed in excess of $272 million since October 28, 2022, is vigorously contesting the GS Application, including GS's proposed restructuring plan and the appointment of FTI as Monitor, notwithstanding the Syndicate's agreement that the restructuring of GS's affairs should proceed to the extent possible under the CCAA.

[4] In response to the highly irregular service of the GS Application on Sunday, November 13, 2022 at approximately 11:45 p.m., which was to be presented on an urgent basis at 2:00 p.m. the next day, the Syndicate filed, minutes before the 2:00 p.m. start of the hearing, its own Application for an Initial Order[4] (the "**NBC Application**") proposing its own restructuring plan and the appointment of PricewaterhouseCoopers Inc. ("**PwC**") as Monitor with enhanced powers to carry out the development and implementation of the GS Business Restructuring Plan to be approved by the Court in a particular and complex context.

[5] The Syndicate points out that during negotiations between the parties on Sunday morning, November 13, 2022, in an attempt to find mutually acceptable common ground, among other things, with respect to the additional funding required by GS, GS representatives never indicated that they intended to file the GS Application within the next few hours, a behaviour which, according to the Syndicate, only irreparably undermined the confidence it had in GS executives.

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[1] Identified in Schedule A attached hereto.
[2] Identified in Schedule B attached hereto.
[3] Henceforth, when the Court refers to GS it will also include and cover the Debtors, where applicable.
[4] Commonly referred to as a "*competing application*".

[6] The Syndicate alleges that its members were caught off guard with the unexpected filing of the GS Application on Sunday night without reasonable notice. It considers that this tactic used by GS is detrimental to their interests and those of a significant number of GS's business partners, discussed below, as well as stakeholders including residents of GS's RPAs and other multi-residential buildings.

[7] Essentially, the Syndicate alleges that GS has failed to comply with its contractual obligations to repay amounts advanced since 2021 and has failed to repay more than $272 million due and owing to the Syndicate since October 28, 2022.

[8] In fact, according to the Syndicate, GS is in a highly precarious, even critical, financial position, as it continues to generate losses of approximately $7 million per month for several months, which has led to the granting of additional advances of $64.5 million since April 2002[5] without any improvement in GS's financial position, quite the contrary.

[9] In short, GS is experiencing a chronic cash shortage of some $7 million from month to month with no prospect of improvement in the short term to meet its current financial obligations.

[10] The Syndicate, GS's principal lender, lost confidence in its management team and executives, resulting in the withdrawal of its financial support on October 28, 2022.

[11] This loss of confidence also affected GS's principal business partners who, at the hearing, expressed to the Court their opposition to the Court granting the GS Application.

[12] In fact, counsel for Revera Inc, Montoni Group, Fonds de solidarité FTQ, Fédération des Caisses Desjardins, Timbercreek Capital and 7813040 Canada inc., CIBC and the Bank of Nova Scotia (Scotia) all intervened during the hearing to confirm their respective clients' loss of confidence in GS executives and management. Their clients fully support the NBC Application, the approach proposed at the hearing by the Syndicate for the development of a restructuring plan to turn around GS's business, and the selection of PwC as the proposed Monitor.

[13] For its part, Investissement Québec, another major partner that has guaranteed a significant portion of GS's indebtedness to the Syndicate, informed the Court that it was deferring to the Court's decision, but that it nevertheless wished to reiterate that its primary concern is the safety and well-being of the residents of the RPAs.

[14] In short, GS no longer has access to any credit that would allow it to cover its monthly operating deficit of some $7 million, which is recurring, and consequently, it is no longer able to honour its current obligations to its creditors and partners, which places these businesses in an insolvency situation, hence the filing of the GS Application.

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[5] PwC Proposed Monitor's First Report dated November 14, 2022 (**A-5A**) (hereinafter the "**PwC Report**") para. 48.

[15] The filing of the GS Application constitutes an admission of insolvency on the part of GS and the Debtors whom GS has chosen to include in its proceedings. There can be no doubt, therefore, that GS and the Debtors are insolvent in the present context. Consequently, on November 14, 2022, the Court issued an Interim Order under the provisions of the CCAA, essentially staying all proceedings against the Debtors[6] and their Property[7] until judgment has intervened on the GS Application and the NBC Application.

[16] For its part, the Syndicate accuses GS of attempting to continue, under the cover of the CCAA, its operations essentially on a "business as usual" basis, sheltered from its various creditors, business partners and stakeholders by financing them with an interim $50-million financing offered by Mr. Herbert Black ("**Mr. Black**" or the "**DIP Lender[8]**") on terms that were considered highly disadvantageous to all secured creditors without conferring any tangible benefit or advantage on GS and its stakeholders other than to buy time and hope that economic conditions will improve.

[17] The $50 million interim financing favoured by GS is considered in the context of a restructuring where maintaining the *status quo* would essentially be the preferred approach in the hope that the value of GS's assets will appreciate and allow them to be monetized on more favourable terms in the near future.

[18] GS is considering the possibility of an investment and bidding process, but the Syndicate is concerned that under the approach advocated by GS, coupled with the passage of time and the increase in the operating deficit that would be made up by the $50 million advanced by the DIP Lender, the equity of GS's assets, and therefore the value of the security it holds, will continue to erode significantly and put the repayment of its claim at risk.

[19] In addition to the Syndicate, the other secured creditors who have advanced substantial amounts by way of mortgage loans on properties owned in whole or in part by GS, who appeared at the hearing, argue that the approach advocated by GS is likely to result in a rapid and significant reduction in the value of the securities they hold, with an interim priority financing of $50 million, which would be used primarily to wipe out the financial hemorrhage experienced by GS over the months.

[20] Still according to the Syndicate, the contemplated restructuring requires stabilizing GS's operations on an urgent basis by determining, among other things, the measures that could reasonably be taken to limit, if not eliminate, this recurring need for cash that the Debtor companies simply do not have.

[21] Moreover, at the hearing, counsel for the Syndicate argued on more than one occasion that their client's members consider of prime importance the safety and well-being of residents of RPAs, whose services must not be affected by the restructuring process to be undertaken under the supervision of the Court.

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[6] As defined in the Interim Order of November 14, 2022.
[7] *Ibid*.
[8] **D**ebtor **i**n **P**ossession (**DIP**).

[22] In this regard, the interim financing of approximately $20 million[9] that the Syndicate is offering to advance will be used, among other things, to meet any one-time financial needs to ensure the continuation of services that RPA residents are entitled to expect.

[23] Counsel for the Syndicate also suggested to the Court that if the financial needs related primarily to maintaining the services offered to the residents of the RPAs required the injection of additional capital over and above the $20 million initially proposed, the members of the Syndicate would favourably consider such a contribution, subject, of course, to the agreement of the Court and to the conditions that they might then impose, as the case may be.

[24] In sum, the debate over the GS Application and NBC Application, which prompted four days of hearings, essentially raises the following key issues:

- Should the development and implementation of the GS restructuring process be left to GS executives and management who no longer have the confidence of the Syndicate and key business partners, or to the Syndicate's proposed Monitor PwC whose powers would be increased?

- Is it appropriate to approve the engagement of 9372-9804 Québec Inc ("**9372**" or the "**CRO**") represented by Mr. Yanick Blanchard[10] ("**Mr. Blanchard**") as the Chief Restructuring Officer proposed by GS with a Chief Restructuring Officer Charge of $3 million, despite the opposition of the Syndicate and the key business partners?

- Is it appropriate to approve Mr. Black's $50-million interim financing advocated by GS that would include a $60-million Interim Lender Charge that would have priority over any security interests held by GS's various secured creditors or the $20-million interim financing offered by the Syndicate?

[25] For the following reasons, in exercising its judicial discretion under the CCAA, the Court finds that it must dismiss the GS Application, grant the NBC Application and issue the Initial Order sought by the Syndicate subject to certain adjustments.

1. CONTEXT

[26] Before addressing the issues identified above, it is relevant to outline the current context.

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[9] The Syndicate's interim financial offer provides that $20 million will be advanced essentially in two tranches with an initial tranche of $10 million if the NBC Application is successful as well as its offer of interim financing in accordance with the provisions set out in Exhibits **A-38** and **A-39**.

[10] **R-25**.

[27] At the hearing, all agreed that this case is quite exceptional and involves major and complex circumstances and issues that are equally exceptional and that will significantly complicate not only the future conduct of these proceedings, but also the restructuring process that is set in motion by this judgment.

[28] The 137 Debtors that filed with GS for Court protection under the CCAA are only a portion of the companies operating under the management of GS which will not be directly subject to the Initial Order issued pursuant to this judgment.

[29] At the hearing, it was rightly pointed out that the organizational chart of the GS companies was more complex than the London Underground map.

1.1. THE RPAs

[30] GS owns and operates some 50 RPAs located throughout Quebec, in addition to multi-residential properties.

[31] The Court understands that GS operates and manages some 14,000 housing units, primarily in RPAs.

[32] The Court also understands that the vast majority of the thousands of residents who occupy the RPAs are of advanced age and are highly dependent on the various services provided to them on a daily basis by the managers of each facility.

[33] In the Court's view, RPAs are the core business of GS, even though most of the cash flow shortfall is caused by companies acquiring land for the construction of new buildings primarily, but not exclusively, for use as RPAs, which will be discussed below.

[34] Currently, a majority of RPAs do not generate enough revenue to cover their ongoing operating expenses, requiring regular injections of funds to maintain services.

[35] Although the situation appears to be slowly improving, the pandemic has had a significant negative impact on the occupancy rate of RPAs, which in turn has affected the revenue generated by insufficient occupancy.

[36] Of the 50 RPAs, GS wholly owns only 6 of them[11], and all other residences are jointly owned with business partners such as Revera Inc. ("**Revera**"), Blackstone ("**Blackstone**") and Lokia ("**Lokia**"), to name only the main ones.

[37] According to PwC, as of May 31, 2022, of the 50 RPAs, 28 (56%) were in deficit and required capital injections from GS and its partners to fund their operations. The average occupancy rate was approximately 80 percent.[12]

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[11] PwC Report, para. 110.
[12] *Ibid*., para. 39.

[38] Thus, the majority of RPAs owned in whole or in part and managed by GS are in deficit (56%) and require close to $2 million in additional cash flow per month despite the management fees collected.[13]

[39] The Court understands that the current situation remains essentially unchanged, although in some locations, the occupancy rate has increased slightly since last May.

[40] Failure to meet the RPAs' monthly operating deficits jeopardizes the services provided to residents on a daily basis, making it critical to advance the required funds in a timely manner.

[41] Moreover, the recurring cash flow shortfall experienced by GS forces its partners, such as Revera, to make up the share of the RPAs' operating deficits that would normally be assumed by GS, thereby increasing the tension between the various business partners who expect GS to assume and honour not only its financial obligations to them under the terms of their contractual agreements, but also its obligations to the RPA residents.

[42] The problem is that GS's business model is not limited to holding variable percentages of interests in existing RPAs and to managing them.

1.2. LAND ACQUISITION AND BUILDING CONSTRUCTION

[43] GS acquires land from time to time for the purpose of constructing buildings to be used primarily as RPAs or sometimes as multi-residential buildings.

[44] Over time, GS has become involved in increasingly important and complex projects such as Espace Montmorency in Laval and the development of the Molson property in Montreal, which require major investments without generating any revenues for the moment. In fact, GS is currently in default of its share of the additional contributions requested for these two major projects involving mainly the Montoni Group and Fonds de solidarité FTQ.

[45] In pursuing this business model, after acquiring a piece of land, GS then attempts to associate with a partner who will become an undivided co-owner based on a percentage agreed upon from time to time, the rate of which will vary on a project-by-project basis. This approach allows GS to share the costs of maintaining and preserving the land.

[46] The Court understands that there are currently approximately 15 projects under development, including 7 rental unit towers that are either still under construction or nearing completion.

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[13] *Ibid*., para. 41.

[47] Another important element is that GS also provides for the construction of the facilities on the land in question, still sharing with the partner, in the agreed proportions, the costs related to carrying out the construction project.

[48] To this end, some of the GS entities act as general contractors and subcontractors to carry out the projects, among other roles.

[49] GS then takes over the management of the building once construction is completed.

[50] Needless to say, until construction is completed and the building is sufficiently occupied to generate adequate revenues, these construction projects are a major source of expense and fixed costs requiring cash flow.

[51] According to PwC, fixed construction expenses, consisting primarily of salaries and consulting fees, are in excess of $7 million per month. To date, this level of spending is incurred regardless of the level of activity.[14]

[52] Accordingly, GS's construction activities are in deficit and alone generate monthly fixed costs estimated by PwC to reach $7 million. Some $30 million in cash was spent from January to June 2022 in this regard.[15]

[53] PwC concludes that in terms of construction-related activities, GS is undercapitalized, having invested more than $136 million in the 18 months ended June 30, 2022, or the equivalent of $7.5 million per month.

[54] However, this amount was financed 100% by borrowings from the financing provided by the Syndicate or from the proceeds of various monetizations that were to be made under the credit agreements entered into with the Syndicate for the purpose of reducing its indebtedness.[16]

[55] Incidentally, the monetization of GS projects is the agreed source of repayment of the debt owed to the Syndicate according to an agreed-upon schedule that has not been met, rightly or wrongly. While GS has been able to monetize certain projects, the very large proportion of the money repaid has been replaced this year by advances required to cover GS's emergency cash flow needs.

[56] In short, the amount of the Syndicate's debt has essentially returned to the level it was at prior to GS's repayments from monetized projects, with the practical result that the base of the security interests held by the Syndicate to secure its advances has shrunk with the sale of certain assets.

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[14] *Ibid*., para. 25.
[15] *Ibid*., para. 31.
[16] *Ibid*., para. 35.

[57] Moreover, insofar as GS is unable to contribute its share of the costs related to the construction of the projects in progress, these projects are placed at risk, unless the affected partner assumes the entirety of these costs, including GS's share, which risks diluting its interest in such projects to the detriment of its creditors.

[58] But there is more.

[59] Since the majority of subcontractors are GS companies, the situation could be significantly complicated if GS does not have the cash flow to pay the various workers on its construction sites.

[60] GS currently employs approximately 3,000 employees overall, although some layoffs have reportedly occurred recently.

[61] In short, in the face of such a finding, it is not surprising that counsel for the key partners who appeared at the hearing echoed their respective clients' loss of confidence in GS's executives and managers and spoke out against the GS Application, the approval of the CRO, Mr. Black's $50-million interim financing plan and the FTI Monitor, all of which were proposed by GS.

[62] Instead, they fully supported the NBC Application and the $20-million interim financing and PwC as Monitor proposed by the Syndicate.

[63] It is important to note that most of these partners are not necessarily secured creditors of GS, but rather business partners who are committed to maintaining the services offered to RPA residents or to completing the construction projects that have already begun for the most part.

1.3. THE INDEBTEDNESS OF GROUPE SÉLECTION

[64] The Syndicate is owed an amount of **$272,227,164.84** secured by various assets of certain Debtors.[17]

[65] The complex structure adopted by GS and the varied interests, both tangible and intangible, held by its various companies in a variety of assets as well as the nature of the security interests held by the Syndicate, which differ in certain respects from the security interests traditionally granted by a borrower render the enforcement mechanism for the security interests in question significantly more complex.

[66] This situation is not, however, unique to the Syndicate as a secured creditor.

[67] Not surprisingly, at the hearing, the Syndicate expressed its support for the development of a reasonable and realistic plan for the restructuring of GS's affairs under the CCAA through the proposed Monitor, PwC.

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[17] NBC Application, para. 23-27.

[68] Moreover, according to the GS Application, in addition to its indebtedness to the Syndicate, GS owes an additional amount of approximately **$925 million** to the various mortgage lenders who have financed up to approximately $2 billion of the real estate portfolios that GS holds either on its own or with other equity partners.[18]

[69] In this regard, GS notes that not all of the debtor companies under these various mortgage loans are entities covered by the CCAA protection:

> 87. Although, as of the date hereof, the debtor companies under the various credit agreements with the foregoing mortgagees are not all CCAA Parties to whom the CCAA Proceedings are proposed to apply, the Debtors nevertheless reserve their rights to seek protection from this Court with respect to such other companies.

[70] As for the "*suppliers and other creditors*," paragraph 88 of the GS Application dated November 13, 2022 shows a indebtedness of **$118,059,000** as at June 30, 2022.[19]

[71] Surprisingly, at the end of the four-day hearing, counsel for SG announced that they would be filing an amended GS Application dated November 17, 2022. Indeed, the Debtors' indebtedness on a consolidated basis of **$118,059,000** as at June 30, 2022 mentioned in paragraph 88 decreased to "**approximately $63.3 million**" as at November 13, 2022:

> 88. Based on the financial information provided by Groupe Sélection, as at November 13, 2022, an amount of approximately $63.3 million was owed by the CCAA Parties, on a consolidated basis, to ordinary creditors and other suppliers in the following proportion:
>
> (a) $2.9 million payable by Master Immo (or its subsidiaries);
>
> (b) $53.8 million payable by Master Corpo (or its subsidiaries); and
>
> (c) $6.6 million of outstanding or stopped payment cheques.
>
> As of the same date, the CCAA Parties' external project accounts receivable totalled $24.9 million.

[72] As for the employees, the Debtors allege owing them approximately **$1,078,000** in regular pay and **$5,703,240** in vacation pay:

> 90. […] The estimated amount of accrued and unused vacation and salaries as of October 31, 2022 is approximately $4,625,600 for employees working for RPAs,

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[18] GS Application, para. 85.
[19] *Ibid*., para. 88.

$486,500 for employees working in construction operations and $591,140 for employees working at the corporate level.

[73] In addition, the amounts owed to the tax agencies would be nominal.

[74] Finally, as part of the ongoing real estate projects and in partnership with the financial partners previously referred to, some of the GS companies are called upon to contribute their share of the costs from time to time by way of an investment. These companies expect to receive contribution calls for up to approximately **$20 million** in the coming months, which they claim they are unable to advance in the current environment. These contribution calls are, among others, for the major projects of Espace Montmorency[20] in Laval and the Molson lot[21] in Montréal.

[75] By and large, the indebtedness of GS companies is massive and their ownership of multiple real estate assets requires significant capital injections on a regular basis that GS simply does not have the resources or financial liquidity to make without the support of a lender.

[76] Unfortunately, the equity available to GS is of little assistance in this case, as its complex corporate structure and the particular nature of the interests and assets held by all of its companies can hardly generate the additional loans that GS absolutely needs in the absence of any institutional lender that is able or willing to trust them in the current environment.

[77] It is clear that because of its business model, combined with the challenges posed by the pandemic and the ongoing challenges of inflation, rising interest rates and supply chain issues, the current state of the financial condition of GS and its multiple companies is unfortunately critical.

[78] With all due respect to the contrary opinion, this critical state requires not only the protection of the Court, but also a major and realistic revision of GS's business model by prioritizing jobs and RPAs in particular; this implies maintaining the services offered on a daily basis to the thousands of residents who already occupy the buildings managed by GS's employees, not to mention the need to ensure their safety and well-being.

2. ANALYSIS

[79] At the outset, there can be no doubt that GS and the Debtors are insolvent and unable to meet their obligations as they fall due. For this reason, they have chosen to avail themselves of the protection of the CCAA to enable them to effect the substantial restructuring that is clearly required in the circumstances.

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[20] Involving Montoni Group, Fonds de Solidarité FTQ and Montez.
[21] Involving Montoni Group, Fonds de Solidarité FTQ and Montez.

[80] As mentioned previously, the Court already issued an Interim Order on November 14, granting them temporary protection. The Initial Order to be made under this judgment will extend that protection subject to certain amendments prompted by the parties' interventions and comments at the hearing.

2.1 Should the development and implementation of the GS restructuring process be left to the GS executives and management who no longer have the confidence of the Syndicate and key business partners or to the Syndicate's proposed Monitor PwC whose powers would be increased?

[81] This first issue gives rise to major objections by counsel to GS, both in relation to the Syndicate's interest in submitting the NBC Application and the choice of PwC as the proposed Monitor whose impartiality is questioned in the current context.

2.1.1 Does the Syndicate have the necessary interest to make the NBC Application?

[82] GS challenges the right and appropriateness of the Syndicate as a secured creditor to make the NBC Application under the CCAA, the primary purpose of which is to facilitate the recovery of an insolvent corporation.

[83] The purpose of issuing an initial order is essentially to allow an eligible insolvent debtor corporation to recover under the protection of the CCAA and not to allow a creditor to proceed with a disguised receivership by way of a court-appointed Monitor as the Syndicate is attempting to do.

[84] Counsel for GS submits that the issuance of an initial order under the CCAA at the request of a creditor should be an exceptional measure which does not apply in this case.

[85] The Court fully agrees with these guiding principles, but not necessarily with the conclusions they draw.

[86] Counsel for GS insisted that all the Syndicate was really seeking to do was to realize its security interests by liquidating GS, nothing more and nothing less, while dismembering it completely, which is contrary to the spirit of the CCAA.

[87] The PwC Report and the testimony of Mr. Christian Bourque ("**Mr. Bourque**") of PwC as the Syndicate's proposed Monitor's representative would have fuelled their concerns in this regard.

[88] The Court not only had the opportunity to examine the GS Application and the NBC Application, the exhibits relied upon in support of them, the reports submitted by the proposed Monitors FTI and PwC and the plans of argument submitted by each side.

[89] The Court also had the benefit of hearing a variety of testimony over the course of four days of hearings, an unusual amount of time for the issuance of an initial order in the presence of some forty lawyers representing some twenty clients.

[90] All of this reflects the exceptional, if not unique, nature of the present case involving 137 entities with varying interests in multiple significant assets, including some fifty RPAs, which collectively owe their creditors close to $1.5 billion, while GS faces a recurring cash flow shortfall of approximately $7 million per month, and whose cash inflows since the beginning of the year have barely made up for recent losses incurred without being able to reimburse the amounts agreed upon to the Syndicate.

[91] In other words, the amounts borrowed from the Syndicate by GS over the past year have been used to cover recent operating losses or to cover significant losses that continue to accumulate on a monthly basis. The Syndicate is no longer willing to continue to play this game which is going nowhere in the current environment.

[92] The Syndicate urged the Court to allow the Monitor, PwC to develop a restructuring plan aimed initially at stopping the financial hemorrhaging, stabilizing the debtor companies and rethinking GS's business model in order to return it to financial health.

[93] There is every reason to believe that over the years, the principal shareholder, Mr. Réal Bouclin ("**Mr. Bouclin**"), encouraged by the success of his various businesses, began to take bigger and bigger bites, which unfortunately led to the financial consequences that his companies are currently experiencing.

[94] The Court is seized of an extraordinarily complex insolvency file because of the corporate structure adopted by the management of GS, - which is not a reproach - the number and particular nature of the security interests granted to numerous secured creditors in addition to the Syndicate, covering a host of assets, many of which are not wholly owned by the Debtors, which implies the presence of business partners who also have interests in these assets.

[95] In reality, an outright liquidation of GS and the Debtors is difficult to envisage without the risk of creating legal chaos, given the diversity of interests at stake.

[96] In fact, after four days of hearings, the Court is quite satisfied that this case is well suited to a restructuring process under the CCAA because of its complexity and the issues involved, including the thousands of RPA residents.

[97] A restructuring process that begins under the CCAA does not imply that a debtor company will necessarily retain all of its assets and emerge from the restructuring process intact with a reduced debt burden. The restructuring process is dynamic based on the circumstances and events that will occur over time.

[98] The CCAA process has the advantage of being conducted under the supervision of the Court, which - in compliance with the provisions of the CCAA - will ensure, among other things, the reasonable and appropriate character of the remedies being considered not only from the perspective of the debtor companies and secured and unsecured creditors, but also from the perspective of stakeholders, including the thousands of RPA residents.

[99] Moreover, the Court expects good faith on the part of all parties involved in this process and that GS management will cooperate fully with the Monitor in the search for viable and reasonable solutions.

[100] These four days of hearings have allowed the Court to observe what it would describe as a positive evolution from the perspective of the principal creditors and business partners with respect to the restructuring plan being favoured initially, with respect to the financial support that could be offered to allow the development and implementation of a restructuring plan and with respect to the next steps to be taken.

[101] It is important to note that the Syndicate and its members have heard, understood and responded to the Court's concerns regarding the respect of the thousands of vulnerable people who are at risk of being affected by the unfolding of the restructuring process beginning under the terms of this judgment. This means that special attention must also be paid to the GS employees who are dedicated to providing services to residents on a daily basis.

[102] In short, the circumstances and the very particular context of this case constitute a very exceptional situation allowing an interested creditor within the meaning of section 11 CCAA, such as the Syndicate, to make the NBC Application.

[103] With respect, the "business as usual" approach presumably advocated by GS under the GS Application does not appear to be reasonable, realistic or fair in the circumstances, even with the addition of the proposed CRO Blanchard who, incidentally, has been with the company since June 2022.

[104] It is neither reasonable nor realistic to contemplate a form of "business as usual" under the CCAA by using a temporary loan of $50 million, some of the conditions of which give rise to serious doubts in the mind of the Court, especially since some of the requirements are likely to cause significant prejudice to a number of hypothecary creditors whose debtors will not benefit in any way from the sums that will then be advanced to GS, given the nature of their security interests, the debts that they secure.

[105] With respect, for the purposes of obtaining comprehensive protection under the CCAA, the advantage of combining nearly 150 companies with different assets and creditors - not to mention the fact that they may have divergent interests relative to one another - may also result in certain disadvantages when it comes to granting priority to a temporary lender who wishes to secure its new advances by essentially encumbering all of their assets, especially if the interim financing will not necessarily serve each of the affected companies in the same way.

[106] It is therefore not surprising that, at first glance, a hypothecary creditor who has advanced substantial funds to a specific company which has encumbered its building in its favour would have serious reservations about the Court's granting of an additional priority charge on the same building in the amount of $60 million.

[107] The loss of confidence of the Syndicate and its members, described by them as irreparable, in GS management - whether this loss of confidence is justified or not - is another inescapable reality that the Court must consider, given the magnitude of the debt of more than $272 million that is owed thereto and the impossibility for GS to find the crucial financing from another similar source to cover its monthly losses, which will continue to accumulate if nothing is done.

[108] Obtaining CCAA protection to, on balance, continue GS's operations using the proposed $50 million interim loan and to attempt to submit to the Court by December 23, 2022[22] a sale and investor solicitation process without immediately identifying the assets that are generating these inordinate recurring losses and without promptly taking the steps reasonably necessary to at least reduce those recurring losses, to the extent possible, does not appear to be a formula for maximizing the value of GS's assets for the benefit of GS's creditors and other stakeholders, quite the contrary.

[109] The $50-million loan will be used primarily to cover recurring monthly losses without adding any value to the GS assets. The Syndicate is not wrong to claim that such an approach involving a temporary $60 million Lender Charge will have the direct effect of significantly reducing the value of the assets subject to the security interests it holds to secure repayment of its more than $272-million claim, not to mention the negative impact on the security interests held by GS's other secured creditors.

[110] Finally, it should not be forgotten that GS's other debts exceed $1 billion.

[111] What about the main financial partners identified earlier who also showed their loss of confidence while supporting the Syndicate's actions? Their opinion must also be considered by the Court.

[112] All in all, the four-day hearing proved beneficial to the Court and allowed it to see, as the hearing unfolded, the openness of the Syndicate and its members to developing and implementing GS's restructuring process by focusing mainly on GS's core business of some 50 RPAs, the employees who work daily for the benefit of thousands of residents, the service providers and others who supply and service these RPAs, all in order to ensure and maintain the safety and well-being of these residents who should not be deprived of the services they have paid for and have a right to expect.

[113] With this in mind, the Syndicate expressed its willingness to offer an interim loan of up to $20 million on much more favourable terms than Mr. Black’s interim financing advocated by GS.

[114] Moreover, the interim financing proposed by the Syndicate is not raising the opposition manifested by the same hypothecary creditors who had serious reservations about Mr. Black's interim financing.

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[22] A requirement of the $50-million interim loan (**R-26**).

[115] The Court also took note of the commitment of the members of the Syndicate expressed through their counsel that they would favourably consider advancing additional funds if the restructuring process so required, particularly with respect to the maintenance of the operations and services offered by the RPAs.

[116] In conclusion, the Syndicate as a creditor of GS, while not a creditor of each and every one of the companies and limited partnerships that have sought protection under the CCAA, has the necessary interest to make the NBC Application.

[117] With respect, counsel for GS are ill-advised when asserting against the Syndicate that the Debtors include companies that are not debtors of the Syndicate, in an attempt to defeat the NBC Application.

[118] In any event, such an approach by counsel for GS necessarily takes place in a context where counsel for GS assumed that the exercise proposed by the Syndicate in the NBC Application was essentially a disguised enforcement of its security interests, which the Court does not consider to be the case.

[119] After all, the restructuring as contemplated by the Syndicate will undoubtedly involve a reduction of GS's financial burden by continuing to monetize its assets as also contemplated in the GS Application. This exercise can be done under the supervision of the Court without the Syndicate having to formally enforce its security interests.

2.2 Should the restructuring process be assigned to GS management and FTI, the Monitor proposed in the GS Application?

[120] To answer this question, counsel for GS suggested that the Court look to the future rather than to the past and, consequently, allow Mr. Bouclin to proceed with the required restructuring with his team, assisted by the CRO Blanchard and the Monitor, FTI.

[121] With respect, the exceptional circumstances and issues of this case unfortunately argue against such a proposal.

[122] The scope of the indebtedness combined with the recurring financial hemorrhaging that seriously undermines GS, the extraordinary complexity of the corporate structure of the companies subject to this process, the diversity of significant assets that are mostly held in part by financial partners, the type of security interests encumbering these assets and the large number of secured creditors and financial partners with divergent interests in many respects, the safety and well-being of the thousands of people housed in some 50 RPAs require the involvement of experts specializing in corporate restructuring.

[123] Moreover, the current management team no longer enjoys the confidence of the Syndicate, its members and GS's major business partners.

[124] According to the PwC Report and in light of the very compelling testimony of Mr. Bourque, an insolvency professional with PwC who has been called upon to advise various financial institutions on the affairs of GS since 2019, including the Syndicate at

this time, Mr. Bouclin is the principal shareholder who ultimately controls and manages, directly or indirectly, the various Debtor companies.

[125] To his knowledge, Mr. Bouclin has always made the key decisions with respect to GS, whether of a strategic or operational nature, including the management of the financing contracted with the Syndicate.[23]

[126] One of Mr. Bourque's findings is as follows:

> 15. In short, GS:
>
> i. Is incurring significant operational losses each month for the reasons more fully described above;
>
> ii. On a ongoing basis;
>
> iii. Has been unable to execute the various monetization plans it has proposed;
>
> iv. Cannot meet its obligations to the Lenders and various partners in a significant number of real estate projects; and
>
> v. Is unable to service the debt owed to its Lenders;
>
> By being undercapitalized, GS is currently dependent on the Syndicated Financing offered by the Lenders.
>
> 16. GS is now in a situation where it has put its assets up for sale, ultimately encumbered in favour of the Lenders, to finance its operating losses rather than repay its debt, all while the value of GS's assets and business is declining and now appears insufficient to meet all of its obligations. Without a change of course, this downward spiral is expected to continue, growing each month and increasing the loss to the Lenders. In addition, the sustainability of GS's operations and business is seriously at risk, to the detriment of all of the Company's stakeholders.[24]
>
> [Emphasis added]

[127] Another observation made by Mr. Bourque is of particular concern to the Court.

[128] Mr. Bourque reported that since his involvement in the case, there has been considerable instability in GS's financial management. GS is unable to produce historical, reliable and timely financial information.[25]

[129] In the PwC Report, Mr. Bourque noted that the instability and inefficiency of the finance function within GS is a major concern[26] and concluded:

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[23] PwC Report, para. 2.
[24] *Ibid*., paras. 15-16.
[25] *Ibid*., para. 78 and court testimony.
[26] PwC Report, paras. 79-94.

> 86. In summary, it is incomprehensible and unacceptable that an organization of GS's size and complexity is unable to generate reliable financial information, both historical and prospective. This situation is detrimental to all of GS's financial partners.[27]

[130] Mr. Bourque also noted that GS has had to rely on outside consultants to perform tasks that are routine and inherent in a normal financial function. GS does not have the internal resources and expertise to produce timely financial forecasts.

[131] In fact, this summer, financial management had to be turned over to Raymond Chabot Grant Thornton ("**RCGT**") :

> 92. Cash management also had to be taken over by the firm Raymond Chabot Grant Thornton, as the treasury team was unable to follow up on receipts and disbursements in a timely manner. To this end, GS's external consultants had to set up weekly cash management committees in order to ensure sound cash management and follow-up within GS. These tasks are usually routine in a company the size of GS with a finance function.
>
> 93. While hiring outside consultants may seem to address some of the above issues, the chronic instability of the finance function over the years has made the task difficult and caused significant delays, so that various stakeholders have had to rely on partial, incomplete, and often unsubstantiated information in attempting to make important financial decisions.

[132] Mr. Bourque concludes with this very revealing observation about the state of financial management at GS:

> 94. In summary, GS's disorganization, lack of competence and casualness in generating and understanding basic financial information for its business segments is incomprehensible.

[133] The Court understands that RCGT is no longer acting for GS and that the accounting firm has chosen not to act as the proposed monitor, hence the proposal of the Monitor FTI.

[134] The major deficiencies identified in the financial management of GS by Mr. Bourque are of great concern to the Court in determining the identity of the person or persons who should assume responsibility for developing a restructuring plan and managing the implementation of the restructuring process which must definitely take place as soon as possible.

[135] Normally, this responsibility falls to the management team put in place by the executives of the insolvent business under the supervision of a court-appointed monitor. In some jurisdictions, officers also retain the services of a CRO ("Chief Restructuring Officer") to lead and carry out the agreed upon restructuring plan, depending on the complexity of the process considered.

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[27] *Ibid*.

[136] In such circumstances, the selected CRO is a professional experienced in corporate restructuring in an insolvency context.

[137] However, it is clear that such a team does not exist within GS and that, for all intents and purposes, CRO Blanchard does not have the practical experience in restructuring and insolvency matters required to meet GS's pressing needs.

[138] It should also be noted that according to the letter of engagement of November 11, 2022 signed by Mr. Bouclin[28] (the "**Engagement Letter**"), Mr. Blanchard is to report directly to Mr. Bouclin in the performance of his mandate.

[139] Certain elements of this letter, including the proposed compensation package, also raise concerns in the mind of the Court that allow it to question the detachment and minimum level of impartiality that Mr. Blanchard should have in carrying out his mandate as CRO, whose decisions are not always likely to please or suit Mr. Bouclin.

[140] Moreover, in a context where the Syndicate and the key business partners have lost all confidence in GS management to carry out the appropriate restructuring process required, it must be noted that the arrival of Mr. Blanchard, a former banker who worked for some 20 years with NBC, has not made it possible in six months to "bridge the divide" between GS and the Syndicate and thus restore a certain level of confidence between the parties.

[141] In fact, the Syndicate, its members and the key business partners who intervened do not favour at all the Court approving the appointment of Mr. Blanchard as CRO, whether under the terms of the Letter of Engagement or otherwise.

[142] With great respect for Mr. Blanchard, whose competence and integrity are in no way questioned, the Court considers that the Syndicate, its members and the key business partners who intervened are right.

[143] With respect, Mr. Blanchard is not the appropriate person to act as CRO in this case, which presents major and complex issues in a context where there are major, even worrisome, deficiencies in GS's financial management, especially since GS's management, under the direction of Mr. Bouclin, does not consider the required restructuring process in the same way as its main creditors and financial partners.

[144] Another concern raised by Mr. Bourque in the PwC Report is the lack of transparency shown by Mr. Bouclin - who incidentally has always refused to meet with the Syndicate's representative, despite Mr. Bourque's repeated requests to do so, except only once in the last few days prior to the filing of the GS Application - with respect to his children's related companies[29] and the various major payments that have been made on

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[28] **R-25**.
[29] 9419-1780 Québec inc. operating under the name of Gaia ("**Gaia**") and Groupe Conseil Evolia inc. ("**Evolia**").

a regular basis to both of there companies despite the extent of GS's financial difficulties[30].

[145] In this regard, another decisive element in the eyes of the Court is the fortuitous discovery on the morning of November 15, 2022 that at the time of presenting the GS Application to the undersigned or in the hours preceding it, GS had transferred, among other things, $1,503,694 to Gaia[31]. On November 10, 2022, $904,921 had also been transferred to Gaia.[32]

[146] Although GS alleges in the paragraph of the Amended GS Application as at November 17, 2022 that it "*has $6.6 million in outstanding or stop-payment cheques* ", GS not only pays $2.4 million to Gaia, but also $500,000 to Mr. Black the proposed interim lender and $200,000 to counsel for Mr. Black[33].

[147] The Court has been advised that these payments to Mr. Black and his counsel totalling $700,000 made on November 14, 2022 are non-refundable, even if the Court does not approve Mr. Black's DIP Loan. GS certainly did not have the luxury of losing $700,000 under these rather unusual circumstances.

[148] Finally, it was not until mid-day on Wednesday, November 16, 2022 that counsel for GS filed a very succinct table[34] identifying the beneficiaries of the $2.4 million transferred to Gaia since November 10, 2022, in addition to those mentioned above.

[149] Surprisingly, of the $2.4 million, Gaia transferred $1,198,000[35] to Evolia, the other related company owned by Mr. Bouclin's two children, which allegedly made various payments to certain service providers and tax authorities without providing any further explanation during the trial[36].

[150] With respect, GS's failure during the trial to act proactively to disclose relevant, complete and reliable information in a timely manner, rather than reacting to the "discoveries" made by the Syndicate or PwC, only reinforces in the mind of the Court the major financial shortcomings of GS noted by Mr. Bourque and the lack of transparency - unless forced to do so - that Mr. Bouclin and his team appear to be showing.

[151] Unfortunately, Mr. Bouclin, the guiding spirit of the GS Group, did not testify at the hearing to reassure not only the Court, but especially the Syndicate, its members and the various financial partners present as to his vision and the soundness of the restructuring plan that he is considering.

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[30] PwC Report, para. 109.
[31] **A-41**.
[32] *Ibid*.
[33] **A-41** and **R-33**.
[34] **R-33**.
[35] **R-33**.
[36] *Ibid*.

[152] With respect, counsel for GS should have presented Mr. Bouclin's testimony in the current context rather than criticizing counsel for the Syndicate for not requiring his testimony at the hearing.

[153] That being said, the Court also questions whether Mr. Blanchard has the necessary distance and independence from Mr. Bouclin and his management team to point out, for example, that the various payments made seemingly *in extremis* on November 14, 2022 were inappropriate in the circumstances when a good number of cheques sent to other "less privileged" recipients had their payments stopped.

[154] In retrospect, the Court would have liked Mr. Blanchard to have mentioned this during his testimony and to have voluntarily provided all the necessary explanations to ideally eliminate any doubt that might arise in the mind of the Court, not to mention the Syndicate, its members and the key financial partners present at the hearing. The information was bound to come out sooner or later.

[155] Such an approach promoting the transparency that is crucially necessary in the circumstances should have been prioritized by Mr. Blanchard who had already agreed to act as CRO.

[156] On the other hand, the Court could not hold it against Mr. Blanchard if, at the time he testified, he was unaware of the existence of the banking transactions that had just taken place or were then taking place. If this were the case, his involvement as CRO would be of little use.

[157] The Court does not imply that no payment was to be made on November 14, 2022. Rather, it is the covert approach that casts a pall over the credibility of the GS team that would like to be entrusted with the responsibility for the restructuring process that is now beginning.

2.3 Appointment of PwC as Monitor

[158] In the end, the exceptional circumstances of this case and the issues that have already been identified require the involvement of an experienced person with the necessary resources to urgently develop a restructuring plan in consultation with GS's management team and to submit it to the Court for approval, while keeping in mind the concerns that the undersigned has expressed throughout the hearing, which are part of a context that favours the restructuring of GS's business to the extent possible.

[159] The Court is of the view that at this time the most appropriate person to assume this role is Mr. Bourque and the PwC team. The Court expects that Mr. Bourque will perform his role in consultation with the GS management team when appropriate.

[160] Given the exceptional circumstances of this case, it is entirely appropriate for Mr. Bourque to perform his role through certain additional powers to be granted to the Monitor selected by the Court, PwC, for whom Mr. Bourque is the representative.

[161] Counsel for GS objected to the selection of PwC and Mr. Bourque on the basis that Mr. Bourque's mandates from various financial institutions since 2019 will place him in a conflict of interest and he will not have the necessary distance and independence to adequately perform his role as monitor under the CCAA.

[162] With respect, the Court does not share this view.

[163] From the outset, Mr. Bourque is a competent and experienced insolvency professional who has already acted on numerous occasions as a monitor under the CCAA, a role that he must exercise impartially, becoming from the moment of his appointment the eyes and ears of the Court, which will rely on his full and frank assistance throughout the restructuring process that is beginning today.

[164] In accepting this mandate from the Court, Mr. Bourque will take the pulse of the situation and, after consultation with GS's management team, will make the necessary recommendations to the Court to stabilize GS's financial situation and recommend a restructuring plan that will have the support of GS's management and other stakeholders, to the extent possible and reasonable.

[165] In doing so, Mr. Bourque must, among other things, attempt to consider and reconcile, if possible, the concerns and expectations of interested parties.

[166] In short, until the contrary is proven, the Court has no doubt that from now on, in his new capacity as controller, Mr. Bourque will act with impartiality, which will enable him to advise the Court in the execution of his new mandate in accordance with the provisions of the CCAA.

[167] In view of the conclusions reached by the Court above, it is not appropriate to appoint FTI as Monitor.

[168] The Court nevertheless wishes to make it clear that this decision should in no way be interpreted as discrediting FTI in any way and, more particularly, Nigel Meakin and Martin Franco, both of whom are competent and experienced insolvency professionals.

[169] Being new to the case, their learning curve impeded the urgency to act imposed by the circumstances and the very particular context at hand, which was not the case for PwC.

2.4 Interim financing proposed by the Syndicate

[170] Although the aggregate amount of $20 million offered by the Syndicate as temporary financing is less than that offered by Mr. Black, the Court considers that, based on the representations and assurances of counsel for the Syndicate, the terms of the interim loan offered are more favourable than those of the financing offered by Mr. Black and that the amounts to be made available to GS will be sufficient to allow for the

development of a restructuring plan and the initial stabilization of GS's operations, while maintaining an emphasis on the residents of the RPAs.

[171] Moreover, the Court is sensitive to the openness shown by the Syndicate and its members, through their counsel, to consider favourably, if required, an increase in the interim loan as part of the implementation of the approved restructuring plan.

[172] Moreover, this interim financing was supported by all creditors and business partners who appeared at the hearing.

[173] Ultimately, given the particular corporate structure of GS and the nature of the multiple security interests often involving assets held jointly with third parties, a restructuring plan promoting the maintenance of GS's core business while continuing in a reasonable, realistic and orderly fashion, the process of monetizing GS's assets should be much more successful than a simple liquidation from the perspective of both GS and its creditors, including the Syndicate, without forgetting the business partners and other stakeholders, as well as the thousands of residents who have placed their trust in GS and who depend on the services offered to them on a daily basis by dedicated staff.

CONCLUSION

[174] Accordingly, for the foregoing reasons, GS's Application for an Initial Order should be dismissed and the Syndicate's NBC Application should be granted in accordance with the findings sought in the Initial Order attached to this judgment.

FOR THESE REASONS, THE COURT:

[175] **DISMISSES** the Application entitled "*Demande amendée pour l'émission d'une ordonnance initiale et d'une ordonnance initiale amendée et reformulée*" (Amended application for the issuance of an initial order and an amended and restated initial order) of the Plaintiffs and Impleaded Parties dated November 17, 2022;

[176] **GRANTS** the *Application for an Initial Order, an Amended and Restated Initial Order and* Other *Relief* of National Bank of Canada, dated November 14, 2022 pursuant to the conclusions of the Initial Order attached hereto;

[177] **THE WHOLE** without legal costs.

(signed) Michel A. Pinsonnault, J.S.C.

MICHEL A. PINSONNAULT, J.S.C.

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Mtre. Joseph Reynaud
Mtre. Danny Duy Vu
Stikeman Elliott LLP
Counsel for the Debtors, Groupe Sélection Inc. *et al* and for the Impleaded Parties

Mtre. Luc Morin
Mtre. Arad Mojtahedi
Mtre. Guillaume Pierre Michaud
Mtre. Noah Zucker

Norton Rose Fulbright
Counsel for the Petitioner, National Bank of Canada, representing the Banking Syndicate

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Mtre. Alain Tardif
McCarthy Tétrault LLP
Counsel for the Proposed Monitor, FTI CONSULTING INC.

Mtre. Alain Riendeau
Fasken Martineau DuMoulin LLP
Counsel for the Proposed Monitor, PRICEWATERHOUSECOOPERS INC.

Mtre. Luc Béliveau
Mtre. Marc-André Morin
Fasken Martineau DuMoulin LLP
Counsel for CIBC

Mtre. Christian Lachance
Davies Ward Phillips & Vineberg LLP
Counsel for Fédération des Caisses Desjardins for Otera Capital

Mtre. Nicolas Brochu
Fishman Flanz Meland Paquin LLP
Counsel for Bank of Montreal

Mtre. François Viau
Mtre. Geneviève Cloutier
Gowling WLG (Canada) LLP
Counsel for Briva Finance and Fiera Private Debt

Mtre. Neil G. Oberman

Spiegel Sohmer, Inc.
Counsel for MCAP Financial Corporation

Mtre. Matthew Cressatti
Osler, Hoskin & Harcourt LLP
Counsel for Royal Bank of Canada

Mtre. Alexandre Bayus
Mtre. Nicolas Mancini
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Counsel for Bank of Nova Scotia (Scotiabank)

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Proposed representatives for the residents of the RPAS

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Davies Ward Phillips & Vineberg LLP
Counsel for the Fonds de Solidarité (FTQ)

Mtre. Avram Fishman
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Counsel for Kingsett Capital

Mtre. Nicholas Sheib
Scheib Legal
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Mtre. Mark Rasile
Mtre. Aiden Nelms
Bennett Jones LLP
Counsel for the Impleaded Party, Herbert Black

Mtre. Denis Ferland
Mtre. Louis-Martin O'Neill
Mtre. Benjamin Jarvis
Davies Ward Phillips & Vineberg LLP
Counsel for Revera inc.

Mtre. Kim Sheppard
Mtre. Rim Afegrouch
Ministère de la Justice Canada
Counsel for the Canada Revenue Agency

Mtre. Daniel Cantin

Mtre. Vincenzo
Carrozza Mtre.
Frédéric Tessier
Revenu Québec
Counsel for Agence du revenu du Québec

Mtre. Bernard Boucher
Mtre. Christina Cataldo
Blake, Cassels & Graydon LLP
Counsel for Investissement Québec

Mtre. Sandra Abitan
Mtre. Julien Morissette
Osler, Hoskin & Harcourt LLP
Counsel for Groupe Montoni

Hearing dates: November 14, 15, 16 and 17, 2022

SCHEDULE "A"
LIST OF DEBTORS

1. GROUPE SELECTION INC.
2. 9411-3594 QUÉBEC INC.
3. 8504750 CANADA INC.
4. 10067628 CANADA INC.
5. 10067601 CANADA INC.
6. 9281-8343 QUÉBEC INC.
7. 10437042 CANADA INC.
8. 9395-8379 QUÉBEC INC.
9. 10437123 CANADA INC.
10. 10437387 CANADA INC.
11. 10442364 CANADA INC.
12. 10442259 CANADA INC.
13. 10442500 CANADA INC.
14. 10442437 CANADA INC.
15. 10437492 CANADA INC.
16. 10442453 CANADA INC.
17. 10437433 CANADA INC.
18. 9408-3581 QUÉBEC INC.
19. 9408-3789 QUÉBEC INC.
20. 9650261 CANADA INC.
21. 11349945 CANADA INC.
22. 9357-2006 QUÉBEC INC.
23. 9851267 CANADA INC.
24. 9357-2014 QUÉBEC INC.
25. 11075900 CANADA INC.
26. 10702030 CANADA INC.
27. 9357-2030 QUÉBEC INC.
28. 9394-6127 QUÉBEC INC.
29. 9399-6049 QUÉBEC INC.
30. 9399-6072 QUÉBEC INC.
31. 10067644 CANADA INC.
32. 10067636 CANADA INC.
33. 10212440 CANADA INC.
34. 9413-5449 QUÉBEC INC.
35. 9415-4580 QUÉBEC INC.
36. 9409-4794 QUÉBEC INC.
37. 9411-9252 QUÉBEC INC.
38. 9408-6824 QUÉBEC INC.
39. 9410-5475 QUÉBEC INC.
40. 9245-0519 QUÉBEC INC.
41. 10619817 CANADA INC.
42. 9328-2887 QUÉBEC INC.
43. 8504776 CANADA INC.
44. 9497722 CANADA INC.
45. 8788537 CANADA INC.
46. 9094-8951 QUÉBEC INC.
47. 9286861 CANADA INC.
48. 12781948 CANADA INC.
49. 9408-1577 QUÉBEC INC.
50. GESTION CH 2015 INC.
51. 9390-8697 QUÉBEC INC.
52. CONCEPTION HABITAT 2015 INC.
53. 9352-0252 QUÉBEC INC.
54. 9319-7473 QUÉBEC INC.
55. GROUPE RÉSEAU SÉLECTION CONSTRUCTION INC.
56. STRUCTURE ISO 2015 INC.
57. 9280-2842 QUÉBEC INC.
58. 8468834 CANADA INC.
59. 9408-2328 QUÉBEC INC.
60. 9408-2369 QUÉBEC INC.
61. 9408-2401 QUÉBEC INC.
62. 8788383 CANADA INC.
63. 9462-9037 QUÉBEC INC.
64. 9408-1585 QUÉBEC INC.
65. 9408-1593 QUÉBEC INC.
66. 9408-1601 QUÉBEC INC.
67. ÉBÉNISTERIE BOSCO INC.
68. TOITURES FD INC.
69. 9383-3572 QUÉBEC INC.
70. 9383-3507 QUÉBEC INC.
71. CONSTRUCTION DELAUMAR INC.
72. BMD ÉLECTRIQUE INC.
73. 9334-9652 QUÉBEC INC.
74. 9395-8387 QUÉBEC INC.
75. 9395-4956 QUÉBEC INC.
76. 9395-5094 QUÉBEC INC
77. 9463-6297 QUÉBEC INC.
78. 9463-8749 QUÉBEC INC.
79. 9851321 CANADA INC.
80. 9650270 CANADA INC.
81. 9387-2604 QUÉBEC INC.

SCHEDULE "B"
LIST OF LIMITED PARTNERSHIPS

1. SOCIÉTÉ EN COMMANDITE GROUPE SÉLECTION IMMOBILIER
2. SOCIÉTÉ EN COMMANDITE CORPORATION GROUPE SÉLECTION
3. SOCIÉTÉ EN COMMANDITE ROSEMONT
4. SOCIÉTÉ EN COMMANDITE INVESTISSEURS CONDOS ROSEMONT II
5. SOCIÉTÉ EN COMMANDITE INVESTISSEURS CONDOS LACHENAIE
6. SOCIÉTÉ EN COMMANDITE INVESTISSEURS LOGEMENT LACHENAIE
7. SOCIÉTÉ EN COMMANDITE INVESTISSEURS LACHENAIE II
8. SOCIÉTÉ EN COMMANDITE INVESTISSEURS LACHENAIE III
9. SOCIÉTÉ EN COMMANDITE INVESTISSEURS LACHENAIE IV
10. SOCIÉTÉ EN COMMANDITE INVESTISSEURS GATINEAU
11. SOCIÉTÉ EN COMMANDITE INVESTISSEURS SÉLECTION MONTMORENCY
12. SOCIÉTÉ EN COMMANDITE INVESTISSEURS DISTRICT DES BRASSEURS
13. SOCIÉTÉ EN COMMANDITE INVESTISSEURS LACHENAIE V
14. SOCIÉTÉ EN COMMANDITE INVESTISSEURS LACHENAIE VI
15. SOCIÉTÉ EN COMMANDITE INVESTISSEURS ROSEMONT III
16. SOCIÉTÉ EN COMMANDITE COMMANDITAIRE GROUPE SÉLECTION
17. SOCIÉTÉ EN COMMANDITE GS IMMOBILIER 2
18. SOCIÉTÉ EN COMMANDITE INVESTISSEURS CONDOS ROSEMONT
19. SOCIÉTÉ EN COMMANDITE RÉSIDENCE GATINEAU
20. SOCIÉTÉ EN COMMANDITE TOURS RIMOUSKI COMMERCIAL
21. SOCIÉTÉ EN COMMANDITE RIMOUSKI
22. SOCIÉTÉ EN COMMANDITE INVESTISSEURS REPENTIGNY
23. SOCIÉTÉ EN COMMANDITE RÉSEAU SÉLECTION INVESTISSEMENT
24. SOCIÉTÉ EN COMMANDITE INVESTISSEURS STJ
25. SOCIÉTÉ EN COMMANDITE INVESTISSEURS DEUX-MONTAGNES
26. SOCIÉTÉ EN COMMANDITE INVESTISSEURS RV
27. SOCIÉTÉ EN COMMANDITE RÉSIDENCE VANIER
28. SOCIÉTÉ EN COMMANDITE RÉSIDENCE LE JARDIN DES SOURCES
29. SOCIÉTÉ EN COMMANDITE INVESTISSEURS CHÂTEAUGUAY
30. SOCIÉTÉ EN COMMANDITE CONDOS ROSEMONT
31. SOCIÉTÉ EN COMMANDITE GS IMMOBILIER
32. SOCIÉTÉ EN COMMANDITE IMMEUBLE CHAMBLY
33. COMMANDITÉ SÉLECTION S.E.C.
34. SOCIÉTÉ EN COMMANDITE GS GESTION
35. SOCIÉTÉ EN COMMANDITE GESTION IMMO SÉLECTION
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38. SOCIÉTÉ EN COMMANDITE SÉLECTION DÉVELOPPEMENT
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40. SOCIÉTÉ EN COMMANDITE CONDOS ROSEMONT II

41. SOCIÉTÉ EN COMMANDITE RÉSIDENCE VAUDREUIL
42. SOCIÉTÉ EN COMMANDITE RÉSIDENCE VALLEYFIELD
43. SOCIÉTÉ EN COMMANDITE ROSEMONT II
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52. SOCIÉTÉ EN COMMANDITE SÉLECTION MONTMORENCY
53. SOCIÉTÉ EN COMMANDITE DISTRICT DES BRASSEURS
54. SOCIÉTÉ EN COMMANDITE CONDOS LACHENAIE
55. SOCIÉTÉ EN COMMANDITE MIRABEL
56. SOCIÉTÉ EN COMMANDITE INVESTISSEUR VALLEYFIELD

TAB C

COUR D'APPEL

CANADA
PROVINCE DE QUÉBEC
GREFFE DE MONTRÉAL

N° : 500-09-030290-225
(500-11-061657-223)

DATE : 28 novembre 2022

DEVANT L'HONORABLE PETER KALICHMAN, J.C.A.

DANS L'AFFAIRE DE LA *LOI SUR LES ARRANGEMENTS AVEC LES CRÉANCIERS DES COMPAGNIES* DE :

GROUPE SÉLECTION INC.
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9463-6297 QUÉBEC INC.
9463-8749 QUÉBEC INC.
9851321 CANADA INC.
9650270 CANADA INC.
9387-2604 QUÉBEC INC.

REQUÉRANTES – débitrices/demanderesses

et

SOCIÉTÉ EN COMMANDITE GROUPE SÉLECTION IMMOBILIER
SOCIÉTÉ EN COMMANDITE CORPORATION GROUPE SÉLECTION
SOCIÉTÉ EN COMMANDITE ROSEMONT
SOCIÉTÉ EN COMMANDITE INVESTISSEURS CONDOS ROSEMONT II
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SOCIÉTÉ EN COMMANDITE INVESTISSEURS LACHENAIE VI
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SOCIÉTÉ EN COMMANDITE COMMANDITAIRE GROUPE SÉLECTION
SOCIÉTÉ EN COMMANDITE GS IMMOBILIER 2
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SOCIÉTÉ EN COMMANDITE SÉLECTION MONTMORENCY
SOCIÉTÉ EN COMMANDITE DISTRICT DES BRASSEURS
SOCIÉTÉ EN COMMANDITE CONDOS LACHENAIS
SOCIÉTÉ EN COMMANDITE MIRABEL
SOCIÉTÉ EN COMMANDITE INVESTISSEUR VALLEYFIELD

REQUÉRANTES – mises en cause

c.

BANQUE NATIONALE DU CANADA, en sa qualité de prêteur et d'agent administratif pour elle-même et pour la Banque canadienne impériale de commerce, la fédération des Caisses Desjardins du Québec, La Banque Toronto-Dominion, La Banque de Montréal, La Banque HSBC Canada, Briva finance (Équité) S.E.C. et Fiera FP Business Financing fund, LP.

INTIMÉE – créancière garantie/requérante pour l'émission d'une Ordonnance initiale

et

PRICEWATERHOUSECOOPERS INC.

MISE EN CAUSE – contrôleur proposé

et

REVERA INC.
SOCIÉTÉ EN COMMANDITE HÉRITAGE MONTONI
GROUPE MONTONI (1995) DIVISION CONSTRUCTION INC.
INVESTISSEMENT QUÉBEC

FONDS IMMOBILIER DE SOLIDARITÉ FTQ INC.
FÉDÉRATION DES CAISSES DESJARDINS
10998877 CANADA INC.
ENTREPRENEUR GÉNÉRAL F.D. INC.
9379-6001 QUÉBEC INC.
9377-0980 QUÉBEC INC.
9377-0998 QUÉBEC INC.
9302-8041 QUÉBEC INC.
9429-9633 QUÉBEC INC.
GESTION S. BRAULT INC.
BANQUE LAURENTIENNE DU CANADA
CO-LABB AMÉNAGEMENT INTÉRIEUR INC.
VERSION PAYSAGE INC.
LEFEBVRE & BENOIT S.E.C.
MÉTRICA ARPENTEURS GÉOMÈTRES INC.
DÉVELOPPEMENT STATÉGIQUE GROUPE ABS INC.
FRANKLIN EMPIRE INC.
RUCCOLO + FAUBERT ARCHITECTES INC.
AGENCE AIRPC INC.
RAMPES ALUMIDEK INC.
FENPLAST INC.
9446-1753 QUÉBEC INC.
9446-5523 QUÉBEC INC.
ISOLATION VAL-MERS LTÉE
ÉLECTRIMAT LTÉE
SITRACO INC.
ACDG ARCHITECTURE INC.
MISES EN CAUSE

JUGEMENT

---

[1] Je suis saisi d'une requête pour permission d'appeler d'un jugement rendu par la Cour supérieure le 21 novembre 2022 (l'honorable Michel A. Pinsonnault)[1], rejetant la demande de Groupe Sélection inc. pour une ordonnance initiale en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*[2] (la **LACC**) et accueillant une demande concurrente d'un groupe de ses créanciers. Si la permission d'appeler est accordée, on me demande également de suspendre l'exécution provisoire du jugement,

---

1 *Arrangement relatif à Groupe Sélection inc.*, 2022 QCCS 4281 [jugement entrepris].
2 L.R.C. (1985), ch. C-36.

de prononcer une ordonnance de sauvegarde et de fixer une date prioritaire pour l'audition de l'appel.

* * *

[2] Groupe Sélection se décrit comme un chef de file en immobilier multirésidentiel et la plus importante entreprise privée au Canada dans le domaine des résidences privées pour aînés (**RPA**). Elle compte plus de 3 000 employés et plus de 15 000 clients, dont pour la majorité des personnes âgées résidant dans des RPA qu'elle détient soit directement ou en partenariat avec d'autres entités. Groupe Sélection est également impliqué dans de nombreux projets immobiliers qui en sont à différents stades de développement.

[3] Pour diverses raisons, dont la pandémie de la Covid-19, la hausse des taux d'intérêt et des problèmes dans la gestion de la chaîne d'approvisionnement, Groupe Sélection fait face à une crise financière majeure. Malgré l'injection d'un financement supplémentaire de 64,5 M$ depuis avril 2022, sa situation ne s'est pas améliorée. Sa dette globale est d'environ 1,5 G$ et elle affiche un déficit opérationnel récurrent de 7 M$ par mois. Le 28 octobre 2022, un syndicat de ses prêteurs, mené par la Banque Nationale du Canada (le **Syndicat**), retire son soutien financier.

[4] Le 13 novembre 2022, 81 sociétés et 56 sociétés en commandite faisant partie de Groupe Sélection (collectivement les **Débitrices**) présentent une demande en vertu de la LACC pour obtenir une ordonnance initiale en vue de se mettre à l'abri de leurs créanciers et initier une restructuration de leurs affaires et de leurs opérations. Les Débitrices proposent que FTI Consulting Canada inc. (**FTI**) soit nommé contrôleur, que Yanick Blanchard occupe le poste de chef de la restructuration (**CRO**) et qu'un financement privé temporaire de 50 M$ soit mis en place.

[5] De nombreux créanciers s'opposent à la demande des Débitrices. Par ailleurs, le Syndicat, dont la créance collective s'élève à 276 M$, présente sa propre demande d'ordonnance initiale en vertu de la LACC et propose que PricewaterhouseCoopers inc. (**PWC**) agisse comme contrôleur.

[6] Face à ces demandes concurrentes, le juge rend une ordonnance intérimaire suspendant toutes les procédures à l'encontre des Débitrices et de leurs actifs et procède immédiatement à l'audition des deux demandes. L'audience s'est étendue sur une période de quatre jours, impliquant des milliers de pages de pièces et plusieurs témoins. Le juge rend son jugement le 21 novembre 2022 accueillant la demande du Syndicat, rejetant celle des Débitrices et prononçant une ordonnance initiale pour une période de dix jours.

[7] Les Débitrices soutiennent que le jugement fait fi des principes qui sous-tendent la LACC, en prononçant une ordonnance initiale qui, en fait, ouvre la porte à une liquidation des Débitrices aux mains de leurs créanciers et les prive de la possibilité de

restructurer leurs affaires. Elles soutiennent également que le juge a rompu avec les précédents en la matière en refusant leur demande, sans conclure que le plan de restructuration qu'elles entendaient mettre en place était voué à l'échec. De plus, selon elles, le juge a commis une erreur non seulement en désignant PWC comme contrôleur, car il n'avait pas l'indépendance nécessaire, mais aussi en lui conférant des pouvoirs exceptionnels qui vont bien au-delà de ceux d'une ordonnance initiale et qui s'apparentent à ceux généralement dévolus à un séquestre en matière de faillite.

* * *

[8] Un jugement rendu en application de la LACC ne peut faire l'objet d'un appel qu'avec l'autorisation prévue à son article 13. Pour que l'autorisation soit accordée, les Débitrices doivent établir que l'appel proposé : (i) soulève une question importante pour la pratique de l'insolvabilité et de la restructuration; (ii) est important dans le cadre de ce dossier; (iii) est *prima facie* bien fondé; et (iv) n'entravera pas indûment le déroulement des procédures[3]. Chacun de ces critères doit être satisfait pour que l'autorisation soit accordée[4].

[9] Il est bien établi qu'une telle autorisation n'est accordée qu'avec parcimonie[5], vu la grande déférence dont font l'objet les décisions rendues par les juges chargés de superviser les procédures intentées en vertu de la LACC.

* * *

[10] Pour les motifs qui suivent, les Débitrices n'ont pas réussi à me convaincre qu'il y a lieu d'accorder la permission dans le cas présent.

[11] Rien n'empêche un créancier plutôt qu'un débiteur d'introduire une demande d'ordonnance initiale en vertu de la LACC et ce n'est pas la première fois qu'une telle situation se présente[6]. Ainsi, la question n'est pas de savoir si le juge avait le pouvoir discrétionnaire de prononcer un tel jugement – qui aurait pu avoir une certaine importance pour la pratique de la restructuration si elle n'avait pas déjà été abordée - mais plutôt de savoir si, dans les circonstances très particulières de cette affaire, il a exercé ce pouvoir de manière raisonnable. Les Débitrices soutiennent que ce n'est pas le cas et que les motifs d'appel qu'elles soulèvent apparaissent bien fondés.

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3 *Cantore c. Nemaska Lithium inc.*, 2022 QCCA 598, paragr. 8, (Moore, j.c.a.); *Papiers Gaspésia Inc., Re,* 2004 CanLII 46685 (C.A.), paragr. 4, (Bich, j.c.a.).

4 *Bock inc. (Arrangement relatif à)*, 2013 QCCA 851, paragr. 3, (Bich, j.c.a.); *Statoil Canada Ltd. (Arrangement relatif à)*, 2012 QCCA 665, paragr. 4, (Hilton, j.c.a.).

5 *Arrangement relatif à 9424-9356 Québec inc.*, 2022 QCCA 549, paragr. 5, (Fournier, j.c.a.); *Audet c. Richter Groupe Conseil inc.*, 2021 QCCA 1170, paragr. 16, (Baudouin, j.c.a.).

6 LACC, articles 4 et 5; *Arrangement relatif à 9186-9297 Québec inc.*, 2022 QCCS 1707, paragr. 22, *Arrangement relatif à Groupe SMI inc. / SMI Group Inc.*, 2018 QCCS 5528, paragr. 9; *MJardin Group, Inc. (Re)*, 2022 ONSC 3338, paragr. 21; *Miniso International Hong Kong Limited v*. *Migu Investments Inc.*, 2019 BCSC 1234, paragr. 45.

[12] Je ne suis pas de cet avis.

[13] Les raisons pour lesquelles le juge a préféré l'approche proposée par le Syndicat sont exposées dans un jugement extrêmement détaillé et comprennent les suivantes :

> a) Il rejette l'approche « business as usual » proposée par les Débitrices, qu'il décrit comme étant déraisonnable, irréaliste et inéquitable. Selon lui, la situation nécessite que des moyens soient rapidement identifiés pour faire face, à tout le moins, aux pertes opérationnelles récurrentes et ce n'est pas ce que les Débitrices proposent. Il opte plutôt pour l'approche du Syndicat, qui se concentre sur la préservation de ce qu'il décrit comme le « core business » des Débitrices et qui vise à s'assurer que les services continueront à être livrés aux résidents.
>
> b) Il préfère le financement intérimaire proposé par le Syndicat à celui des Débitrices, dont les conditions de financement sont beaucoup moins attrayantes. À cet égard, il se dit également rassuré par l'ouverture des membres du Syndicat à augmenter le financement intérimaire, si nécessaire.
>
> c) L'approche proposée par le Syndicat, y compris la nomination de PWC à titre de contrôleur, est soutenue par les créanciers, les partenaires et les autres parties intéressées qui ont comparu à l'audience[7]. Au contraire, chacune de ces parties intéressées s'est opposée à la demande des Débitrices quant à la nomination du CRO et à la désignation de FTI comme contrôleur.
>
> d) Les membres de l'équipe de direction des Débitrices, y compris le CRO, n'ont pas l'expérience ou l'expertise nécessaires pour mener à bien la restructuration très complexe à laquelle elles sont confrontées.
>
> e) Le juge a de très sérieuses inquiétudes quant à la capacité de l'équipe de direction des Débitrices d'assurer la gestion financière de celles-ci. Non seulement n'a-t-elle pas été en mesure de présenter des projections financières fiables, mais elle a fait preuve d'un manque de transparence inquiétant, y compris durant l'audience, lequel a aggravé les préoccupations du juge.
>
> f) Tout en reconnaissant les préoccupations des Débitrices quant à l'indépendance de PWC, le juge mentionne ne pas les partager. À son avis, PWC et son représentant Christian Bourque ont l'expérience et l'indépendance nécessaires pour remplir la fonction de contrôleur.

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[7] À une exception près, soit Investissement Québec, qui a adopté une position neutre. De plus, il est à noter que, lors de l'audition en appel, deux groupes de parties intéressées ont exprimé leur appui à la requête pour permission d'appeler des Débitrices.

[14] De toute évidence, le juge opte pour l'approche qu'il estime la plus conforme aux objectifs remédiateurs de la LACC, y compris la maximisation du recouvrement des créanciers, la préservation de la valeur d'exploitation lorsque cela est possible, et la préservation des emplois et des communautés touchées par la détresse financière d'un débiteur[8], ce qui, en l'espèce, comprend les résidents des RPA. Son appréciation de la preuve et les conclusions qu'il en tire, y compris le choix du contrôleur, méritent déférence et les Débitrices n'ont pas réussi à démontrer, même sur une base *prima facie*, qu'il a exercé son pouvoir discrétionnaire d'une manière déraisonnable ou qu'il a commis une erreur révisable.

[15] De plus, bien que les pouvoirs accordés à PWC soient considérables dans le cadre d'une ordonnance initiale, ils n'échappent pas à la compétence du juge et, rappelons-le, sont exercés sous la surveillance continue de ce dernier. En ce qui concerne la prétention des Débitrices selon laquelle la décision équivaut à une ordonnance de liquidation ou avalise une tentative du Syndicat de réaliser ses sûretés, il convient de noter que le juge a été très clair quant au fait que vu la situation des Débitrices, une liquidation n'est pas souhaitable, ni même envisageable[9]. La restructuration de leurs affaires est donc le scénario privilégié par le juge et il a rendu une ordonnance initiale en conséquence.

[16] Par ailleurs, les Débitrices n'ont pas réussi à me convaincre que l'appel n'entravera pas indûment le déroulement du dossier. Il est évident, comme le juge l'a noté à plusieurs reprises, que le déficit opérationnel récurrent de 7 M$ par mois affaiblit la capacité des Débitrices de maintenir les services à ses quelque 15 000 résidents. Il est tout aussi évident que, même avec l'accès à un financement intérimaire d'urgence de 5 M$, le temps nécessaire à ce que l'appel sur le fond soit entendu et qu'une décision soit rendue compromettrait sérieusement et indûment les chances qu'une restructuration de leurs activités soit couronnée de succès.

[17] Puisque la permission d'appel ne sera pas accordée, il n'est pas nécessaire d'aborder les autres demandes des Débitrices.

POUR CES MOTIFS, LE SOUSSIGNÉ :

[18] **REJETTE** la requête pour permission d'appeler;

[19] **REJETTE** comme sans objet, la requête en suspension d'exécution, la requête pour ordonnance de sauvegarde et la requête pour fixation d'une audition sur une base prioritaire;

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8 Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed., Toronto, Carswell, 2013, p. 14, cité dans *9354-9186 Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, paragr. 42.

9 Jugement entrepris, paragr. 95-96.

[20] **LE TOUT** avec frais de justice.

PETER KALICHMAN, J.C.A.

Me Guy P. Martel
Me Joseph Reynaud
Me Danny Duy Vu
Me Nathalie Nouvet
Me Alexa Teofilovic
Me William Rodier-Dumais
STIKEMAN ELLIOTT
Pour les requérantes

Me Luc Morin
Me Guillaume Pierre Michaud
Me Noah Zucker
Me Arad Mojtahedi
NORTON ROSE FULBRIGHT CANADA
Pour l'intimée

Me Alain Riendeau
Me Brandon Farber
Me Luc Béliveau
Me Eliane Dupéré-Tremblay
Me Nicolas Mancini
Me Alexander Bayus
FASKEN MARTINEAU DUMOULIN
Pour PricewaterhouseCoopers inc.

Me Denis Ferland
Me Louis-Martin O'Neil
DAVIES WARD PHILLIPS & VINEBERG
Pour Revera inc.

Me Sandra Abitan
OSLER, HOSKIN & HARCOURT
Pour Société en commandite Héritage Montoni et
Groupe Montoni (1995) Division Construction inc.

Me Bernard Boucher
Me Sébastien Guy
Me Éric Stachecki
BLAKE, CASSELS & GRAYDON
Pour Investissement Québec

Me Gabriel Lavery Lepage
DAVIES WARD PHILLIPS & VINEBERG
Pour Fonds immobilier de solidarité FTQ inc.

Me Christian Lachance
DAVIES WARD PHILLIPS & VINEBERG
Pour Fédération des caisses Desjardins

Me Olivia Argento
GBV AVOCATS
Me Charles Caza
ASTELL CAZA DE SUA
Pour 10998877 Canada inc., Entrepreneur général F.D. inc., 9379-6001 Québec inc., 9377-0980 Québec inc., 9377-0998 Québec inc. 9302-8041 Québec inc., 9429-9633 Québec inc. et Gestion S. Brault inc.

Me Ari Y. Sorek
Me Roger P. Simard
DENTONS CANADA
Pour Banque Laurentienne du Canada

Me Michel Doyon
DOYON IZZI NIVOIX, AVOCATS
Co-LaBB aménagement intérieur inc., Version paysage inc., Lefebvre & Benoit s.e.c., Métrica arpenteurs géomètres inc., Développement Stratégique Groupe ABS inc., Franklin Empire inc., Ruccolo + Faubert architectes inc., Agence AIRPC inc., Rampes Alumidek inc., Fenplast inc., 9446-1753 Québec inc., 9446-5523 Québec inc., Isolation Val-Mers ltée, Électrimat ltée, Sitraco inc., ACDG Architecture inc.

Date d’audience : 24 novembre 2022

TAB D

[UNOFFICIAL TRANSLATION]

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
MONTREAL REGISTRY

No.: 500-09-030290-225
(500-11-061657-223)

DATE: November 28, 2022

PRESIDING: THE HONOURABLE PETER KALICHMAN, J.C.A.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT* OF:

GROUPE SÉLECTION INC.
9411-3594 QUÉBEC INC.
8504750 CANADA INC.
10067628 CANADA INC.
10067601 CANADA INC.
9281-8343 QUÉBEC INC.
10437042 CANADA INC.
9395-8379 QUÉBEC INC.
10437123 CANADA INC.
10437387 CANADA INC.
10442364 CANADA INC.
10442259 CANADA INC.
10442500 CANADA INC.
10442437 CANADA INC.
10437492 CANADA INC.
10442453 CANADA INC.
10437433 CANADA INC.
9408-3581 QUÉBEC INC.
9408-3789 QUÉBEC INC.
9650261 CANADA INC.
11349945 CANADA INC.
9357-2006 QUÉBEC INC.
9851267 CANADA INC.
9357-2014 QUÉBEC INC.
11075900 CANADA INC.

10702030 CANADA INC.
9357-2030 QUÉBEC INC.
9394-6127 QUÉBEC INC.
9399-6049 QUÉBEC INC.
9399-6072 QUÉBEC INC.
10067644 CANADA INC.
10067636 CANADA INC.
10212440 CANADA INC.
9413-5449 QUÉBEC INC.
9415-4580 QUÉBEC INC.
9409-4794 QUÉBEC INC.
9411-9252 QUÉBEC INC.
9408-6824 QUÉBEC INC.
9410-5475 QUÉBEC INC.
9245-0519 QUÉBEC INC.
10619817 CANADA INC.
9328-2887 QUÉBEC INC.
8504776 CANADA INC.
9497722 CANADA INC.
8788537 CANADA INC.
9094-8951 QUÉBEC INC.
9286861 CANADA INC.
12781948 CANADA INC.
9408-1577 QUÉBEC INC.
GESTION CH 2015 INC.
9390-8697 QUÉBEC INC.
CONCEPT HABITAT 2015 INC.
9352-0252 QUÉBEC INC.
9319-7473 QUÉBEC INC.
GROUPE RÉSEAU SÉLECTION CONSTRUCTION INC.
STRUCTURE ISO 2015 INC.
9280-2842 QUÉBEC INC.
8468834 CANADA INC.
9408-2328 QUÉBEC INC.
9408-2369 QUÉBEC INC.
9408-2401 QUÉBEC INC.
8788383 CANADA INC.
9462-9037 QUÉBEC INC.
9408-1585 QUÉBEC INC.
9408-1593 QUÉBEC INC.
9408-1601 QUÉBEC INC.
ÉBÉNISTERIE BOSCO INC.
TOITURES FD INC.
9383-3572 QUÉBEC INC.
9383-3507 QUÉBEC INC.
CONSTRUCTION DELAUMAR INC.
BMD ÉLECTRIQUE INC.

9334-9652 QUÉBEC INC.
9395-8387 QUÉBEC INC.
9395-4956 QUÉBEC INC.
9395-5094 QUÉBEC INC.
9463-6297 QUÉBEC INC.
9463-8749 QUÉBEC INC.
9851321 CANADA INC.
9650270 CANADA INC.
9387-2604 QUÉBEC INC.
APPLICANTS – Debtors/Applicants
and
SOCIÉTÉ EN COMMANDITE GROUPE SÉLECTION IMMOBILIER
SOCIÉTÉ EN COMMANDITE CORPORATION GROUPE SÉLECTION
SOCIÉTÉ EN COMMANDITE ROSEMONT
SOCIÉTÉ EN COMMANDITE INVESTISSEURS CONDOS ROSEMONT II
SOCIÉTÉ EN COMMANDITE INVESTISSEURS CONDOS LACHENAIE
SOCIÉTÉ EN COMMANDITE INVESTISSEURS LOGEMENT LACHENAIE
SOCIÉTÉ EN COMMANDITE INVESTISSEURS LACHENAIE II
SOCIÉTÉ EN COMMANDITE INVESTISSEURS LACHENAIE III
SOCIÉTÉ EN COMMANDITE INVESTISSEURS LACHENAIE IV
SOCIÉTÉ EN COMMANDITE INVESTISSEURS GATINEAU
SOCIÉTÉ EN COMMANDITE INVESTISSEURS SÉLECTION MONTMORENCY
SOCIÉTÉ EN COMMANDITE INVESTISSEURS DISTRICT DES BRASSEURS
SOCIÉTÉ EN COMMANDITE INVESTISSEURS LACHENAIE V
SOCIÉTÉ EN COMMANDITE INVESTISSEURS LACHENAIE VI
SOCIÉTÉ EN COMMANDITE INVESTISSEURS ROSEMONT III
SOCIÉTÉ EN COMMANDITE COMMANDITAIRE GROUPE SÉLECTION
SOCIÉTÉ EN COMMANDITE GS IMMOBILIER 2
SOCIÉTÉ EN COMMANDITE INVESTISSEURS CONDOS ROSEMONT
SOCIÉTÉ EN COMMANDITE RÉSIDENCE GATINEAU
SOCIÉTÉ EN COMMANDITE TOURS RIMOUSKI COMMERCIAL
SOCIÉTÉ EN COMMANDITE RIMOUSKI
SOCIÉTÉ EN COMMANDITE INVESTISSEURS REPENTIGNY
SOCIÉTÉ EM COMMANDITE RÉSEAU SÉLECTION INVESTISSEMENT
SOCIÉTÉ EN COMMANDITE INVESTISSEURS STJ
SOCIÉTÉ EN COMMANDITE INVESTISSEURS DEUX-MONTAGNES
SOCIÉTÉ EN COMMANDITE INVESTISSEURS RV
SOCIÉTÉ EN COMMANDITE RÉSIDENCE VANIER
SOCIÉTÉ EN COMMANDITE RÉSIDENCE LE JARDIN DES SOURCES
SOCIÉTÉ EN COMMANDITE INVESTISSEURS CHÂTEAUGUAY
SOCIÉTÉ EN COMMANDITE CONDOS ROSEMONT
SOCIÉTÉ EN COMMANDITE GS IMMOBILIER
SOCIÉTÉ EN COMMANDITE IMMEUBLE CHAMBLY
SÉLECTION GENERAL PARTNER L.P.
SOCIÉTÉ EN COMMANDITE GS GESTION
SOCIÉTÉ EN COMMANDITE GESTION IMMO SÉLECTION
SOCIÉTÉ EN COMMANDITE GESTION IMMO SÉLECTION SC

SOCIÉTÉ EN COMMANDITE GS DEV
SOCIÉTÉ EN COMMANDITE SÉLECTION DÉVELOPPEMENT
SOCIÉTÉ EN COMMANDITE SÉLECTION DÉVELOPPEMENT INTERNATIONAL
SOCIÉTÉ EN COMMANDITE CONDOS ROSEMONT II
SOCIÉTÉ EN COMMANDITE RÉSIDENCE VAUDREUIL
SOCIÉTÉ EN COMMANDITE RÉSIDENCE VALLEYFIELD
SOCIÉTÉ EN COMMANDITE ROSEMONT II
SOCIÉTÉ EN COMMANDITE ROSEMONT III
SOCIÉTÉ EN COMMANDITE RÉSIDENCE VICTORIAVILLE
SOCIÉTÉ EN COMMANDITE PROJET CHÂTEAUGUAY
SOCIÉTÉ EN COMMANDITE RÉSIDENCE CHICOUTIMI
SOCIÉTÉ EN COMMANDITE RÉSIDENCE INNES ROAD
SOCIÉTÉ EN COMMANDITE COMPLEXE LÉVIS ST-NICOLAS
SOCIÉTÉ EN COMMANDITE INVESTISSEURS VAUDREUIL HOOP
SOCIÉTÉ EN COMMANDITE INVESTISSEURS ST-HYACINTHE
SOCIÉTÉ EN COMMANDITE SÉLECTION MONTMORENCY
SOCIÉTÉ EN COMMANDITE DISTRICT DES BRASSEURS
SOCIÉTÉ EN COMMANDITE CONDOS LACHENAIS
SOCIÉTÉ EN COMMANDITE MIRABEL
SOCIÉTÉ EN COMMANDITE INVESTISSEUR VALLEYFIELD

APPLICANTS – Impleaded Parties

V.

NATIONAL BANK OF CANADA, in its capacity as lender and administrative agent for itself and for the Canadian Imperial Bank of Commerce, Fédération des Caisses Desjardins du Québec, Toronto Dominion Bank, Bank of Montreal, HSBC Bank Canada, Briva Finance (Équité) S.E.C. and Fiera FP Business Financing Fund, LP.

RESPONDENT – Secured Creditor/Applicant for the issuance of an Initial Order

and

PRICEWATERHOUSECOOPERS INC.

IMPLEADED PARTY – Proposed Monitor

and

REVERA INC.
MONTONI HERITAGE LIMITED PARTNERSHIP
GROUPE MONTONI (1995) DIVISION CONSTRUCTION INC.
INVESTISSEMENT QUÉBEC
FONDS IMMOBILIER DE SOLIDARITÉ FTQ INC.
FÉDÉRATION DES CAISSES DESJARDINS
10998877 CANADA INC.
ENTREPRENEUR GÉNÉRAL F.O. INC.
9379-6001 QUÉBEC INC.
9377-0980 QUÉBEC INC.
9377-0998 QUÉBEC INC.
9302-8041 QUÉBEC INC.
9429-9633 QUÉBEC INC.
GESTION S. BRAULT INC.
LAURENTIAN BANK OF CANADA
CO-LABB INTERIOR DESIGN INC.

VERSION PAYSAGE INC.
LEFEBVRE & BENOIT S.E.C.
MÉTRICA ARPENTEURS GÉOMÈTRES INC.
DÉVELOPPEMENT STATÉGIQUE GROUPE ABS INC.
FRANKLIN EMPIRE INC.
RUCCOLO + FAUBERT ARCHITECTES INC.
AGENCE AIRPC INC.
RAMPES ALUMIDEK INC.
FENPLAST INC.
9446-1753 QUÉBEC INC.
9446-5523 QUÉBEC INC.
ISOLATION VAL-MERS LTÉE
ÉLECTRIMAT LTÉE
SITRACO INC.
ACDG ARCHITECTURE INC.
IMPLEADED PARTIES

JUDGMENT

---

[1] I have before me a motion for leave to appeal a judgment rendered by the Superior Court on November 21, 2022 (the Honourable Michel A. Pinsonnault)[1], dismissing Groupe Sélection Inc.'s application for an Initial Order pursuant to the *Companies' Creditors Arrangement Act*[2] (the **CCAA)** and granting a competing application from a group of its creditors. If the leave to appeal is granted, I am also asked to suspend the provisional execution of the judgment, issue a safeguard order and set a priority date for the hearing of the appeal.

* * *

[2] Groupe Sélection describes itself as a leader in multi-residential real estate and the largest privately held company in Canada in the private seniors' residence (**RPA**) sector. It has over 3,000 employees and more than 15,000 clients, the majority of whom are seniors residing in RPAs that it owns either directly or in partnership with other entities. Groupe Sélection is also involved in a number of real estate projects that are in various stages of development.

[3] For a variety of reasons, including the COVID-19 pandemic, rising interest rates and supply chain management issues, Groupe Sélection is facing a major financial crisis. Despite the injection of $64.5 million in additional financing since April 2022, its situation has not improved. Its overall debt is approximately $1.5 billion and it has a recurring operating deficit of $7 million per month. On October 28, 2022, a syndicate of its lenders, led by the National Bank of Canada (the **Syndicate**), withdrew its financial support.

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1 *Arrangement relatif à Groupe Sélection inc.*, 2022 QCCS 4281 [judgment a quo].
2 R.S.C. (1985), ch. C-36.

[4] On November 13, 2022, 81 companies and 56 limited partnerships forming part of Groupe Sélection (collectively, the **Debtors**) filed an application under the CCAA to obtain an initial order for protection from their creditors and initiate a restructuring of their business and operations. The Debtors proposed appointing FTI Consulting Canada Inc. (**FTI**) as Monitor, naming Yanick Blanchard as Chief Restructuring Officer (**CRO**) and implementing a $50-million interim private financing.

[5] The Debtors' application is opposed by numerous creditors. Additionally, the Syndicate, which has a collective claim of $276 million, filed its own application for an initial order under the CCAA and proposed that PricewaterhouseCoopers Inc. (**PWC**) be appointed as Monitor.

[6] Faced with these competing applications, the judge issued an interim order staying all proceedings against the Debtors and their assets and proceeded immediately to hear both applications. The hearing spanned four days, involving thousands of pages of exhibits and several witnesses. The judge rendered his judgment on November 21, 2022, granting the Syndicate's application, dismissing the Debtors' application, and granting an initial order for a period of ten days.

[7] The Debtors maintain that the judgment disregards the principles underlying the CCAA by making an initial order that effectively opens the door to the liquidation of the Debtors at the hands of their creditors and deprives them of the opportunity to restructure their affairs. They also maintain that the judge broke with precedent in denying their application, without finding that the restructuring plan they intended to implement was doomed to fail. Moreover, they argue that the judge erred not only in appointing PWC as Monitor, as it lacked the necessary independence, but also in giving it exceptional powers that go well beyond those of an initial order and are similar to those generally vested in a receiver in bankruptcy matters.

* * *

[8] A judgment under the CCAA may be appealed only with the authorization provided for in section 13 of the CCAA. In order for authorization to be granted, the Debtors must establish that the proposed appeal: (i) raises an issue of importance to the practice of insolvency and restructuring; (ii) is material to this case; (iii) is *prima facie* well founded; and (iv) will not unduly impede the proceedings[3]. Each of these criteria must be satisfied for authorization to be granted[4].

[9] It is well established that such authorization is granted only sparingly[5], given the high degree of deference accorded to the decisions of judges supervising CCAA proceedings.

* * *

[10] For the following reasons, the Debtors have failed to convince me that permission should be granted in this case.

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3 *Cantore v. Nemaska Lithium Inc.*, 2022 QCCA 598, para. 8, (Moore, j.c.a.); *Papiers Gaspésia Inc., Re*, 2004 CanLII 46685 (C.A.), para. 4, (Bich, j.c.a.).

4 *Bock inc. (Arrangement relatif à)*, 2013 QCCA 851, para. 3, (Bich, j.c.a.); *Statoil Canada Ltd. (Arrangement relatif à)*, 2012 QCCA 665, para. 4, (Hilton, j.c.a.).

5 *Arrangement relatif à 9424-9356 Québec inc.*, 2022 QCCA 549, para. 5, (Fournier, j.c.a.); *Audet c. Richter Advisory Group Inc.,* 2021 QCCA 1170, para. 16, (Baudouin, j.c.a.).

[11] There is nothing to prevent a creditor rather than a debtor from applying for an initial order under the CCAA, and this is not the first time such a situation has arisen[6]. Thus, the issue is not whether the judge had the discretion to make such a ruling - which might have had some significance for the practice of restructuring had it not already been addressed - but rather whether, in the very unique circumstances of this case, the judge exercised that discretion reasonably. The Debtors maintain that he did not and that the grounds of the appeal they raise appear to be well founded.

[12] I do not agree.

[13] The reasons why the judge preferred the approach proposed by the Syndicate are set out in a considerably detailed judgment and include the following:

> (a) He rejects the "business as usual" approach proposed by the Debtors, which he describes as unreasonable, unrealistic and inequitable. In his view, the situation requires that resources be identified quickly to deal with, at the very least, recurring operational losses and this is not what the Debtors are proposing. Instead, he opts for the Syndicate's approach, which focuses on preserving what he describes as the "core business" of the Debtors and which aims to ensure that services will continue to be delivered to residents.
>
> (b) He prefers the interim financing proposed by the Syndicate to that of the Debtors, whose financing conditions are much less attractive. In this regard, he is also reassured by the openness of the Syndicate's members to increase the interim financing, if necessary.
>
> (c) The Syndicate's proposed approach, including the appointment of PWC as Monitor, is supported by the creditors, partners and other interested parties who appeared at the hearing[7]. On the contrary, each of these interested parties objected to the Debtors' request for the nomination of the CRO and the appointment of FTI as Monitor.
>
> (d) The members of the Debtors' management team, including the CRO, do not have the necessary experience or expertise to carry out the very complex restructuring they are facing.
>
> (e) The judge has very serious concerns about the ability of the Debtor's management team to manage the Debtor's finances. Not only was it unable to provide reliable financial projections, but it demonstrated a disturbing lack of transparency, including during the hearing, which compounded the judge's concerns.

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6 CCAA, sections 4 and 5; *Arrangement relatif à 9186-9297 Québec inc.,* 2022 QCCS 1707, para. 22, *Arrangement relatif à Groupe SMI inc. / SMI Group Inc.,* 2018 QCCS 5528, para. 9; *MJardin Group, Inc. (Re),* 2022 ONSC 3338, para. 21; *Miniso International Hong Kong Limited v. Migu Investments Inc.,* 2019 BCSC 1234, para. 45.

7 With one exception, namely Investissement Québec which took a neutral position. In addition, it should be noted that, at the appeal hearing, two groups of interested parties expressed their support for the Debtors' motion for leave to appeal.

(f) While acknowledging the Debtors' concerns about PWC's independence, the judge indicated that he did not share them. In his opinion, PWC and its representative Christian Bourque have the necessary experience and independence to perform the role of Monitor.

[14] Clearly, the judge is taking the approach that he believes is most consistent with the remedial objectives of the CCAA, including maximizing creditor recovery, preserving going-concern value where possible, and preserving jobs and communities affected by a debtor's financial distress[8], which, in this case, includes the residents of the RPAs. His weighing of the evidence and the conclusions he draws therefrom, including the choice of monitor, are entitled to deference and the Debtors have failed to demonstrate, even on a *prima facie* basis, that he exercised his discretion unreasonably or that he committed a reviewable error.

[15] Moreover, while the powers granted to PWC are considerable in the context of an initial order, they are not beyond the judge's jurisdiction and, it should be noted, are exercised under the judge's continuing supervision. With respect to the Debtors' contention that the decision amounts to a winding-up or that the order endorses an attempt by the Syndicate to realize on its security interests, it should be noted that the judge was very clear that given the Debtors' situation, a liquidation is not desirable or even possible. The restructuring of their affairs is therefore the judge's preferred scenario and he has made an initial order accordingly.

[16] Moreover, the Debtors were unsuccessful in convincing me that the appeal will not unduly impede the progress of the case. It is clear, as the judge has repeatedly noted, that the recurring operating deficit of $7 million per month weakens the Debtors' ability to maintain services to its approximately 15,000 residents. It is equally clear that, even with access to $5 million in emergency interim funding, the length of time it would take for the appeal on the merits to be heard and decided would seriously and unduly jeopardize the chances of a successful restructuring of their operations.

[17] Since leave to appeal will not be granted, it is not necessary to address the Debtors' other applications.

FOR THESE REASONS, THE UNDERSIGNED:

[18] **DISMISSES** the application for leave to appeal;

[19] **DISMISSES** as moot the motion for a stay of execution, the motion for a safeguard order and the motion to schedule a hearing on a priority basis;

[20] **THE WHOLE** with legal costs.

(signed) Peter Kalichmam, J.C.A.
PETER KALICHMAN, J.C.A.

Mtre. Guy P. Martel
Mtre. Joseph Reynaud

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[8] Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act,* 2nd ed., Toronto, Carswell, 2013, p. 14, cited in *9354-9186 Québec inc. v. Callidus Capital Corp.,* 2020 SCC 10, para. 42.

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Groupe Montoni (1995) Division Construction Inc.

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Hearing date: November 24, 2022

TAB 10

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walter Energy Canada Holdings, Inc. (Re),* 2016 BCSC 107

Date: 20160126
Docket: S1510120
Registry: Vancouver

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

And

In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57, as Amended

And

In the Matter of a Plan of Compromise or Arrangement of Walter Energy Canada Holdings, Inc. and the Other Petitioners Listed on Schedule "A"

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	Marc Wasserman Mary I.A. Buttery Tijana Gavric Joshua Hurwitz
Counsel for United Mine Workers of America 1974 Pension Plan and Trust:	John Sandrelli Tevia Jeffries
Counsel for Steering Committee of First Lien Creditors of Walter Energy, Inc.:	Matthew Nied
Counsel for Her Majesty the Queen in Right of the Province of British Columbia:	Aaron Welch
Counsel for Morgan Stanley Senior Funding, Inc.:	Kathryn Esaw

Counsel for KPMG Inc., Monitor:	Peter Reardon Wael Rostom Caitlin Fell
Counsel for Canada Revenue Agency:	Neva Beckie
Counsel for the United States Steel Workers, Local 1-424:	Stephanie Drake
Place and Date of Hearing and Ruling given to Parties with Written Reasons to Follow:	Vancouver, B.C. January 5, 2016
Place and Date of Written Reasons:	Vancouver, B.C. January 26, 2016

Introduction and Background

[1] On December 7, 2015, I granted an initial order in favour of the petitioners, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*").

[2] The "Walter Group" is a major exporter of metallurgical coal for the steel industry, with mines and operations in the U.S., Canada and the U.K. The petitioners comprise part of the Canadian arm of the Walter Group and are known as the "Walter Canada Group". The Canadian entities were acquired by the Walter Group only recently in 2011.

[3] The Canadian operations principally include the Brule and Willow Creek coal mines, located near Chetwynd, B.C., and the Wolverine coal mine, near Tumbler Ridge, B.C. The mine operations are conducted through various limited partnerships. The petitioners include the Canadian parent holding company and the general partners of the partnerships. Given the complex corporate structure of the Walter Canada Group, the initial order also included stay provisions relating to the partnerships: *Lehndorff General Partner Ltd. (Re)* (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.); *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 21.

[4] The timing of the Canadian acquisition could not have been worse. Since 2011, the market for metallurgical coal has fallen dramatically. This in turn led to financial difficulties in all three jurisdictions in which the Walter Group operated. The three Canadian mines were placed in care and maintenance between April 2013 and June 2014. The mines remain in this state today, at an estimated annual cost in excess of $16 million. Similarly, the U.K. mines were idled in 2015. In July 2015, the U.S. companies in the Walter Group filed and sought creditor protection by filing a proceeding under Chapter 11 of the U.S. *Bankruptcy Code*. It is my understanding that the U.S. entities have coal mining operations in Alabama and West Virginia.

[5] From the time of the granting of the initial order, it was apparent that the outcome of the U.S. proceedings would have a substantial impact on the Walter

Canada Group. A sales process completed in the U.S. proceeding is anticipated to result in a transfer of the U.S. assets to a stalking horse bidder sometime early this year. This is significant because the U.S. companies have historically supported the Canadian operations with funding and provided essential management services. This is a relevant factor in terms of the proposed relief, as I will discuss below.

[6] The Walter Canada Group faces various significant contingent liabilities. The various entities are liable under a 2011 credit agreement of approximately $22.6 million in undrawn letters of credit for post-mining reclamation obligations. Estimated reclamation costs for all three mines exceed this amount. Further obligations potentially arise with respect to the now laid-off employees of the Wolverine mine, who are represented by the United Steelworkers, Local 1-424 (the "Union"). If these employees are not recalled before April 2016, the Wolverine partnership faces an estimated claim of $11.3 million. As I will discuss below, an even more significant contingent liability has also recently been advanced.

[7] This anticipated "parting of the ways" as between the U.S. and Canadian entities in turn prompted the filing of this proceeding, which is intended to provide the petitioners with time to develop a restructuring plan. The principal goal of that plan, as I will describe below, is to complete a going concern sale of the Canadian operations as soon as possible. Fortunately, as of early December 2015, the Walter Canada Group has slightly in excess of US$40.5 million in cash resources to fund the restructuring efforts. However, ongoing operating costs remain high and are now compounded by the restructuring costs.

[8] As was appropriate, the petitioners did not seek extensive orders on December 7, 2015, given the lack of service on certain major stakeholders. A stay was granted on that date, together with other ancillary relief. KPMG Inc. was appointed as the monitor (the "Monitor").

[9] The petitioners now seek relief that will set them on a path to a potential restructuring; essentially, an equity and/or debt restructuring or alternatively, a sale and liquidation of their assets. That relief includes approving a sale and solicitation

process and the appointment of further professionals to manage that process and complete other necessary management functions. They also seek a key employee retention plan. Finally, the petitioners seek an extension of the stay to early April 2016.

[10] For obvious reasons, the financial and environmental issues associated with the coal mines loom large in this matter. For that reason, the Walter Canada Group has engaged in discussions with the provincial regulators, being the B.C. Ministry of Energy and Mines and the B.C. Ministry of the Environment, concerning the environmental issues and the proposed restructuring plan. No issues arise from the regulators' perspective at this time in terms of the relief on this application. Other stakeholders have responded to the application and contributed to the final terms of the relief sought.

[11] The stakeholders appearing on this application are largely supportive of the relief sought, save for two.

[12] Firstly, the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Pension Plan") opposes certain aspects of the relief sought as to who should be appointed to conduct the sales process.

[13] The status of the 1974 Pension Plan arises from somewhat unusual circumstances. One of the U.S. entities, Jim Walter Resources, Inc. ("JWR") is a party to a collective bargaining agreement with the 1974 Pension Plan (the "CBA"). In late December 2015, the U.S. bankruptcy court issued a decision that allowed JWR to reject the CBA. The court also ordered that the sale of the U.S. assets would be free and clear of any liabilities under the CBA. As a result, the 1974 Pension Plan has filed a proof of claim in the U.S. proceedings advancing a contingent claim against JWR with respect to a potential "withdrawal liability" under U.S. law of approximately US$900 million. The U.S. law in question is the *Employee Retirement Income Security Act of 1974*, 29 USC § 101, as amended, which is commonly referred to as "*ERISA*".

[14] The 1974 Pension Plan alleges that it is only a matter of time before JWR formally rejects the CBA. In that event, the 1974 Pension Plan contends that *ERISA* provides that all companies under common control with JWR are jointly and severally liable for this withdrawal liability, and that some of the entities in the Walter Canada Group come within this provision.

[15] It is apparent at this time that neither the Walter Canada Group nor the Monitor has had an opportunity to assess the 1974 Pension Plan's contingent claim. No claims process has even been contemplated at this time. Nevertheless, the standing of the 1974 Pension Plan to make submissions on this application is not seriously contested.

[16] Secondly, the Union only opposes an extension of the stay of certain proceedings underway in this court and the Labour Relations Board in relation to some of its employee claims, which it wishes to continue to litigate.

[17] At the conclusion of the hearing, I granted the orders sought by the petitioners, with reasons to follow. Hence, these reasons.

The Sale and Investment Solicitation Process ("SISP")

[18] The proposed SISP has been developed by the Walter Canada Group in consultation with the Monitor. By this process, bidders may submit a letter of intent or bid for a restructuring, recapitalization or other form of reorganization of the business and affairs of the Walter Canada Group as a going concern, or a purchase of any or all equity interests held by Walter Energy Canada. Alternatively, any bid may relate to a purchase of all or substantially all, or any portion of the Walter Canada Group assets (including the Brule, Willow Creek and Wolverine mines).

[19] It is intended that the SISP will be led by a chief restructuring officer (the "CRO"), implemented by a financial advisor (both as discussed below) and supervised by the Monitor.

[20] Approvals of SISPs are a common feature in *CCAA* restructuring proceedings. The Walter Canada Group refers to *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750. At para. 6, Brown J. (as he then was) stated that in reviewing a proposed sale process, the court should consider:

> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

[21] Although the court in *CCM Master Qualified Fund* was considering a sales process proposed by a receiver, I agree that these factors are also applicable when assessing the reasonableness of a proposed sales process in a *CCAA* proceeding: see *PCAS Patient Care Automation Services Inc. (Re)*, 2012 ONSC 2840 at paras. 17-19.

[22] In this case, the proposed timelines would see a deadline of March 18 for letters of intent, due diligence thereafter with a bid deadline of May 27 and a target closing date of June 30, 2016. In my view, the timeline is reasonable, particularly with regard to the need to move as quickly as possible to preserve cash resources pending a sale or investment; or, in the worst case scenario, to allow the Walter Canada Group to close the mines permanently. There is sufficient flexibility built into the SISP to allow the person conducting it to amend these deadlines if the circumstances justify it.

[23] The SISP proposed here is consistent with similar sales processes approved in other Canadian insolvency proceedings. In addition, I agree with the Monitor's assessment that the SISP represents the best opportunity for the Walter Canada Group to successfully restructure as a going concern, if such an opportunity should arise.

[24] No stakeholder, including the 1974 Pension Plan, opposed this relief. All concerned recognize the need to monetize, if possible, the assets held by the Walter Canada Group. I conclude that the proposed SISP is reasonable and it is approved.

Appointment of Financial Advisor and CRO

[25] The more contentious issues are who should conduct the SISP and manage the operations of the Walter Canada Group pending a transaction and what their compensation should be.

[26] The Walter Canada Group seeks the appointment of a financial advisor and CRO to assist with the implementation of the SISP.

[27] In restructuring proceedings it is not unusual that professionals are engaged to advance the restructuring where the existing management is either unable or unwilling to bring the required expertise to bear. In such circumstances, courts have granted enhanced powers to the monitor; otherwise, the appointment of a CRO and/or financial advisor can be considered.

[28] A consideration of this issue requires some context in terms of the current governance status of the Walter Canada Group. At present, there is only one remaining director, who is based in West Virginia. The petitioners' counsel does not anticipate his long-term involvement in these proceedings and expects he will resign once the U.S. sale completes. Similarly, the petitioners have been largely instructed to date by William Harvey. Mr. Harvey is the executive vice-president and chief financial officer of Walter Energy Canada Holdings, Inc., one of the petitioners. He lives in Birmingham, Alabama. As with the director, the petitioners' counsel expects him to resign in the near future.

[29] The only other high level employee does reside in British Columbia, but his expertise is more toward operational matters, particularly regarding environmental and regulatory issues.

[30] Accordingly, there is a legitimate risk that the Walter Canada Group ship may become rudderless in the midst of these proceedings and most significantly, in the midst of the very important sales and solicitation process. This risk is exacerbated by the fact that the management support traditionally provided by the U.S. entities will not be provided after the sale of the U.S. assets. Significant work must be done to effect a transition of those shared services in order to allow the Canadian operations to continue running smoothly. It is anticipated that the CRO will play a key role in assisting in this transition of the shared services.

[31] In these circumstances, I am satisfied that professional advisors are not just desirable, but indeed necessary, in order to have a chance for a successful restructuring. Both appointments ensure that the SISP will be implemented by professionals who will enhance the likelihood that it generates maximum value for the Walter Canada Group's stakeholders. In addition, the appointment of a CRO will allow the Canadian operations to continue in an orderly fashion, pending a transaction.

[32] The proposal is to retain PJT Partners LP ("PJT") as a financial advisor and investment banker to implement the SISP. PJT is a natural choice given that it had already been retained in the context of the U.S. proceedings to market the Walter Group's assets, which of course indirectly included the Walter Canada Group's assets. As such, PJT is familiar with the assets in this jurisdiction, knowledge that will no doubt be of great assistance in respect of the SISP.

[33] In addition, the proposal is to retain BlueTree Advisors Inc. as the CRO, by which it would provide the services of William E. Aziz. Mr. Aziz is a well-known figure in the Canadian insolvency community; in particular, he is well known for having provided chief restructuring services in other proceedings (see for example *Mobilicity Group (Re)*, 2013 ONSC 6167 at para. 17). No question arises as to his extensive qualifications to fulfil this role.

[34] The materials as to how Mr. Aziz was selected were somewhat thin, which raised some concerns from the 1974 Pension Plan as to the appropriateness of his

involvement. However, after submissions by the petitioners' counsel, I am satisfied that there was a thorough consideration of potential candidates and their particular qualifications to undertake what will no doubt be a time-consuming and complex assignment. In that regard, I accept the recommendations of the petitioners that Mr. Aziz is the most qualified candidate.

[35] The Monitor was involved in the process by which PJT and BlueTree/Mr. Aziz were selected. It has reviewed both proposals and supports that both PJT and BlueTree are necessary appointments that will result in the Walter Canada Group obtaining the necessary expertise to proceed with its restructuring efforts. In that sense, such appointments fulfill the requirements of being "appropriate", in the sense that that expertise will assist the debtor in achieving the objectives of the *CCAA*: see s. 11; *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd*., 2007 SKQB 121 at para. 19.

[36] The 1974 Pension Plan does not mount any serious argument against the need for such appointments, other than to note that the costs of these retainers will result in a very expensive process going forward. The matter of PJT and the CRO's compensation was the subject of some negative comment by the 1974 Pension Plan. However, the 1974 Pension Plan did not suggest any alternate way of proceeding with the SISP and the operations generally. When pressed by the Court on the subject, the 1974 Pension Plan acknowledged that time was of the essence in implementing the SISP and it did not contend that a further delay was warranted to canvas other options.

[37] PJT is to receive a monthly work fee of US$100,000, although some savings are achieved since this amount will not be charged until the completion of the U.S. sale. In addition, PJT will receive a capital raising fee based on the different types of financing that might be arranged. Lastly, PJT is entitled to a transaction or success fee, based on the consideration received from any transaction.

[38] At the outset of the application, the proposed compensation for the CRO was similar to that of PJT. The CRO was to obtain a monthly work fee of US$75,000. In

addition, the CRO was to receive a transaction or success fee based on the consideration received from any transaction. After further consideration by the petitioners and BlueTree, this proposed compensation was subsequently renegotiated so as to limit the success fee to $1 million upon the happening of a "triggering event" (essentially, a recapitalization, refinancing, acquisition or sale of assets or liabilities).

[39] To secure the success fees of PJT and the CRO, the Walter Canada Group seeks a charge of up to a maximum of $10 million, with each being secured to a limit of half that amount. Any other fees payable by the Walter Canada Group to PJT and the CRO would be secured by the Administration Charge granted in the initial order.

[40] The jurisdiction to grant charges for such professional fees is found in s. 11.52 of the *CCAA*:

> 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.

[41] In *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145 at para. 22, Justice Wilton-Siegel commented on the necessity of such a charge in a restructuring, as it is usually required to ensure the involvement of these professionals and achieve the best possible outcome for the stakeholders. I concur in that sentiment here, as the involvement of PJT and BlueTree is premised on this charge being granted.

[42] In *Canwest Publishing Inc.*, 2010 ONSC 222 at para. 54, Justice Pepall (as she then was) set out a non-exhaustive list of factors to consider when determining

whether the proposed compensation is appropriate and whether charges should be granted for that compensation:

(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.

[43] I am satisfied that the Walter Canada Group's assets and operations are significantly complex so as to justify both these appointments and the proposed compensation. I have already referred to the significant regulatory and environmental issues that arise. In addition, relevant employment issues are already present. Any transaction relating to these assets and operations will be anything but straightforward.

[44] The factors relating to the proposed role of the professionals and whether there is unwarranted duplication can be addressed at the same time. As conceded by the petitioners' and Monitor's counsel, there will undoubtedly be some duplication with the involvement of the Monitor, PJT and the CRO. However, the issue is whether there is *unwarranted* duplication of effort. I am satisfied that the process has been crafted in a fashion that recognizes the respective roles of these professionals but also allows for a coordinated effort that will assist each of them in achieving their specific goals. Each has a distinct focus and I would expect that their joint enterprise will produce a better result overall.

[45] Any consideration of compensation will inevitably be driven by the particular facts that arise in the proceedings in issue. Even so, I have not been referred to any material that indicates that the proposed compensation and charge in favour of PJT and the CRO are inconsistent with compensation structures and protections approved in other similarly complex insolvency proceedings. In that regard, I accept

the petitioners' submissions that the task ahead justifies both the amount of the fees to be charged and the protections afforded by the charge. In short, I find that the proposed compensation is fair and reasonable in these circumstances.

[46] The secured creditors likely to be affected by the charges for PJT and the CRO's fees have been given notice and do not oppose the relief being sought.

[47] Finally, the Monitor is of the view that the agreed compensation of PJT and the CRO and the charge in their favour are appropriate.

[48] In summary, all circumstances support the relief sought. Accordingly, I conclude that it is appropriate to appoint the CRO and approve the engagement of PJT on the terms sought. In addition, I grant a charge in favour of PJT and the CRO to a maximum of $10 million to secure their compensation beyond the monthly work fees, subject to the Administration Charge, the Director's Charge and the KERP Charge (as discussed below).

Key Employee Retention Plan ("KERP")

[49] The Walter Canada Group also seeks approval of a KERP, for what it describes as a "key" employee needed to maintain the Canadian operations while the SISP is being conducted. In addition, Mr. Harvey states that this employee has specific information which the CRO, PJT and the Monitor will need to draw on during the implementation of the SISP.

[50] The detailed terms of the KERP are contained in a letter attached to Mr. Harvey's affidavit #3 sworn December 31, 2015. In the course of submissions, the Walter Canada Group sought an order to seal this affidavit, on the basis that the affidavit and attached exhibit contained sensitive information, being the identity of the employee and the compensation proposed to be paid to him.

[51] I was satisfied that a sealing order should be granted with respect to this affidavit, based on the potential disclosure of this personal information to the public: see *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at

para. 53; *Sahlin v. The Nature Trust of British Columbia*, 2010 BCCA 516 at para. 6. A sealing order was granted on January 5, 2016.

[52] The proposed KERP must be considered in the context of earlier events. This individual was to receive a retention bonus from the U.S. entities; however, this amount is now not likely to be paid. In addition, just prior to the commencement of these proceedings, this person was given a salary increase to reflect his additional responsibilities, including those arising from the loss of support and the shared services from the U.S. entities. This new salary level has not been disclosed to the court or the stakeholders.

[53] The Walter Canada Group has proposed that this employee be paid a retention bonus on the occurrence of a "triggering event", provided he remains an active employee providing management and other services. The defined triggering events are such that the retention bonus is likely to be paid whatever the outcome might be. In addition, to secure the payment of the KERP to this employee, Walter Energy Canada seeks a charge up to the maximum amount of the retention bonus.

[54] The amount of the retention bonus is large. It has been disclosed in the sealed affidavit but has not been disclosed to certain stakeholders, including the 1974 Pension Plan. The Monitor states in its report:

> The combination of the salary increase and proposed retention bonus … were designed to replace the retention bonus previously promised to the KERP Participant by Walter Energy U.S.

[55] I did not understand the submissions of the 1974 Pension Plan to be that the granting of a KERP for this employee was inappropriate. Rather, the concern related to the amount of the retention bonus, which is to be considered in the context of the earlier salary raise. At the end of the day, the 1974 Pension Plan was content to leave a consideration of the level of compensation to the Court, given the sealing of the affidavit.

[56] The authority to approve a KERP is found in the courts' general statutory jurisdiction under s. 11 of the *CCAA* to grant relief if "appropriate": see *U.S. Steel Canada* at para. 27.

[57] As noted by the court in *Timminco Ltd. (Re)*, 2012 ONSC 506 at para. 72, KERPs have been approved in numerous insolvency proceedings, particularly where the retention of certain employees was deemed critical to a successful restructuring.

[58] Factors to be considered by the court in approving a KERP will vary from case to case, but some factors will generally be present. See for example, *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); and *U.S. Steel Canada* at paras. 28-33.

[59] I will discuss those factors and the relevant evidence on this application, as follows:

a) Is this employee important to the restructuring process?: In its report, the Monitor states that this employee is the most senior remaining executive in the Walter Canada Group, with extensive knowledge of its assets and operations. He was involved in the development of the Wolverine mine and has extensive knowledge of all three mines. He also has strong relationships in the communities in which the mines are located, with the Group's suppliers and with the regulatory authorities. In that sense, this person's expertise will enhance the efforts of the other professionals to be involved, including PJT, the CRO and the Monitor: *U.S. Steel* at para. 28;

b) Does the employee have specialized knowledge that cannot be easily replaced?: I accept that the background and expertise of this employee is such that it would be virtually impossible to replace him if he left the employ of the Walter Canada Group: *U.S. Steel* at para. 29;

c) Will the employee consider other employment options if the KERP is not approved?: There is no evidence here on this point, but I presume

that the KERP is more a prophylactic measure, rather than a reactionary one. In any event, this is but one factor and I would adopt the comments of Justice Newbould in *Grant Forest Products* at paras. 13-15, that a "potential" loss of this person's employment is a factor to be considered;

d) Was the KERP developed through a consultative process involving the Monitor and other professionals?: The Monitor has reviewed the proposed KERP, but does not appear to have been involved in the process. Mr. Harvey confirms the business decision of the Walter Canada Group to raise this employee's salary and propose the KERP. The business judgment of the board and management is entitled to some deference in these circumstances: *Grant Forest Products* at para. 18; *U.S. Steel Canada* at para. 31; and

e) Does the Monitor support the KERP and a charge?: The answer to this question is a resounding "yes". As to the amount, the Monitor notes that the amount of the retention bonus is at the "high end" of other KERP amounts of which it is aware. However, the Monitor supports the KERP amount even in light of the earlier salary increase and after considering the value and type of assets under this person's supervision and the critical nature of his involvement in the restructuring. As this Court's officer, the views of the Monitor are also entitled to considerable deference by this Court: *U.S. Steel* at para. 32.

[60] In summary, the petitioners' counsel described the involvement of this individual in the *CCAA* restructuring process as "essential" or "critical". These sentiments are echoed by the Monitor, who supports the proposed KERP and charge to secure it. The Monitor's report states that this individual's ongoing employment will be "highly beneficial" to the Walter Canada Group's restructuring efforts, and that this employee is "critical" to the care and maintenance operations at

the mines, the transitioning of the shared services from the U.S. and finally, assisting with efforts under the SISP.

[61] What I take from these submissions is that a loss of this person's expertise either now or during the course of the *CCAA* process would be extremely detrimental to the chances of a successful restructuring. In my view, it is more than evident that there is serious risk to the stakeholders if this person does not remain engaged in the process. Such a result would be directly opposed to the objectives of the *CCAA*. I find that such relief is appropriate and therefore, the KERP and charge to secure the KERP are approved.

Cash Collateralization / Intercompany Charge

[62] Pursuant to the initial order, the Walter Canada Group was authorized and directed to cash collateralize all letters of credit secured by the 2011 credit agreement within 15 days of any demand to do so from the administrative agent, Morgan Stanley Senior Funding Inc. ("Morgan Stanley"). This order was made on the basis of representations by the Monitor's counsel that it had obtained a legal opinion that the security held by Morgan Stanley was valid and enforceable against the Walter Canada Group.

[63] On December 9, 2015, Morgan Stanley demanded the cash collateralization of approximately $22.6 million of undrawn letters of credit. On December 21, 2015, Morgan Stanley requested that the Walter Canada Group enter into a cash collateral agreement (the "Cash Collateral Agreement") to formalize these arrangements.

[64] The Walter Canada Group seeks the approval of the Cash Collateral Agreement, which provides for the establishment of a bank account containing the cash collateral and confirms Morgan Stanley's pre-filing first-ranking security interest in the cash in the bank account. The cash collateralization is intended to relate to letters of credit issued on behalf of Brule Coal Partnership, Walter Canadian Coal Partnership, Wolverine Coal Partnership and Willow Creek Coal Partnership. However, only the Brule Coal Partnership has sufficient cash to collateralize all these letters of credit.

[65] Accordingly, the Walter Canada Group seeks an intercompany charge in favour of Brule Coal Partnership, and any member of the Walter Canada Group, to the extent that a member of the Walter Canada Group makes any payment or incurs or discharges any obligation on behalf of any other member of the Walter Canada Group in respect of obligations under the letters of credit. The intercompany charge is proposed to rank behind all of the other court-ordered charges granted in these proceedings, including the charges for PJT and the CRO and the KERP.

[66] No objection is raised in respect of this relief. The Monitor is of the view that the intercompany charge is appropriate.

[67] In my view, this relief is simply a formalization of the earlier authorization regarding the trusting up of these contingent obligations. On that basis, I approve the Cash Collateral Agreement. I also approve the intercompany charge in favour of the Brule Coal Partnership, on the basis that it is necessary to preserve the *status quo* as between the various members of the Walter Canada Group who will potentially benefit from the use of this Partnership's funds. Such a charge will, as stated by the Monitor, protect the interests of creditors as against the individual entities within the Walter Canada Group.

Stay Extension

[68] In order to implement the SISP, and further its restructuring efforts in general, the Walter Canada Group is seeking an extension of the stay and other relief granted in the initial order until April 5, 2016.

[69] Section 11.02(2) and (3) of the *CCAA* authorizes the court to make an order extending a stay of proceedings granted in the initial application. In this case, the evidence, together with the conclusions of the Monitor, support that an extension is appropriate and that the petitioners are acting in good faith and with due diligence. No stakeholder has suggested otherwise.

[70] As noted above, it is anticipated that the Walter Canada Group will have sufficient liquidity to continue operating throughout the requested stay period.

[71] Further, as the Phase 1 deadline in the SISP is March 18 2016, an extension of the stay until April 5, 2016 will provide sufficient time for PJT to solicit, and the CRO (in consultation with the Monitor and PJT) to consider, any letters of intent. At that time, the process may continue to Phase 2 of the SISP, if the CRO, in consultation with the Monitor and PJT, deems it advisable. In any event, at the time of the next court date, there will be a formal update to the court and the stakeholders on the progress under the SISP.

[72] The only issue relating to the extension of the stay arises from the submissions of the Union, who represents the employees at the Wolverine mine owned and operated by the Wolverine Coal Partnership ("Wolverine LP"). The Union wishes to continue with certain outstanding legal proceedings outstanding against Wolverine LP, as follows:

a) In June 2015, the B.C. Labour Relations Board (the "Board") found that Wolverine LP was in breach of s. 54 of the *Labour Relations Code,* R.S.B.C. 1996, c. 224 (the "*Code*"). The Board ordered Wolverine LP to pay $771,378.70 into trust by way of remedy. This was estimated to be the amount of damages owed by Wolverine LP, but the Union took the position that further amounts are owed. In any event, this amount was paid and is currently held in trust;

b) In November 2015, Wolverine LP filed a proceeding in this court seeking a judicial review of the Board's decision on the s. 54 issue. As a result, the final determination of the damages arising from the *Code* breach has not yet occurred and may never occur if Wolverine LP succeeds in its judicial review; and

c) Following layoffs in April 2014, the Union claimed that a "northern allowance" was payable by Wolverine LP to the employees, including those on layoff. This claim was rejected at arbitration, and upheld on review at the Board. In February 2015, the Union filed a proceeding in this court seeking a judicial review of the Board's decision.

[73] The Union's counsel has referred me to my earlier decision in *Yukon Zinc Corporation (Re)*, 2015 BCSC 1961. There, I summarized the principles that govern applications by a creditor to lift the stay of proceedings to litigate claims:

> [26] There is also no controversy concerning the principles which govern applications by creditors under the *CCAA* to lift the stay of proceedings to litigate claims in other courts or forums, other than by the procedures in place in the restructuring proceedings:
>
> a) the lifting of the stay is discretionary: *Canwest Global Communications Corp.*, 2011 ONSC 2215, at paras. 19, 27;
>
> b) there are no statutory guidelines and the applicant faces a "very heavy onus" in making such an application: *Canwest Global Communications Corp. (Re)* (2009), 61 C.B.R. (5th) 200, at para. 32, 183 A.C.W.S. (3d) (Ont. S.C.J.) ("*Canwest* (2009)"), as applied in *Azure Dynamics Corporation (Re)*, 2012 BCSC 781, at para. 5 and *505396 B.C. Ltd. (Re)*, 2013 BCSC 1580, at para. 19;
>
> c) there are no set circumstances where a stay will or will not be lifted, although examples of situations where the courts have lifted stay orders are set out in *Canwest* (2009) at para. 33;
>
> d) relevant factors will include the status of the *CCAA* proceedings and what impact the lifting of the stay will have on the proceedings. The court may consider whether there are sound reasons for doing so consistent with the objectives of the *CCAA*, including a consideration of the relative prejudice to parties and, where relevant, the merits of the proposed action: *Canwest* (2009) at para. 32;
>
> e) particularly where the issue is one which is engaged by a claims process in place, it must be remembered that one of the objectives of the *CCAA* is to promote a streamlined process to determine claims that reduces expense and delay; and
>
> f) as an overarching consideration, the court must consider whether it is in the interests of justice to lift the stay: *Canwest* (2009); *Azure Dynamics* at para. 28.

[74] I concluded that the Union had not met the "heavy onus" on it to justify the lifting of the stay to allow these various proceedings to continue. My specific reasons are:

a) The Union argues that the materials are essentially already assembled and that these judicial reviews can be scheduled for short chambers matters. As such, the Union argues that there is "minimal prejudice" to Wolverine LP. While this may be so, proceeding with these matters will

inevitably detract both managerial and legal focus from the primary task at hand, namely to implement the SISP, and as such, potentially interfere with the restructuring efforts;

b) The Union argues that any purchaser of Wolverine LP's mine will inherit outstanding employee obligations pursuant to the *Code*. Accordingly, the Union argues that it will be more attractive to a buyer for the mine to have all outstanding employee claims resolved. Again, while this may come to pass, such an argument presupposes an outcome that is anything less than clear at this time. Such a rationale is clearly premature;

c) The Union argues that it is unable to distribute the $771,378.70 to its members until Wolverine LP's judicial review is addressed. Frankly, I see this delay as the only real prejudice to the Union members. However, on the other hand, one might argue that the Union members are in a favourable position with these monies being held in trust as opposed to being unsecured creditors of Wolverine. In any event, the Union's claim to these monies has not yet been determined and arises from a dispute that dates back to April 2014. Therefore, there is no settled liability that would allow such payment to be made; and

d) The Union claims that these matters must be determined "in any event" and that they should be determined "sooner rather than later". However, the outcome of the SISP may significantly affect what recovery any creditor may hope to achieve in this restructuring. In the happy circumstance where there will be monies to distribute, I expect that a claims process will be implemented to determine valid claims, not only in respect of the Union's claims, but all creditors.

[75] In summary, there is nothing to elevate the Union's claims such that it is imperative that they be determined now. There is nothing to justify the distraction and expense of proceeding with these actions to the detriment of the restructuring

efforts. If it should come to pass that monies will be distributed to creditors, such as the Union, then I expect that the usual claims process will be implemented to decide the validity of those claims.

[76] In the meantime, if it becomes necessary to determine the validity of these claims quickly (such as to clarify potential successor claims for a purchaser), the Union will be at liberty to renew its application to lift the stay for that purpose.

[77] Accordingly, I grant an extension of the stay of proceedings and other ancillary relief until April 5, 2016.

"Fitzpatrick J."

TAB 11

COURT FILE NO.: CV-09-8241-OOCL
DATE: 20091013

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

R.S.C. 1985, C-36. AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

BEFORE: PEPALL J.

COUNSEL: *Lyndon Barnes, Edward Sellers and Jeremy Dacks* for the Applicants
Alan Merskey for the Special Committee of the Board of Directors
David Byers and Maria Konyukhova for the Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett and Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for the Asper Family
Peter H. Griffin and Peter J. Osborne for the Management Directors and Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia,
Steve Weisz for CIT Business Credit Canada Inc.

REASONS FOR DECISION

Relief Requested

[1] Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act.*[1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by

[1] R.S.C. 1985, c. C. 36, as amended

the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

[2] The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

[3] No one appearing opposed the relief requested.

Backround Facts

[4] Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

[5] As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

[6] Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

[7] Canwest Global is a public company continued under the *Canada Business Corporations Act*[2]. It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

[8] The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

[9] Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

[10] In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six

[2] R.S.C. 1985, c.C.44.

occasions. On March 15, 2009, it failed to make an interest payment of US$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to $75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

[11] Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of $4.855 billion and total consolidated liabilities of $5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling $2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately $954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by $272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by $253 million or 47%. It reported a consolidated net loss of $1.578 billion compared to $22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by $8 million or 4% in the third quarter of 2009 and operating profit was $21 million compared to $39 million in the same period in 2008.

[12] The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

[13] On September 15, 2009, CMI failed to pay US$30.4 million in interest payments due on the 8% senior subordinated notes.

[14] On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of $75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to $23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of $100 million.

[15] Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

[16] The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately $634 million were realized. The proceeds were applied to

fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of $10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US$393.25 million.

[17] In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of $187.3 million and an unsecured promissory note in the principal amount of $430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

[18] Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

[19] The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual “pre-packaged” recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a

support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

[20] CMI has agreed to maintain not more than $2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

[21] The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of $13.3 million as at the last valuation date and a wind up deficiency of $32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

[22] The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

[23] I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having

reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

[24] This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

(a) Threshhold Issues

[25] Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*[3] definition and under the more expansive definition of insolvency used in *Re Stelco*[4]. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

[3] R.S.C. 1985, c. B-3, as amended.
[4] (2004), 48 C.B.R. (4th) 299; leave to appeal refused 2004 CarswellOnt 2936 (C.A.).

[26] Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

[27] Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

[28] The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

[29] While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Re Lehndorff General Partners Ltd.*[5]; *Re Smurfit-Stone Container Canada Inc.*[6]; and *Re Calpine Canada Energy Ltd.*[7]. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

[5] (1993), 9 B.L.R. (2d) 275.
[6] [2009] O.J. No. 349.
[7] (2006), 19 C.B.R. (5th) 187.

[30] Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Re Cadillac Fairview*[8] and *Re Global Light Telecommunications Ltd.*[9]

(c) DIP Financing

[31] Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

> (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.

[8] (1995), 30 C.B.R. (3d) 29.
[9] (2004), 33 B.C.L.R. (4th) 155.

> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (*a*) the period during which the company is expected to be subject to proceedings under this Act;
>
> (*b*) how the company's business and financial affairs are to be managed during the proceedings;
>
> (*c*) whether the company's management has the confidence of its major creditors;
>
> (*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (*e*) the nature and value of the company's property;
>
> (*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

[32] In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

[33] Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to

$100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately $10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

[34] Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is $10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

[35] Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge

is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

[36] For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

[37] While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

> (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.

[38] I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

[39] As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to $15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

[40] Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

[41] The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

> (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 a person to be a critical supplier to the company if the court is satisfied that

> the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> (2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.
>
> (4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[42] Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

[43] In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the

Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

[44] The applicants also seek a directors' and officers' ("D &O") charge in the amount of $20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank pari passu with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first $85 million payable under the secured intercompany note.

[45] Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

> (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
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

[46] I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

[47] The proposed Monitor reports that the amount of $20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for $30 million in coverage and $10 million in excess coverage for a total of $40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

[48] The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *Re General Publishing Co.*[10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor

believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

[49] Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of $5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

[50] Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Re Grant Forest*[11] have all been met and I am persuaded that the relief in this regard should be granted.

[51] The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing

[10] (2003), 39 C.B.R. (4th) 216.

orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*[12]provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

[52] In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

[53] The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

[11] [2009] O.J. No. 3344. That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.
[12] [2002] 2 S.C.R. 522.

[54] CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

[55] The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

[56] Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

[57] Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from $1000 to $5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

[58] This is a “pre-packaged” restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

[59] I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor’s report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

[60] Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

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Pepall J.

Released: October 13, 2009

TAB 12

COURT OF APPEAL FOR ONTARIO

CITATION: Crystallex (Re), 2012 ONCA 404
DATE: 20120613
DOCKET: C55434 & C55435

O'Connor A.C.J.O., Blair and Hoy JJ.A.

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 Crystallex International Corporation

Richard B. Swan, S. Richard Orzy, Derek J. Bell and Emrys Davis, for the appellant Computershare Trust Company of Canada

Andrew J.F. Kent, Markus Koehnen and Jeffrey Levine, for the respondent Crystallex International Corporation

Barbara L. Grossman, for Tenor Capital Management Company, L.P. and Affiliates

Robert Frank, for Forbes & Manhattan Inc. and Aberdeen International Inc.

David Byers, for the Monitor Ernst & Young Inc.

Heard: May 11, 2012

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice dated January 20, 2012, with reasons reported at 2012 ONSC 538, and from the orders of Justice Frank J.C. Newbould of the Superior Court of Justice dated April 16, 2012, with reasons reported at 2012 ONSC 2125.

Hoy J.A.:

I. OVERVIEW

[1] The primary issue in these appeals is the scope of financing the supervising judge can or should approve, without the sanction of creditors, while

a company is under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

[2] The respondent Crystallex International Corporation ("Crystallex") is a Canadian mining company. Its principal asset was the right to develop Las Cristinas in Venezuela, which is one of the largest undeveloped gold deposits in the world. Crystallex obtained this right through a contract with the Corporacion Venezolana de Guayana (the "CVG"), a state-owned Venezuelan corporation. On February 3, 2011, after Crystallex spent over $500 million on developing Las Cristinas, the CVG sent Crystallex a letter to "unilaterally rescind" the contract for reasons of "expediency and convenience". There is no suggestion in these proceedings that the rescission was due to any mismanagement by Crystallex.

[3] As a result of the cancellation of the contract, Crystallex was unable to pay its $100 million in senior 9.375 per cent notes due December 23, 2011 (the "Notes"). It sought and, on December 23, 2011 obtained, protection under the CCAA.

[4] At present, Crystallex's only asset of significance is an arbitration claim for US $3.4 billion against the government of Venezuela in relation to the cancellation of the contract. The arbitration claim is the "pot of gold" in the CCAA proceeding.

[5] The appellant Computershare Trust Company of Canada, in its capacity as Trustee for the holders of the Notes (the "Noteholders"), appeals, with leave, three orders made by the supervising judge in the CCAA proceeding: (i) the January 20, 2012 CCAA Bridge Financing Order (with reasons released January 25, 2012 and reported at 2012 ONSC 538 (the "Bridge Financing Reasons")) authorizing Crystallex to obtain bridge financing of $3.125 million (the "Bridge Loan") from the respondent Tenor Special Situations Fund, L.P. ("Tenor L.P."); (ii) the April 16, 2012 CCAA Financing Order authorizing Crystallex to obtain $36 million of what the supervising judge characterized as Debtor in Possession ("DIP") financing from Tenor Special Situation Fund I, LLC ("Tenor") (the "Tenor DIP Loan"); and (iii) the April 16, 2012 Management Incentive Plan Approval Order approving a Management Incentive Plan ("MIP") designed to ensure the retention of key executives until the arbitration is completed. The supervising judge's reasons for the CCAA Financing Order and Management Incentive Plan Approval Order are reported at 2012 ONSC 2125 (the "DIP Financing Reasons").

[6] Among other conditions, the Tenor DIP Loan, due December 31, 2016, entitles Tenor to 35 per cent of the net proceeds of the arbitration in addition to interest, provides governance rights that may continue after Crystallex exits from CCAA protection, and requires Tenor's approval to a range of options that might customarily be offered to unsecured creditors in seeking to negotiate a plan of compromise or arrangement.

[7] Substantially all of the creditors opposed the approval of the Bridge Loan, the Tenor DIP Loan and the MIP. Crystallex represents that it hopes to negotiate a plan of arrangement or compromise with the Noteholders and other creditors before the current stay until July 30, 2012 expires.

[8] The bulk of the $36 million Tenor DIP Loan comprises financing to pursue the arbitration claim, which may continue after the period of CCAA protection.

II. THE LEGISLATIVE FRAMEWORK

[9] The CCAA was amended effective September 18, 2009 to add the following provisions regarding the grant of a charge to secure financing required by the debtor:

> Interim financing
>
> 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.
>
> ...
>
> Factors to be considered
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> > (a) the period during which the company is expected to be subject to proceedings under this Act;

> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.[1]

Prior to the enactment of these provisions, the court relied on its general authority under the CCAA to approve DIP financing: see Lloyd W. Houlden, Geoffey B. Morawetz & Janis P. Sarra, *The 2012 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2011), at p. 1175.

III. THE BACKGROUND

A. Events Prior to the CCAA Filings

[10] Crystallex has filed a Request for Arbitration pursuant to the Canada-Venezuela Bilateral Investment Treaty, claiming $3.4 billion plus interest for the loss of its investment in Las Cristinas. The hearing of the arbitration is scheduled for November 11, 2013.

[1] Paragraph 23(1)(b) provides that the monitor shall "review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings".

[11] Crystallex's most significant liability is its debt to the Noteholders. In addition to amounts owed to the Noteholders, Crystallex has other liabilities of approximately CAD $1.2 million and approximately US $8 million.

[12] The current Noteholders are hedge funds, some of whom purchased Notes after Venezuela announced its intention to expropriate Las Cristinas at prices as low as 25 cents on the dollar.

[13] The relationship between Crystallex and the current Noteholders is hostile. Crystallex and the Noteholders have been in litigation since 2008. Prior to the maturity date of the Notes, the Noteholders twice, unsuccessfully, brought court proceedings against Crystallex alleging that an event had occurred which accelerated Crystallex's obligation to pay the Notes. Those proceedings were also heard by the supervising judge: see *Computershare Trust Co. of Canada v. Crystallex International Corp.* (2009), 65 B.L.R. (4th) 281 (S.C.), aff'd 2010 ONCA 364, 263 O.A.C. 137; and *Computershare v. Crystallex*, 2011 ONSC 5748.

B. Commencement of Proceedings under the CCAA and Chapter 15

[14] On December 22, 2011, one day prior to the maturity of the Notes, Crystallex and the Noteholders filed competing CCAA applications. The Noteholders' application contemplated that all existing common shares would be cancelled, an equity offering would be undertaken, and if, or to the extent, the

equity proceeds were insufficient to pay out the Noteholders, the Notes would be converted to equity.

[15] Crystallex sought authority to file a plan of compromise and arrangement, the authority to continue to pursue the arbitration in Venezuela, and the authority to pursue all avenues of interim financing or a refinancing of its business and to conduct an auction to raise financing. In his supporting affidavit sworn December 22, 2011, Robert Fung, Crystallex's Chairman and Chief Executive Officer, indicated that Crystallex wished to have all claims stayed against it until the arbitration settled or Crystallex realized the arbitration award. Crystallex had already received an unsolicited offer of financing from Tenor Capital Management.

[16] It was (and is) expected that, if the arbitration is successful and the award is collected, there will be more than enough to pay the creditors and a significant amount will be available to shareholders.

[17] On December 23, 2011, the supervising judge made an order granting Crystallex's CCAA application (the "Initial Order"). In his reasons released December 28, 2011, he explained that the Noteholders' proposal was not a fair balancing of the interests of all stakeholders: *Re Crystallex International Corporation*, 2011 ONSC 7701, at para. 26. The Noteholders did not appeal the Initial Order.

[18] Crystallex obtained an order under chapter 15 of the United States Bankruptcy Code from the United States Bankruptcy Court for the District of Delaware, among other things giving effect to the Initial Order in the United States as the main proceeding.

C. Crystallex Develops a DIP Auction Process

[19] Paragraph 12 of the Initial Order authorized Crystallex to pursue all avenues of interim financing or a refinancing of its business or property, subject to the requirements of the CCAA and court approval, to permit it to proceed with an orderly restructuring. It further provided:

> Without limiting the foregoing, the Applicant may conduct an auction to raise interim or DIP financing pursuant to procedures approved by the Monitor and using such professional assistance as the Applicant may determine with the consent of the Monitor. If such approved procedures are followed to the satisfaction of the Monitor then the best offer as determined by the Applicant pursuant to the approved procedures shall be afforded the protection of the *Soundair* principles so that it will be too late to make topping offers thereafter and such offers will not be considered by this Court.

[20] Crystallex hired an independent financial advisory firm, Skatoff & Company, LLC, and developed a set of procedures to govern the solicitation of bids to provide financing to Crystallex. The Monitor, Ernst & Young Inc., approved the bid procedures. The bid procedures indicated that Crystallex's objective was to obtain financing of not less than $35 million, net of costs, that, on completion of the CCAA and U.S. Chapter 15 reorganization proceedings,

would roll into financing maturing not sooner than December 31, 2014. The bid deadline was February 1, 2012.

D. The Bridge Loan

[21] On January 20, 2012, the supervising judge considered competing proposals from Tenor L.P. and the Noteholders to provide bridge financing. Tenor L.P. offered $3.125 million with interest at 10 per cent per annum. The Noteholders offered $3 million with interest at 1 per cent per annum.

[22] The board of Crystallex, taking into account advice received from Mr. Skatoff, recommended the Tenor L.P. offer. Mr. Skatoff was concerned that the Noteholders' objective may have been to defeat the larger DIP financing process so that they could ultimately impose financing terms on Crystallex. It was also his view that Crystallex should avoid entering into an important financial relationship with a hostile party.

[23] The supervising judge approved Tenor L.P.'s offer.

E. The Noteholders Object to the DIP Auction Process

[24] On January 20, 2012, the Noteholders brought a cross-motion to modify the DIP auction process then underway, which they severely criticized. They objected to the amount sought, the term, and the lender back-end entitlement a successful DIP lender could acquire. In their view, Crystallex was inappropriately seeking financing in excess of amounts required until a compromise or plan of

arrangement could be arrived at between Crystallex and its creditors. Given their existing position in Crystallex, the Noteholders also objected to being required to sign a non-disclosure agreement containing a standstill provision in order to be a qualified bidder.

[25] The supervising judge held that if the Noteholders wished to be considered as a qualified bidder, they would have to sign a non-disclosure agreement: Bridge Financing Reasons, at para. 27. As to their other concerns, he wrote, at para. 29:

> In my view these objections are premature and it is not necessary for me to consider their strength at this stage. The time for filing bids from qualified bidders has not yet expired and what bids will be received is unknown. It is when a successful bidder has been chosen and the DIP facility is before the court for approval that these issues raised by the Noteholders would be more appropriately dealt with. Until then, there is no factual foundation for judgment to be passed on the bid procedures for the DIP facility for which Crystallex will seek approval.

F. Competing DIP Financing Offers: The Tenor DIP Loan and the Noteholders' Offer

[26] The bidders who responded to the request for DIP financing included three hedge funds that hold approximately 77 per cent of the Notes and Tenor.

[27] Those hedgefund Noteholders proposed a loan of $10 million with a simple interest rate of 1 per cent repayable on October 15, 2012.

[28] The supervising judge described Tenor's proposed terms in the DIP Financing Reasons:

> [23] The Tenor DIP facility contains the following material financial terms:
>
> (a) Tenor will advance $36 million to Crystallex due and payable on December 31, 2016. This period for the loan is based on Crystallex's arbitration counsel's assessment of the likely timing of a decision from the arbitral tribunal and collection of the award.
>
> (b) The advances will be in four tranches, being $9 million upon execution of the loan documentation and approval of the facility by court order in Ontario, the second being $12 million upon any appeal of the Ontario court order approving the facility being dismissed and upon a U.S court order approving the facility, the third being $10 million when Crystallex has less than $2.5 million in cash and the fourth being $5 million when Crystallex again has less than $2.5 million in cash.
>
> (c) The loans are to be used to (i) repay an interim bridge loan of $3.25 million advanced by Tenor with court approval of January 20, 2012 and payable on April 16, 2012, (ii) fees and expenses in connection with the facility, (iii) general corporate expenses of Crystallex including expenses of the restructuring proceedings and of the arbitration in accordance with cash flow statements and budgets of Crystallex approved by Tenor from time to time.
>
> (d) Crystallex will pay Tenor a $1 million commitment fee.

> (e) $35 million of the loan amount will bear PIK interest (payment in kind, meaning it is capitalized and payable only upon maturity of the loan or upon receipt of the proceeds of the arbitration) at the rate of 10% per annum compounded semi-annually.
>
> (f) Tenor will receive additional compensation equal to 35% of the net proceeds of any arbitral award or settlement, conditional upon the second tranche of the loan being advanced. Net proceeds of the award or settlement is defined as the amount remaining after payment of principal and interest on the DIP loan, taxes and proven and allowed unsecured claims against Crystallex, including the noteholders, the latter of which will have a special charge for the unsecured amounts owing. Alternatively, Tenor can convert the right to additional compensation to 35% of the common shares of Crystallex. This conversion right is apparently driven by tax considerations.

[24] The Tenor DIP facility also provides for the governance of Crystallex to be changed to give Tenor a substantial say in the governance of Crystallex. More particularly:

> (a) Crystallex shall have a reduced five person board of directors, being two current Crystallex directors, two nominees of Tenor and an independent director selected by agreement of Crystallex and Tenor.
>
> (b) The independent director shall be chair of the board of directors and shall not have a second-casting or tie-breaking vote.
>
> (c) The independent director shall be appointed a special managing director and shall have all the powers of the board of

> directors to (i) the conduct of the reorganization proceedings in Canada and in the U.S. and the efforts of Crystallex to reorganize the pre-filing claims of the unsecured creditors, (ii) any matters relating to the rights of Crystallex and Tenor as against the other under the facility, (iii) the administration of the MIP to the extent not otherwise delegated to the bonus pool committee under the MIP, and (iv) to retain any advisor in respect of these matters. The special manager shall first consult with a non-board advisory panel, consisting of the three Crystallex directors who will step down from the board, and consider in good faith their recommendations.
>
> (d) With respect to matters that may not at law be delegable to the special managing director, he will be required to obtain board approval. If the Tenor nominees use their votes to block that approval, Tenor will forfeit its 35% additional compensation.

> [25] The Tenor DIP facility contains proscribed rights of Tenor in the event of default. Tenor may seize and sell assets other than the arbitration proceeding (i.e. any cash and unsold mining equipment). It may not sell the arbitration claim. If there is a default before any arbitration award, Tenor would have the right to apply to court to have the Monitor or a Canadian receiver and manager appointed to take control of the arbitration proceedings. If such application were not granted, Tenor would be entitled to exercise the rights and remedies of a secured creditor pursuant to an order, the loan documentation or otherwise at law.

[29] Mr. Skatoff recommended, and the board of Crystallex agreed, to accept the Tenor DIP Loan. Mr. Skatoff indicated, in an affidavit sworn March 20, 2012,

that he had recommended that the board reject the Noteholders' offer of a $10 million loan for 6 months because Crystallex could not be assured that it could borrow the balance of the required funds at the expiry of that period on the same terms as the Tenor DIP Loan.

G. The Noteholders' Further, Competing Offer to Allay Mr. Skatoff's Concerns

[30] In his affidavit on behalf of the Noteholders, sworn March 27, 2012, Mr. Mattoni responded to Mr. Skatoff's concern by committing that the Noteholders would be prepared to,

> … provide financing to Crystallex on the same terms as the [Tenor DIP Loan], in the event that prior to October 1, 2012, the Court orders that such long-term financing is appropriate and necessary. The Noteholders would reserve their complete and unfettered ability as creditors to continue to oppose stay extensions or attempts to secure such long-term financing outside of a Plan of compromise (including, specifically, financing to the extent contemplated by the Proposed Loan), but they will provide it if it is ordered by the Court on the same basis as currently proposed with Tenor...

H. The Noteholders' Proposed Plan

[31] Prior to the April 5, 2012 hearing, the Noteholders proposed a plan to indicate a good faith intention to bargain. They did not seek approval of this proposed plan at the April 5, 2012 hearing.

[32] The plan's terms included that the Noteholders would provide a $10 million loan on the terms described above; exchange their debt for approximately 58 per cent of the equity; provide $35 million to Crystallex in exchange for 22.9 per cent of the equity; and provide incentives to management at a lesser level than the MIP. Their proposed plan left approximately 14 per cent of the equity for the existing shareholders.

I. The Management Incentive Plan

[33] The Noteholders had criticized the independent directors of Crystallex as not being sufficiently independent. As a result, the independent directors of Crystallex comprising the compensation committee retained Jay Swartz, a partner of Davies Phillips Vineberg, to determine, from the perspective of an independent director, what an appropriate MIP would be. He in turn retained an independent national executive compensation consulting firm to provide expert advice. Mr. Swartz opined that the overall compensation proposal for the establishment of the bonus pool for the benefit of Crystallex's management was reasonable in the circumstances. The independent directors of Crystallex comprising the compensation committee approved the MIP.

[34] At para. 102 of the DIP Financing Reasons, the supervising judge described the MIP:

> In sum, a pool of money, consisting of up to 10% of the net proceeds of the arbitration up to $700 million and

> 2% of any further net proceeds, after all costs and charges, including the amounts owing to noteholders, is to be set aside and money in this pool may be paid to the beneficiaries of the MIP, depending on the determination of an independent committee. The amounts to be allocated to participants by the compensation committee are discretionary and could be nil. No one will be entitled to any particular amount. Members of the compensation committee will not be eligible for any payments.

[35] The MIP sets out a number of factors to be considered by the compensation committee in exercising its discretion. They include the amount and speed of recovery, the amount of time and energy expended by the individual, and the opportunity cost to the individual in staying with Crystallex.

[36] In the view of the Noteholders, the MIP is too generous. They proposed that management receive 5 per cent through an equity participation in any after tax award. They also took issue with the range of persons eligible under the MIP.

J. The April 5, 2012 motion

[37] On April 5, 2012, Crystallex sought orders approving, among other things, the Tenor DIP Loan and the MIP. The Noteholders as well as Forbes & Manhattan Inc. and Aberdeen International Inc., creditors owed approximately $2.5 million by Crystallex, opposed both the Tenor DIP Loan and the MIP. The one shareholder who attended opposed the MIP.

[38] The supervising judge approved the Tenor DIP Loan and the MIP.[2] He also extended the stay until July 30, 2012.

K. Events since April 5, 2012

[39] Tenor made the first, $9 million advance under the Tenor DIP Loan. The Bridge Loan was repaid out of the first advance.

[40] At the hearing of this appeal, the Monitor advised that Crystallex would require further funds before the anticipated release of this court's decision. Crystallex accepted Tenor's offer to advance a further $4 million to Crystallex, on the same terms as the first, $9 million tranche of the Tenor DIP Loan. Accordingly, this further advance does not entitle Tenor to participate in any arbitration proceeds, or trigger any change in the governance of Crystallex. If the Noteholders' appeal succeeds, the additional amounts advanced by Tenor are, like the first tranche, to be immediately repaid with interest at the rate of 1 per cent per annum, and the Noteholders shall fund the repayment. No commitment fee is payable in respect of this additional advance.

[2] The MIP was approved subject to an amendment (agreed to by Crystallex) to provide that the value of any stock options ultimately realized by participants of the MIP would be deducted from the amount of any bonus awarded under the MIP on a tax neutral basis.

IV. THE SUPERVISING JUDGE'S REASONS

A. The Bridge Loan

[41] The supervising judge noted, at para. 5 of the Bridge Financing Reasons, that Tenor L.P.'s bridge financing proposal was "really short-term DIP financing". With respect to the boards' recommendation – based on Mr. Skatoff's advice – that Tenor L.P.'s proposal be approved, he wrote, at para. 12:

> This was a business judgment protected by the business judgment rule so long as it was a considered and informed judgment made honestly and in good faith with a view to the best interests of Crystallex. See *Re Stelco Inc*. (200[5]), 9 C.B.R. (5th) 135 (Ont. C.A.) regarding the rule and its application to CCAA proceedings. I see no grounds for concluding that the decision of Crystallex to prefer the Tenor bridge financing proposal is not protected by the business judgment rule or that I should not give it appropriate deference. [Citation corrected.]

[42] The supervising judge noted, at para. 13, that "the Monitor has no basis to say that the business judgment exercised by the Crystallex board of directors was unreasonable". The supervising judge accordingly approved the Bridge Loan.

[43] Mr. Skatoff expressed concern that the Noteholders' objective in offering bridge financing on such advantageous terms (interest at the rate of 1 per cent, as opposed to the 10 per cent in the Tenor L.P. offer) was to undermine the DIP auction process. The supervising judge observed, at para. 14:

> Whether Mr. Skatoff is correct in his concerns, it seems to me that the relatively minor extra cost involving the Tenor proposed bridge financing for at most a few months must be weighed against the risk of harm to the longer-term DIP financing auction process, and that for the sake of that process, it is preferable not to run the risks that Mr. Skatoff is concerned about.

B. The Tenor DIP Loan

[44] The substance of the supervising judge's reasons for approving the Tenor DIP Loan – as set out in the DIP Financing Reasons – may be summarized as follows.

i. The exercise of business judgment by the board of directors of Crystallex in approving the Tenor DIP Loan is a factor that can be taken into account by the court in considering whether to make an order under s. 11.2(1) of the CCAA (at para. 35).

ii. The Tenor DIP Loan did not amount to a plan of arrangement or compromise. Notably, it did not take away the rights of the Noteholders as unsecured creditors to apply for a bankruptcy order or to vote on a plan of compromise or arrangement. A vote of the creditors was therefore not required (at para. 50). In coming to this conclusion, the supervising judge relied on *Re Calpine Canada Energy Limited*, 2007 ABQB 504, 415 A.R. 196, leave to appeal refused, 2007 ABCA 266, 417 A.R. 25.

iii. Crystallex intended to negotiate a plan of compromise or arrangement with the Noteholders during the stay extension until July 30, 2012 (paras. 48, 126). The Tenor DIP Loan is therefore distinguishable from the financing rejected by the court in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577, because in that case the debtor did not have an intention to propose an arrangement or compromise to its creditors.

iv. Because the Tenor DIP Loan involves the grant of a financial interest in part of the assets of Crystallex, it is appropriate to consider the *Soundair* factors in deciding whether to approve it (at para. 59). Crystallex conducted a robust competitive bidding process (at para. 39).

v. Mr. Skatoff's evidence was that the Noteholders' proposed six month facility "would seriously erode the chances of Crystallex obtaining third party financing in October" (at para. 90). Counsel for Computershare had said during argument on the motion that the Noteholders "were not prepared to agree to such a $35 million facility at this time but only at some future time as the $10 million facility they now proposed became due" (at para. 27). While it would have been preferable if the Noteholders had been willing to lend on the basis of the terms of the Tenor DIP facility, "it was made clear during argument that the noteholders were not prepared at this time to do so" (at para. 91).

vi. As to the enumerated factors in s. 11.2(4):

(a) Given that Crystallex intends, if possible, to negotiate an acceptable plan of arrangement or compromise, the length of time during which Crystallex is expected to be subject to the CCAA proceedings is not a determinative factor. The financing will be required to pursue the arbitration (at para. 62) and, as the supervising judge noted, “the only way any of the creditors will receive any substantial cash payment is from the proceeds of the arbitration” (at para. 47);

(b) The management of the business and affairs of Crystallex “are a reasonable compromise between Crystallex and Tenor designed to protect the interests of the stakeholders, including the noteholders” (at para. 73). The fact that Tenor is given substantial governance rights does not in itself mean that the DIP Tenor Loan should not be approved. Tenor does not have the right to conduct the reorganization proceedings or the arbitration proceeding. Moreover, under s. 11.5(1) of the CCAA, the court may remove a director whom it is satisfied is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made. Arguably, a court could remove a Tenor nominee under this section without triggering an event of default under the Tenor DIP Loan (at paras. 63-71);

(c) While the Noteholders expressed “extreme displeasure” at Crystallex’s management’s delay in commencing arbitration proceedings,

they do not oppose management having a continuing role in the arbitration (at para. 72);

(d) The Noteholders' argument that the terms of the Tenor DIP Loan – in particular, the fact that the refusal of the court to grant a stay or a bankruptcy are events of default, the grant of a 35 per cent interest in the arbitration proceeds, and the limits on the type of restructuring that can be concluded without the approval of Tenor – will effectively prevent any plan of arrangement was rejected (at paras. 74-82). While, as the Monitor points out, the introduction of a third party, Tenor, with consent rights to certain actions will add complexity to the negotiation of a CCAA plan (at para. 93), the Tenor DIP Loan would enhance the prospects of a viable compromise or arrangement (at para. 83):

> ... Crystallex requires additional financing to pay its expenses and continue the arbitration. A DIP loan allows the company to have the arbitration financed, which if it were not at this stage would impair the arbitration and perhaps the attitude of Venezuela towards the arbitration claim, and as such enhances the viability of a CCAA plan. I have not accepted the argument of the noteholders that the loan would prevent a plan of arrangement.

(e) The supervising judge noted that Crystallex's principal asset is its US $3.4 billion arbitration claim against Venezuela (at para. 12); and

(f) In considering the Noteholders' complaints of prejudice in the context of what the market is demanding for a DIP loan and in all the circumstances,

the creditors have not been materially prejudiced by the Tenor DIP Loan (at para. 84).

C. The Management Incentive Plan

[45] The supervising judge considered the Noteholders' objections to the quantum and method for providing an incentive to management, the inclusion of certain persons in the MIP, and the approval of the MIP before the negotiation of a plan.

[46] In the DIP Financing Reasons, the supervising judge observed, at para. 109, that whether employee retention provisions should be ordered in a CCAA proceeding was a matter of discretion. He noted that the provisions of the MIP had been approved by an independent committee of the board of directors with impressive qualifications, relying on the opinion of Mr. Swartz. In providing that opinion, Mr. Swartz indicated that the absolute amount of the bonus pool could be very substantial and, in allocating it, the compensation committee "may have to carefully consider the absolute amounts to be paid to each member of the Management Group in order to satisfy its fiduciary duties": see DIP Financing Reasons, at para. 108. The supervising judge also noted that Mr. Swartz had retained an independent national executive compensation consulting firm to provide expert advice.

[47] Citing *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.) and *Timminco Ltd. (Re)*, 2012 ONSC 948, the supervising judge wrote, at para. 112 of the DIP Financing Reasons, "I see no reason why the business judgment rule is not applicable, particularly when the provisions of the MIP have been approved by an independent committee of the board." He further noted, at para. 115, what appears to be the practice of approving employee retention plans before any plan has been negotiated and, at para.105, that the Tenor DIP Loan was conditional on the approval of a MIP acceptable to Crystallex and Tenor.

[48] As to who should be eligible to participate in the MIP, at para. 117, the supervising judge noted that the independent committee had exercised its business judgment on the matter and that the participants were known to Mr. Swartz . Having reviewed the evidence, the supervising judge could not "say that any of the persons included in the MIP should not be there".

V. THE PARTIES' SUBMISSIONS

A. The Noteholders' Submissions

[49] The Noteholders frame their opposition to the Tenor DIP Loan on a number of bases.

[50] They argue that s. 11.2, titled "Interim financing", only permits a supervising judge to approve financing to meet the debtor's needs while it is developing a plan to present to its creditors.

[51] The Noteholders also argue that the supervising judge's finding that the Tenor DIP Loan would enhance the prospects of a viable compromise or arrangement was unreasonable because it resulted from an error of principle, namely an improper focus on the fact that it provided financing for the arbitration.

[52] The Noteholders submit that the supervising judge misapprehended the evidence in finding that the Noteholders were not willing to match the Tenor DIP Loan, and this error affected the outcome of the motion.

[53] They argue that the supervising judge erred in deferring to the business judgment of the directors of Crystallex in approving both the Bridge Loan and the Tenor DIP Loan. They argue that directors always make a recommendation and, if Parliament had thought this was a relevant factor, it would have specifically enumerated it in s. 11.2(4) of the CCAA.

[54] They argue that the supervising judge erred in principle in focusing on what was the most expedient way to fund the arbitration (as opposed to Crystallex's needs while negotiating a plan with the Noteholders) and, in doing so, committed the same error as the motion judge in *Cliffs Over Maple Bay*.

[55] The Noteholders' position is that the Tenor DIP Loan is effectively an arrangement, in the guise of a financing, and Crystallex is misusing the CCAA to impose a restructuring without the requisite creditor approval.

[56] The Noteholders submit that this court should order Crystallex to accept the Noteholders' "matching" DIP loan offer.

[57] They also renew their objections to the MIP.

B. Crystallex's Submissions

[58] Crystallex argues that the Noteholders' appeal with respect to the Bridge Loan is moot because the loan has been advanced, spent and repaid.

[59] As to the Tenor DIP Loan, it argues that approving it was within the discretion of the supervising judge, the supervising judge exercised his discretion on a wide variety of findings of fact, capable of evidentiary support in the record, and there is no basis for this court to intervene. It relies on *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, which recently addressed the broad discretionary jurisdiction of a supervising judge under the CCAA. Crystallex also points to *Air Canada (Re)* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.), as an instance where exit financing was approved before a plan had been approved by creditors.

C. Tenor's Submissions

[60] Tenor argues that "interim financing" in the heading to s. 11.2 of the CCAA does not mean "short term", but rather refers to the interval between two points or events, and s. 11.2 does not contain anything that would fetter the discretion of the supervising judge to select an "end point" beyond the expected conclusion

of a plan. It argues that the duration of the Tenor DIP Loan is tailored to Crystallex's unique circumstance: all stakeholders acknowledge that the arbitration must be pursued in order for there to be meaningful recovery. In any event, it argues, marginal notes, such as the heading "interim financing" in s. 11.2, are not part of the statute, and their value is limited when a court must address a serious problem of statutory interpretation, citing the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 14, and *Imperial Oil Ltd. v. Canada; Inco Ltd. v. Canada*, 2006 SCC 46, [2006] 2 S.C.R. 447, at para. 57.

[61] Moreover, Tenor submits, the supervising judge was in the best position to perform the careful balancing of interests required to facilitate a successful restructuring.

VI. ANALYSIS

A. The Appeal from the Bridge Financing Order

[62] The Noteholders did not strongly pursue their appeal of the Bridge Financing Order. The relief sought at the conclusion of the hearing related to the Tenor DIP Loan and not the Bridge Loan. The Bridge Loan was disbursed, spent and repaid. I agree with the respondents that the Noteholders' appeal with respect to the Bridge Loan is moot. I will therefore confine my analysis to the Tenor DIP Loan and the MIP.

B. The Appeal from the Tenor DIP Financing Order

(1) *Century Services Inc. v. Canada (Attorney General)*

[63] The Supreme Court of Canada had occasion to interpret the CCAA for the first time in *Century Services*. It used that opportunity to make clear that the CCAA gives the courts broad discretionary powers. Those powers must, however, be exercised in furtherance of the CCAA's purposes: para. 59. Section 11, in particular, was drafted in broad language which provides that a supervising judge "may, subject to the restrictions set out in this Act … make any order that it considers appropriate in the circumstances".[3] For the majority in *Century Services*, Deschamps J. wrote:

> [69] The *CCAA* also explicitly provides for certain orders…
>
> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* – avoiding the social and economic losses resulting from liquidation of an

[3] The full text of section 11 is as follows:

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

> 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.

[64] It is with the Supreme Court's interpretation of the scope of judicial discretion under the CCAA in mind that I turn to s. 11.2 and the question of whether it permits a supervising judge to approve financing that may continue for a significant period after CCAA protection ends, without the approval of creditors.

(2) Section 11.2 of the CCAA

[65] Section 11.2 is headed "Interim Financing". Headings may be used as an aid in interpreting the meaning of a statute: R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008), at p. 394, "Interim" generally means temporary or provisional: *Canadian Oxford Dictionary*, 2d ed. The weight to be given to a heading depends on the circumstances.

[66] I agree with the Noteholders that s. 11.2 contemplates the grant of a charge, the primary purpose of which is to secure financing required by the debtor while it is expected to be subject to proceedings under the CCAA. A further purpose, however, is to enhance the prospects of a plan of compromise or arrangement that will lead to a continuation of the company, albeit in restructured form, after plan approval.

[67] Section 11.2(4)(a) directs the court to consider the period during which the debtor is expected to be subject to proceedings under the CCAA. It stops short of confining the financing to the period that the debtor is subject to the CCAA. Section 11.2(4)(d) directs the court to consider if the financing would enhance the prospects of a viable compromise or arrangement.

[68] Having regard to the broad remedial purpose of the CCAA and the broad residual authority of a supervising judge described in *Century Services*, in my view section 11.2 does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection. Indeed, although in very different circumstances, financing to be available on the debtor's emergence from CCAA protection (sometimes called "exit financing") was approved before a plan was approved in *Air Canada*.[4] Both *Century Services* and section 11.2, however, in my view, signal that it would be unusual for a court to approve exit financing where opposed by substantially all of the creditors. Exit or post-plan financing is often a key element, or a pre-requisite, of the plan voted on by creditors.

[4] In *Air Canada,* Farley J. approved a "global restructuring agreement" which included a commitment of an existing creditor to provide exit financing of approximately US $585 million on the company's emergence from CCAA. DIP financing was in place; the financing at issue was clearly recognized as exit financing. The restructuring agreement was not opposed by substantially all of the creditors. Nor was it argued that it adversely affected the ability of the creditors and the debtor to negotiate a compromise or arrangement.

[69] The question becomes whether the unique facts of this case permitted the supervising judge to approve “interim financing” that was of such duration and structure that it could well outlast the CCAA protection period. This court should not substitute its decision for that of the supervising judge. I must ask this question through the lens of the applicable standard of review.

(3) Standard of review

[70] Appellate review of a discretionary order under the CCAA is limited. Intervention is justified only for an error in principle or the unreasonable exercise of discretion: *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (C.A.), at para. 71. An appellate court should not interfere with an exercise of discretion “where the question is one of the weight or degree of importance to be given to particular factors, rather than a failure to consider such factors or the correctness, in the legal sense, of the conclusion”: *New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 26.

(4) The supervising judge did not err in principle or unreasonably exercise his discretion

[71] As detailed below, I conclude that there is no basis for interfering with the supervising judge’s exercise of discretion in approving the Tenor DIP Loan.

[72] Most significantly, in this case, the supervising judge found there could be no meaningful recovery, and therefore no successful restructuring, without the

financing of the arbitration. Although the Noteholders characterized the Tenor DIP Loan as “exit financing”, it furthered the remedial purpose of the CCAA. To that extent, it is appropriate in the first sense used by Deschamps J. in *Century Services*, even though it may well outlast the period of CCAA protection. The supervising judge’s focus on the fact that the Tenor DIP Loan provided financing for the arbitration was not, in the circumstances, an error of principle.

[73] In my view, the Noteholders’ real argument is that the *means* by which the Tenor DIP Loan was approved were not appropriate. Ideally, a CCAA supervising judge is able to assist creditors and debtors in coming to a compromise. The creditors and Crystallex have not “achieved common ground” on a very significant matter. Effectively, the Noteholders argue that the creditors have not been treated as advantageously and fairly as the circumstances permit. They are the senior creditors and their offer to provide DIP financing on terms they argue matched those of the Tenor DIP Loan was not accepted. With sufficient financing in place to fund the arbitration, their leverage in negotiating a share of the arbitration proceeds has been reduced. Moreover, the Noteholders argue, the supervising judge erred in applying the business judgment rule, and, contrary to *Cliffs Over Maple Bay*, involuntarily stayed their rights during what they characterize as a restructuring. I consider each of these arguments below.

a. The Noteholders' competing DIP loan offer

[74] The Noteholders point to their affidavit on the April motion indicating they would submit to an order to advance funds on the same terms as the Tenor DIP Loan "in the event that prior to October 1, 2012, the Court orders that such long-term financing is appropriate and necessary". The supervising judge wrote that it would have been a preferable outcome if the Noteholders had been prepared to lend at the time of the April motion on the terms of the Tenor DIP facility: DIP Financing Reasons, at para. 91. The Noteholders argue that: they were prepared to advance funds on the terms of the Tenor DIP Loan, if so ordered; the supervising judge misapprehended the evidence; and, given the supervising judge's comment that it would have been preferable if the Noteholders had been prepared to lend, that misapprehension affected the outcome of the motion.

[75] The supervising judge's comment at para. 91 of the DIP Financing Reasons makes his real concern clear. There, he stated that "at this time" the Noteholders were not prepared to lend on the terms of the Tenor DIP Loan. The Noteholders' view as of April 5, 2012 was that such long-term financing was not necessary, as the $10 million they offered to advance at that time met Crystallex's then cash requirements. The Noteholders reserved their rights to continue to oppose the approval of long term financing before they had come to an agreement with Crystallex about their entitlement, as creditors. Further hearings, and further arguments, were required. The supervising judge found, at

para. 83 of the DIP Financing Reasons, that not putting sufficient financing in place to finance the arbitration "at this stage" would impair the arbitration. There was no suggestion from counsel for the Noteholders that on April 5, 2012 the Noteholders were prepared to waive the condition permitting them to continue to oppose the approval of long term financing. I am not satisfied that the supervising judge clearly misapprehended the evidence.

b. Loss of leverage

[76] In Crystallex's view, a reduction of the Noteholders' leverage was desirable. It points to the Noteholders' competing CCAA application, seeking to cancel all of the shareholders' equity, which the supervising judge rejected as not fairly balancing the interests of all stakeholders. The Noteholders' plan, subsequently proposed, would entitle them to 46 per cent of the equity in return for giving up their Notes, which Crystallex also views as excessive.[5]

[77] Crystallex argues that the Noteholders are not contractually entitled to convert their Notes to equity, and should therefore not be entitled to do so. Moreover, they argue, in the event of bankruptcy, the Noteholders would only be entitled to recover their principal and interest at the statutory rate of 5 per cent under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and, if the

[5] The Noteholders proposed that they receive 22.9 per cent of the equity for the $36 million needed for the arbitration and 58 per cent of the equity in return for giving up their Notes, for a total of approximately 81 per cent of the equity. Assuming that the Noteholders sought a maximum total entitlement of 81 per cent, if they advanced the $36 million on the terms of the Tenor DIP Loan, as they now seek to do, the amount of equity on conversion of their notes would be 46 per cent. See the DIP Financing Reasons, at para. 77.

arbitration is realized, they will be entitled to the higher rate of interest they are contractually entitled to under the Notes. As Deschamps J. noted at para. 77 of *Century Services*, participants in a reorganization "measure the impact of a reorganization against the position they would enjoy in liquidation".

[78] The Noteholders counter that, contractually, they were entitled to be repaid on December 23, 2011 and, since they were not, and Crystallex proposes to defer repayment for several years and repay the Notes only if the arbitration is successful, the long delay entitles them to some equity participation. Moreover, contractually, Crystallex is restricted from incurring the Tenor DIP Loan, which will be senior to the Notes.

[79] Crystallex points to the terms of the Initial Order, affording the "best offer" the protection of the *Soundair* principles, and providing that "topping offers" would not be considered by the court. Crystallex points out that the Noteholders did not appeal the Initial Order and argues that accepting the Noteholders' matching offer would offend the *Soundair* principles. In Crystallex's view, the Noteholders were treated fairly.

[80] In turn, the Noteholders argue that the Initial Order authorized Crystallex to conduct an auction to raise *interim or DIP financing* pursuant to procedures approved by the Monitor. Since the outset, the Noteholders maintained their objection that the auction process sought more than interim or true DIP financing.

The supervising judge deferred consideration of their objections until the DIP facility was before the court for approval.

[81] The Noteholders are sophisticated parties. They pursued a strategy. It ultimately proved less successful than hoped. It appears that the supervising judge would have been prepared to approve the advance of funds to Crystallex by the Noteholders, on the terms of the Tenor DIP Loan, notwithstanding the *Soundair* principles, had the Noteholders agreed to do so, without condition, on April 5, 2012.

[82] The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.

c. The business judgment rule

[83] The supervising judge held that in addition to the factors in s. 11.2(4) of the CCAA, he could take into account the exercise or lack thereof of business judgment by the board of directors of a debtor corporation in considering DIP

financing: DIP Financing Reasons, at paras. 32-35. He cited *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), as authority for this proposition.[6]

[84] The fact that a debtor's board of directors recommends interim financing is not a determinative factor, and in some cases may not be a material factor, in considering whether to make an order under s. 11.2. It would be unusual if the board did not recommend the financing for which the debtor seeks approval.

[85] *Stelco* should not be read as authority for the principle that the recommendation of the directors of a debtor under CCAA protection is entitled to deference in evaluating whether financing should be approved under s. 11.2 of the CCAA where the factors outlined in s. 11.2(4) have not been complied with. In *Stelco,* the debtor did not seek court approval of a recommendation of the board. In the case of interim financing, the court must make an independent determination, and arrive at an appropriate order, having regard to the factors in s. 11.2(4). It may consider, but not defer to, and is not fettered by, the recommendation of the board.

[86] The weight given by the supervising judge to the business judgment of the board of directors of Crystallex in recommending the Tenor DIP Loan is not, however, a basis for this court to interfere with his decision: *New Skeena Forest Products*, at para. 26.

[6] An incorrect citation for *Stelco* was given in the DIP Financing Reasons, at para. 33.

d. *Cliffs Over Maple Bay* is distinguishable

[87] In *Cliffs Over Maple Bay*, the debtor was the developer of a 300 acre site intended to include residential units, a golf course and a hotel. The debtor obtained protection under the CCAA and sought approval of financing that would permit it to complete material parts of the development. It believed that the proceeds generated from the sale of units thus completed would be sufficient to fund the remaining portions of the development and that, if the development were completed, there would be sufficient sale proceeds to satisfy all of the debtor's obligations.

[88] The motion judge approved the financing; the mortgagees of the development appealed. The British Columbia Court of Appeal noted, at para. 35, that it was not suggested that the debtor intended to propose an arrangement or compromise to its creditors before embarking on its restructuring plan. The court allowed the appeal, writing:

> [37] … DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or compromise with its creditors ...
>
> [38] ... What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The CCAA was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a

> restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

[89] I agree with the supervising judge that this case can be distinguished from *Cliffs Over Maple Bay*, which turned on the court's finding that the debtor did not intend to negotiate a plan with its creditors.

[90] While Mr. Fung initially indicated that Crystallex's plan was to stay creditors' claims until the arbitration was settled or realized, his more recent evidence was that approval of the Tenor DIP Loan does not preclude further discussions about a plan with the creditors. In submissions before the supervising judge, and again before this court, counsel for Crystallex reiterated that Crystallex intended to exit from CCAA protection as soon as a plan was negotiated with the creditors and approved, and that Crystallex intended to negotiate a plan by the expiry of the stay on July 30, 2012. The supervising judge found that Crystallex intended to negotiate a plan with its creditors. There is some basis in the record for such a conclusion.

(5) The Tenor DIP Loan is not an arrangement

[91] An arrangement or compromise cannot be imposed on creditors unless it has been approved by a majority in number representing two thirds in value of the creditors: see s. 6(1) of the CCAA.

[92] The supervising judge rejected the argument that the Tenor DIP Loan was a plan of arrangement or compromise and therefore required the approval of the creditors. He held, at para. 50 of the DIP Financing Reasons:

> A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.

[93] I agree. While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. In this case it was within the discretion of the supervising judge to approve the Tenor DIP Loan.

C. The Appeal from the Management Incentive Plan Approval Order

[94] In my view, the supervising judge did not err in principle or unreasonably exercise his discretion in approving the MIP. I see no basis for this court to intervene.

[95] As the supervising judge noted, employee retention provisions are frequently authorized before a plan is negotiated. The supervising judge was alive to the exceptionally large amounts that might be paid to beneficiaries of the MIP (including Mr. Fung) in this case. The supervising judge took specific note of the issues that the Noteholders had raised in the past regarding the extent to which the independent committee of the board that recommended the MIP was truly independent, and the steps taken by that committee to address those concerns.

[96] The recommendation of an independent committee of the board that has obtained expert advice is entitled to more weight in the consideration of a MIP than is the recommendation of the board in the consideration of whether financing should be approved under s. 11.2 of the CCAA. The CCAA does not list specific factors to be considered by the court in the case of a MIP. Moreover, the board would have the best sense of which employees were essential to the success of its restructuring efforts.

[97] In addition to considering the recommendation of the independent committee of the board and Mr. Swartz, the supervising judge also reviewed the evidence to consider whether any persons had been included in the MIP who should not have been. He did not rely solely on the board's recommendation.

VII. DISPOSITION

[98] Accordingly, I would dismiss the appeals of the CCAA Bridge Financing Order, the CCAA Financing Order, and the Management Incentive Plan Approval Order.

VIII. COSTS

[99] If the parties cannot agree, I would order that Crystallex and Tenor provide their submissions on the issue of costs within 14 days, and that the Noteholders, if so advised, provide their submissions in response within 10 days thereafter. No reply submissions are to be provided without leave.

Released: June 13, 2012
"DOC"

"Alexandra Hoy J.A."
"I agree D. O'Connor A.C.J.O."
"I agree R.A. Blair J.A."

TAB 13

FINANCING THE INSOLVENT COMPANY – AN OVERVIEW

M^e Mark Schrager, Partner
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Financing the Insolvent Company – An Overview

The Insolvent Company

The *Bankruptcy and Insolvency Act* ("***BIA***")[1] defines an insolvent person as one:

> "(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."

In discussing the financing of insolvent companies, we propose to first discuss briefly mechanisms to finance an insolvent company prior to seeking protection under either the *BIA* or the *Company Creditors Arrangements Act* ("***CCAA***")[2]. Often, a company that is insolvent because it falls into either paragraph (a) or (b) of the above definition will require the necessity of a formal filing under the *BIA* or the *CCAA* in order to obtain a stay of proceedings and "protection" from its creditors. Companies can, however, limp along without formal protection, under some circumstances, provided they have the support from their lender of operating funds. It is certainly possible, however, to be insolvent within sub-paragraph (c) of the above definition and to continue to operate a business, particularly with the support of the operating lender.

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1 R.S.C., 1985, c. B-3, see s.2.

2 R.S.C., 1985, c. C-36.

With respect to the pre-insolvency filing situation we propose to examine financing through methods of retention of ownership as well as the continuation of existing operating loan facilities under the auspices of a forebearance agreement.

Secondly we will examine in more detail the situation after a formal insolvency filing. In such regard we will discuss various issues involving loans under such circumstances referred to as "DIP financing". All of these mechanisms are essentially temporary mechanisms as the insolvent company will ultimately either work its way out of insolvency or succumb to insolvency and be liquidated.

Forebearance Agreement

A forebearance agreement (sometimes referred to as a standstill agreement) is an agreement between a lender and a borrower forebearing the right to immediate repayment of a loan. It is, in effect, often used as an amendment to a loan agreement whereby a lender will continue to finance the operations of a company which is in default of the terms and conditions of its loan agreement.

The entering into of a forebearance agreement will often, though not necessarily, be preceded by a notice of default by the lender and perhaps a demand for repayment of the loans as well as a notice of intention to enforce security required by s.244 *BIA*[3]. Though recourse is often had to a forebearance agreement in insolvency situations, there is little substantive comment either in the literature or in the case law.

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[3] A secured creditor who intends to enforce its security on the business assets of an insolvent debtor must give ten days' prior written notice.

A forebearance agreement will set out the default and usually contain an acknowledgment thereof by the debtor as well as acknowledgments of the indebtedness and receipt of notice of default and the reasonableness thereof. The secured lender will not waive the default but will agree to forebear acceleration of its loans and often will agree to the continued financing of the company subject to the debtors compliance with the terms and conditions of the forebearance agreement. The forebearance agreement will set forth the conditions upon which financing will continue and, as such, will operate as an amendment to the loan agreement.

As an amendment to the loan agreement, the forebearance agreement may contain provisions providing for a new interest rate(s), various fees including forebearance fees and collateral monitoring fees, additional security, additional terms, conditions and covenants. Particularly, the forebearance agreement may provide for a scheme of reduction of the amounts due to the lender and will often provide for the treatment of the lender in the event that the debtor seeks a stay of proceedings from its creditors, either by filing a notice of intention to file a proposal under the *BIA* or by presenting a motion to a judge under the *CCAA*. The forebearance agreement will generally provide that the debtor undertakes that in any such proposal or plan of arrangement that its secured creditor will be treated as an "unaffected creditor" ie. neither its debt nor its recourses will be compromised in any plan of arrangement nor subject to the stay of proceedings. In order for the existing secured lender to avoid the stay of proceedings imposed by the *BIA*[4] when a notice of intention to file a proposal is filed, the s.244 notice must be given and the ten-

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[4] S.69(1) *BIA*.

day statutory delay waived by the debtor prior to the filing of the notice of intention to file a proposal. Advance waivers (eg. in loan agreements) are not permitted (s.244(2.1) *BIA*).

The terms and conditions of the loan going forward under the forebearance agreement, will almost certainly and naturally be more onerous, not only in terms of increased interest rates but also increased monitoring of collateral, approval of expenditures, submission of cash flow projections and approval of a business plan.

While secured lenders will often seek in the forebearance agreement an undertaking to provide additional collateral security, it should be remembered that additional collateral security from the debtor for existing loans may, in the event of a bankruptcy, be treated as a preference under s.95 BIA and, as such, subject to cancellation. This is not the case for new security for new advances nor is it the case for new security from third parties such as guarantors.

Most often, the forebearance will provide for the financing of an insolvent person, going forward. Once the forebearance is put in place, the debtor company will usually and eventually need to seek the protection of the court either under the *BIA* or the *CCAA* and ultimately a compromise of its debt with its other (unsecured) creditors. Under the *CCAA*, the court can approve and order the continued use of the existing credit facilities subject to the forebearance agreement and that the existing lender will be an unaffected creditor (ie. not subject to the stay of proceedings nor to the plan of arrangement to be entered into[5]). The forebearance can form part of the plan of arrangement[6].

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[5] See in KENT, Andrew J.F., MacFARLANE, Alex L. and MACROV, Adam C., "*Who is in Control? A Commentary on Canadian DIP Lending Practices*", unpublished, May 2004 (**"Kent *et al.*"**) at page 36 Re:

From the lender's point of view, should the process not resolve as described above, it benefits from an acknowledgment of the indebtedness and the defaults and a consent to the enforcement of its secured rights and the sale of collateral thereunder, all contained in the forebearance agreement.

Retention of Ownership Mechanisms

It is possible for a company, including a company in financial difficulties to finance the acquisition of certain assets or to enhance liquidity through various means of providing security by having the party making credit available hold title to the asset in question. In this regard, we refer to what is often called, in business, consignment sales or conditional sales and which in the *Civil Code of Québec* ("***CCQ***") are referred to as instalment sales (see Art. 1745 *CCQ* and following). Reference is also made to leasing (see Art. 1842 *CCQ*). We also propose to examine briefly, factoring, or the sale of accounts receivable.

Article 1745 *CCQ* provides that a seller may reserve ownership of the property sold until full payment of the sale price. Such reservations of ownership are subject to publication, in the Province of Quebec in the Registry of Personal and Moveable Real Rights ("**RDPRM**") as are moveable hypothecs. The obvious advantage is that when ownership is retained, the asset will not become the property of the purchaser/debtor company so that it will not form part of the assets subject to any eventual bankruptcy nor will it fall under the security of an existing secured

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Irwin Toy, (2 December 2002) Ont. 02-CL-4783 (S.C.J.), Farley J. and Re: *A.G. Simpson Automobile Inc*., (2 October 2001), Ont. 01-CL-4281 (S.C.J.), Farley J.

6 See Re: *Quintette Coal* (1992), 68 B.C.L.R. (2d) 219 (B.C.S.C.), Thackray J.

creditor. Obviously, in practical terms, to benefit from such purchase financing, the debtor must show itself able to make the instalment payments on the property purchased.

It seems however that the reservation of ownership, in the event of a bankruptcy, will be opposable to a trustee in bankruptcy, even if it is not registered at the time of the bankruptcy[7]. It does not appear that this position could be successfully asserted against a secured creditor with blanket or universal security on the class of property in question. Lack of registration would be fatal against such a third party.

While this mechanism is most often used to finance the acquisition of equipment, it could even be used to finance inventory for resale in retail stores (often referred to in business terms as "consignment sales"). By stipulating a retention of ownership and identifying the merchandise by the ticketing, tracked in a computerized inventory, the reservation of ownership can be made effective. The sale/retention of ownership contract provides for payment of the wholesale purchase price of all goods resold at retail during the course of a week (by way of example). The contract provides not only for the retention of ownership of the goods until full repayment but can also provide for segregation of the sales proceeds so that in the event of a bankruptcy, they be traceable and thus remain the vendor's property. While the seller may be vulnerable for a week's worth of proceeds, assuming good faith of the purchaser, such risk is manageable. The arrangement allows a retailer in the midst of a restructuring (under court authority or not) to obtain credit from a supplier while protecting the supplier.

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[7] See *Lefebvre (Syndic de)*, [2004] 3 S.C.R. 326 (dealing with a long-term lease).

It is also possible for "insolvent businesses" to obtain liquidity from the sale of capital assets and lease-back from the purchaser (Article 1842 *CCQ*). Since the lessee in our scenario is not in general terms creditworthy, the lessor must have confidence in the value of the asset on a liquidation resale to recover the sums advanced.

While certain concerns can be raised as to the validity of such transactions and their opposability to a trustee in the event of an eventual bankruptcy, the amendments to the *BIA* in 1997 eliminating the concept of retroactivity of bankruptcy make it such that the status of secured creditor is evaluated as at the actual date of the bankruptcy[8]. Moreover, given section 97 *BIA* since current adequate value is being given at the time of the retention of ownership, it is submitted that these transactions would not be liable to be set aside at the instance of the trustee in the event of a bankruptcy.

Financing on the basis of accounts receivable or factoring is often available to a company of questionable solvency. Since the lender or factor purchases an account receivable at a discount and is satisfied with the existence and collectibility of such account receivable, the questionable solvency of the seller of the account receivable (ie. the supplier of the goods or services in consideration of which the account receivable is created) is not directly in issue. Collectibility is key so that satisfaction with the credit worthiness of the debtor of the account receivable (ie customer) is necessary to make the arrangement viable. As well a factoring company will often

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[8] S.71(1) *BIA* (repealed) provided for the "dating back" of the bankruptcy to the date of the filing of a petition for receiving order and sections 50.4(8)(a), 57(a) and 61(2) *BIA* provided similar "retroactivity" for notices of intention to file proposals and proposals.

require a confirmation from the customer that the account receivable is due and not subject to any claim of compensation (set-off) or other defence (ie. defects in the goods purchased).

The Supreme Court of Canada has recognized that a factoring agreement is not a hidden financing contract but a true contract of purchase and sale[9]. This is important because title to the account receivable is of the essence to the factoring company. Where the accounts receivable are subject to security in favour of an existing lender, an inter-lender agreement will be required to provide a mechanism whereby upon purchase and payment of the price the security on the account receivable is deemed discharged.

There are different modalities of factoring contracts providing for the purchase of accounts receivable with or without recourse back to the seller and with or without administration (ie. collection of the accounts receivable). The important point to retain for present purposes is that the purchase of an account receivable for cash allows a debtor to have immediate cash and liquidity usually in amounts greater than made available in traditional banking arrangements. Also, depending on the factoring arrangements, the factor may assume the risk of non-payment due to the insolvency of the customer. A detailed review of all aspects of the factoring contract is beyond the scope of this paper. It should be remembered that factoring is a useful mechanism for a technically insolvent[10] company to obtain financing for its operations. This mechanism is little used in Canada but fairly common in the United States.

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9 *Minister of National Revenue* v. *First Vancouver Finance*, [2002] 2 S.C.R. 720.

10 The company may have no shareholders equity on the balance sheet or its assets on a fair liquidation may be less in value than its debt. It may however have good sales to creditworthy customers going forward.

Debtor-In-Possession Financing

Introduction

Debtor-in-possession financing ("**DIP"**) refers to the judicially supervised mechanism whereby an insolvent company is provided with interim financing, for use during and for the restructuring process. Often the court will authorize the lender to enjoy priority senior to pre-filing claims. DIP financing issues often focus on the competing interests of the debtor company and different classes of its creditors. The availability of DIP financing can be crucial in order for a company to be able to restructure its debt and business operations and successfully pursue its enterprise. In recent years, DIP loans have received much attention amongst the insolvency bar.

As alluded to above, the two principal statutes dealing with insolvency in Canada are the *BIA* and the *CCAA.* Personal and small companies qualify for relief under the *BIA*, whereas the *CCAA* applies only to corporations having at least $5,000,000 in debt[11]. Both statutes have simultaneous objectives of preserving a firm's going concern value where possible, maximizing creditor recovery and minimizing the potential damage to employment and communities caused by a bankruptcy. As DIP financing in Canada was developed under the *CCAA*, this statute will be the focus of our discussion. However, some current practice trends make DIP financing under the *BIA* proposals possible and practical. This may be a significant development in the re-structuring of small and medium-sized businesses. Moreover the recent amendments to the *BIA* in virtue of Bill C-55 (discussed *infra*) once brought into force will enable companies filing proposals under the *BIA* to seek court orders for DIP financing.

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[11] Or in the case of a filing by a corporate family, a total of $5,000,000 (see section 3 CCAA).

The purpose of the *CCAA* is to "facilitate a compromise between an insolvent corporate debtor and its creditors so that the company is able to continue to do business".[12] Given that, as a general rule, a company's assets are worth more as a going concern than on a liquidation break-up basis, the assumption underlying any attempt to re-structure under the *CCAA* is that a viable business should be able to negotiate a workout of its debt with its creditors, and to reorganize its operations for the future. The statute (at least until recently) is brief and non-exhaustive containing just 22 sections, and the courts have exercised their "inherent jurisdiction" to fill in the legislative gaps and give effect to the statute's remedial purpose. It is under this inherent jurisdiction, that the Canadian courts have, through inspiration from U.S. bankruptcy law, developed the notion of DIP financing over the last fifteen to twenty years. There was no explicit statutory provision in the *CCAA* prior to Bill C-55 providing for DIP financing.

An insolvent company may seek "protection" under the *CCAA*, by applying to the court for an order staying all proceedings against it pending a meeting of its creditors to vote on a proposed plan of arrangement. During this stay period[13] the company would remain in possession of its assets, and would continue operations. While the stay of proceedings is essential in that it provides a moratorium designed to foster a workout solution with creditors, it does not solve the problem of financing the day to day operations of the business. A workout solution three months after filing is useless if the company, for financial reasons is forced to close its doors today. Though they are prevented from initiating proceedings, suppliers, employees and other stakeholders fearing that they will not be paid may imminently sever their relationship with the

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[12] In Re*: Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3[d]) 99 (B.C.S.C.), Huddart J at para. 7.

[13] The stay granted by the Court, on the initial application will be limited to 30 days, with the possibility to extend the stay s.11(2) *CCAA*.

firm. The company requires the financing during the stay period in order to remain operational. In other words, the company needs financing to "keep the lights on"[14].

As may be expected, money lenders, whether they are existing or new, are hesitant to extend credit to an insolvent company, without having a reasonable guarantee that they will be repaid. Accordingly DIP lenders will require security on the company's assets and generally insist that this security will be first ranking. This poses a problem as generally, the debtor company does not have unencumbered assets for the DIP lender to charge as security, the tendency being for the principal lender (often a chartered bank) providing operating facilities to take blanket security on all the company's assets or at least on the immediately realizable assets (ie. inventory and accounts receivable).

Thus in order to allow a company subject to the *CCAA* to obtain DIP financing, the courts have allowed DIP loans to rank in priority to those of pre-*CCAA* filing creditors. The lender now has the security needed to extend credit. The problem however is that the pre-filing secured lender, who likely had lent money on condition of having a first rank charge, is "being primed" or forced judicially to cede priority of its security. Courts in granting DIP financings will strive to reach a balance taking into account the interests of all stakeholders including: (i) the secured creditor who originally lent money in consideration of first ranking security; (ii) the company in urgent need of funds; (iii) the mass of ordinary creditors who may lose existing claims as well as a customer for the future if the company goes out of business; and (iv) employees who may lose their jobs. It is these sort of issues that are raised in DIP financing proceedings.

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[14] Re: *Royal Oak Mines* (1999), 6 C.B.R. (4th) 34 (Ont. Gen. Div.), Blair J. ("***Royal Oak Mines***").

The story of a fish farm

In order to flesh out the considerations of the different parties in a DIP setting, we will present a fictitious example, loosely inspired by a recent case of the New Brunswick Court of Queen's Bench[15]:

Since the mid 1990's, Fish Farm Inc. ("**FFI**") has owned and operated a fish farm in Atlantic Canada. In order to begin operations, in 1995, FFI obtained an initial $3,500,000 loan from Atlantic Investment ("**AI**") who took first rank security on all FFI's fixed assets. Over the last decade, FFI has been slowly paying back the principal and interest owed to AI. FFI has an $800,000 revolving line of credit from Fisherman's Bank (the "**Bank**") which is fully drawn down. The various suppliers, the municipality (for business and real estate taxes) and the Canada Customs and Revenue Agency are together owed one million dollars. The Bank has first ranking security on inventory and accounts receivable.

Fish farming is a slow and painstaking process requiring long waiting periods between the birth of the fish and their sale. The maturation period sometimes lasts up to two years so that FFI will regularly not generate any revenue for an extended period of time while still paying the costs of feed, wages, insurance and loan repayments.

In early July 2006, roughly six months before the current crop of fish will reach maturity and are at their optimum value, FFI having drawn on its credit facility to the maximum found itself unable to pay creditors in the normal course of business. FFI needs financing urgently as at the

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15 Re: *Simpson's Island Salmon Ltd.* (2005), 18 C.B.R (5^{th}) 182, Glennie J.

present rate, the company only has money to keep the farm operational for another month. FFI has already defaulted under the credit conditions applicable to both its loans. Management is considered to be honest but relatively inexperienced. There are substantial orders on hand from credit-worthy customers but the orders are subject to cancellation for late delivery.

FFI files an application under the *CCAA* and is granted an initial stay of proceedings. The company then approaches both AI and the Bank requesting financing, during the stay of proceedings, in order to allow the fish to be sold at maturity, and to thereafter reorganize the company's business. The Bank is not interested while AI, though typically not a lender of operating funds is interested, but insists on a first rank charge other than its existing charge on fixed assets - in other words a first rank charge on inventory and accounts receivable. While the current crop of fish could be sold now, allowing the fish to mature for another six months will double their current value.

This simple fact pattern presents a good illustration of issues involved in DIP financing. FFI is in a dire financial situation: it needs money to pay for feed, wages, insurance and operating costs. Moreover the various lenders, having not received their monthly payments are likely to consider realization on their security. Without an urgent injection of funds, the fish will have to be sold immediately to a competitor (at a significant loss) and the business and remaining fixed assets may thereafter be liquidated. Fortunately for FFI, there is a DIP lender willing to offer the essential interim financing but it wants a first rank charge on inventory but a priority charge already exists in favour of the Bank. In this type of situation the court will be called upon to authorize the DIP financing and grant the super-priority charge on inventory in favour of AI. In determining whether or not to authorize the DIP facility, the courts will evaluate several factors,

such as whether or not the Bank is likely to suffer a prejudice from the priming of its security. It appears that there is sufficient surplus value in the inventory and resulting accounts receivable but only if the "lights stay on" for six months to allow the fish crop to mature.

Who will provide the DIP Loan?

DIP financing can be highly profitable. The rates of interest and loan fees charged are high presumably to offset the risk of lending to an insolvent company. Ironically, particularly in the case of a DIP loan from a new lender first ranking security will be demanded, also to offset the high risk.

In Canada restructuring financing has often come from pre-filing or other senior secured creditors. However the trend appears to be moving towards a mix of pre-filing and new, speculative lenders[16]. Nevertheless, anecdotal evidence suggests that in most cases it is the existing lender who is providing the DIP facility[17] which mirrors the statistics in the United States[18]. In fact, existing lenders have an informal "right of first refusal" on the loan[19] and often seize the opportunity when they have it.

Existing lenders may offer DIP financing as there are lucrative benefits stemming from the pre-filing relationship. The existing lender has intimate knowledge of the borrower's business,

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16 SARRA, Janis P., "*Governance and Control: the Role of Debtor-in-Possession Financing under the CCAA*", Annual Revenue of Insolvency Law, 2004 ("**Sarra**") at page 124.

17 *Ibid.* at page 132.

18 U.S. statistics suggest that it is the existing lender who provides some or all of the DIP loan in 58% of Chapter 11 cases. SANDEEP, Dahiya *et al*, "*Debtor in Possession Financing and Bankruptcy Resolution: Empirical Evidence*", (2003) 69 J. Fin. Econ. 259 at 265 cited in Sarra, *supra* note 16, at page 132.

19 Kent *et al.*, *supra* note 5, at page 11

management and security, as well as industry-specific information. They are therefore in a position to make quick decisions with transaction costs lower than those of a new lender.

Moreover, since the DIP lender plays a vital role in dictating the restructuring of the company, existing creditors will often perceive there to be an opportunity cost associated with not providing the interim financing. The pre-filing creditor already fears for the safety of its original loan and wants to ensure that the restructuring of the company is performed in a manner which protects this claim. In other words, it is often preferable to increase the credit rather than risk losing the hierarchical priority of the claim which could happen when the existing lender has its security "primed" by a new DIP lender[20].

Finally, the ability to cross-collaterize claims appears to be an additional advantage for existing creditors to provide the DIP facility. Cross-collaterization refers to using the DIP facility as a means of securing pre-filing claims in addition to obtaining security for the fresh funds. Such was the case in *Air Canada*[21] where under the terms of the DIP financing agreement General Electric Capital Canada Inc. ("**GE**") secured performance of pre-filing obligations which were owed under aircraft leases to GE Capital Aviation Services Inc., an affiliate of the DIP lender. In doing so, GE significantly improved its pre-filing position and ensured a greater return on the leases in the event of a liquidation.

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[20] Sarra, *supra* note 16, at page 132.

[21] *Air Canada,* Re: (2003), 2003 Carswell Ont 1220 (Ont. S.C.J.) [Commercial List] cited in *Kent et al, supra* note 5, at page 11 as Re: *Air Canada* April 1, 2003 Toronto 03-C.C. – 4932 Ont. S.Ct.; see Farley, J. unreported reasons January 16, 2004.

In addition to profit and cross-collateralization (for an existing lender) a DIP lender can exert much control over the company in restructuring through the terms, conditions and covenants of the lending agreement. Moreover, the DIP lender is well positioned to become the lead lender of any successfully re-structured company or, should the outcome be a liquidation, as first ranking secured creditor, the DIP lender is well positioned to control that process.

Despite the foregoing considerations, existing lenders may, for any number of reasons, refuse to be the DIP lender, as in the foregoing example of the fish farm.

Such reasons may include the existing secured creditor not having faith in management while being confident that full recovery could be had from the collateral at existing levels of debt. In such a scenario, an existing secured lender would understandably prefer a liquidation. It thus becomes necessary to identify a new lender. In our fish farm example, there appears to be an enhancement of the value of the assets with fresh funds and more time. This leaves room for DIP financing with a priming order while respecting the collateral of the existing secured lender.

Evolution of DIP financing in Canada

In Re: *Dylex Ltd.*[22] ("***Dylex***"), Justice Farley stated that the "history of *CCAA* law has been an evolution of judicial interpretation" This flexible and creative approach has been particularly employed in the development of DIP financing under the *CCAA*[23].

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[22] (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div.), Farley J.

[23] NADLER, I. Berl, "*Debtor-in-Possession Financing: The Dark Lending Hole*", The Canadian Institute, 2004 ("**Nadler**") at page 3.

The concept of interim financing and the court ordered super-priority charge is rooted in judicial receivership cases, which up until the early 1990's applied equally to situations under the *CCAA*[24]. In these cases, interim financing for the debtor company was included in the expenses of the receiver and the priority status of loans followed the teaching of the Ontario Court of Appeal in *Robert F. Kowal Investments Ltd.* v. *Deeder Electric Ltd*[25] ("***Kowal***").

In *Kowal*, a judicial receiver had been appointed in respect of the property and assets of a partnership without the consent of the mortgagee who possessed a charge on the partnership lands. The issue centered on whether the receiver should be granted a charge over the partnership assets, ranking above that of the mortgagee, for monies advanced in respect of payments made by the receiver during the course of the receivership[26]. The Ontario Court of Appeal refused to grant the receiver priority status, yet provided three non-exhaustive exceptions where the security of existing creditors could be subordinated: (i) consent of the existing secured creditor; (ii) the receiver has been named to preserve and realize assets for the benefit of all interested parties including secured creditors; and (iii) the receiver has expended money for the necessary preservation and improvement of the property[27].

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[24] *Ibid.* at page 4.

[25] (1976), 9 O.R. (2[d]) 84.

[26] Kent *et al.*, *supra* note 5, at page 5.

[27] *Kowal*, *supra* note 25, at pages 88-91.

These exceptions effectively served as the foundation upon which corporate debtors in *CCAA* proceedings, attempted to have their restructuring costs charged on the debtor's property ranking above other secured interests[28].

In the 1990's, Canadian courts began to show a greater willingness to approve DIP financing and super-priority claims in *CCAA* restructurings as compared with the judicial receivership context. In Re: *Westar Mining Ltd.*[29] ("***Westar***") the approach of the courts shifted, and the application of the receiver-manager approach was specifically rejected in the *CCAA* context, Justice Macdonald claiming that he preferred to "revert to what is fair and just in the particular circumstances of this case"[30].

In *Westar*, the court had ordered suppliers of goods to extend further credit to Westar during the interim period. The court subsequently concluded that it lacked the jurisdiction to issue that particular order, but based on its inherent jurisdiction issued a first charge over Westar's interest in the Greenhills mine for credit that had been given and any other credit which suppliers would be willing to extend during the restructuring period. This was done despite the fact that Westar's co-venturer in the mine objected to the granting of the security because Westar had agreed to keep its interest in the mine unencumbered. It is important to note however that the assets in

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[28] ZIMMERMAN, H Alexander, "*Financing the Debtor in Possession*," Insolvency Institute of Canada Tenth Annual Meeting and Conference, (November 1999) cited in *Kent et al., supra* note 5, at page 7.

[29] (1992) 14 C.B.R. (3d) 88 (B.C.S.C.), Macdonald J.

[30] *Ibid* at page 94.

Westar were unencumbered and while the court was willing to issue a first charge, secured creditors were not subordinated in this case[31].

The *Dylex*[32] case is widely regarded as the first Canadian restructuring where super-priority DIP financing was awarded over the objections of a secured creditor. Dylex had determined that it required $30 Million in order to remain afloat during its restructuring period. The principal existing lenders at the time were the Royal Bank of Canada ("**RBC**") and the Bank of Montreal ("**BMO**") who were already owed significant sums at the time of the *CCCA* filing. Both lenders had blanket security over Dylex's assets. RBC offered to provide the DIP loan and insisted that it obtain: (i) a super-priority charge on inventory and receivables, ranking above the existing charges held jointly by the two banks; and (ii) a $1 million arrangement fee. BMO objected to the fee, yet Justice Houlden, relying on the "courts inherent jurisdiction", approved the DIP facility. Justice Houlden concluded that BMO would not be prejudiced as the interim financing would generate revenues which would pay the advances, so that BMO would remain fully secured.

Another significant advance to the DIP financing case law came Re: *Skydome Corp.*[33] ("***Skydome***") and *Royal Oak Mines*[34] where the court approved super-priority DIP facility over the objections of secured creditors because the courts found that the risk of prejudice to the

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31 A similar situation occurred in Re: *The T. Eaton Co.*, [1997] O.J. No. 6388 (QL) at para. 29 et fol. (Ont. Gen. Div.), Houlden J.

32 23/01/95 Doc B-4/95 Ont. Gen. Div (Houlden) cited in *Kent et al*., *supra* pp. 8-9.

33. (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div.), Blair J.

34 *Royal Oak Mines*, *supra* note 14.

existing secured creditors was minimal compared to potential consequences if the DIP facility was not allowed.

Since the *Dylex* case, the courts have gradually and in increasing number, awarded a super-priority charge to the DIP lender. The jurisdiction of the courts to award DIP financing is now widely accepted across Canada[35]. While the "inherent jurisdiction" to make DIP orders including the "priming" of existing security has been much discussed in the literature recent amendments to the *BIA* and *CCAA* would make this jurisdiction issue largely moot.

Statutory Recommendations and Reform

On November 21, 2005, the federal government enacted Bill C-55[36] which amends the *CCAA* and the *BIA*.

Because of an apparent consensus in the insolvency community that various provisions of the law needed fine tuning, the statute has not been proclaimed in force. Best "guestimates" are that the law will not come into force before sometime in 2007. The amendments concerning the financing of insolvent companies and particularly DIP financing are in large measure a codification of the current case law. However, the amendments are also the product of much critical analysis by the Joint Task Force on Business Insolvency Law Reform (the "**JTF**") of the

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35 In Québec, see Re: *Papiers Gaspesia Inc.*, J.E. 2005-74 (S.C.), Chaput j. ("***Papiers Gaspésia***"); Re: *Papiers Gaspesia Inc.*, J.E. 2005-530 (S.C.), Chaput j.; Re: *MEI Computer Technology Group Inc*., [2005] R.J.Q. 1558 (S.C.), Gascon, j.; Re: *Boutiques San Franscisco Inc.*, [2003] Q.J. No. 18940 (QL) (S.C.), Gascon, j. ("***Boutiques San Francisco***") and *Syndicat national de l'amiante d'Asbestos inc.* v. *Mine Jeffrey inc.*, [2003] R.J.Q. 420 (C.A.) ("***Mine Jeffrey***").

36 *An Act to Establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts* Bill C-55 now 2005 S.C. c. 47.

Insolvency Institute of Canada and the Canadian Institute of Insolvency and Restructuring Professionals. The JTF recommended a number of reforms in insolvency law, including the need to legislate on DIP financing. The JTF stressed that though the courts had developed (absent legislative authority and based on their inherent jurisdiction) a body of rules governing DIP financing, a debate still prevailed in some quarters over the existence of that jurisdiction to grant DIP orders and the extent to which such orders could or should be made (particularly with regard to "priming"). The JTF proposed codifying the rules on DIP financing and provided a list of seven (7) factors that the court should consider in deciding whether to order DIP financing. In 2003, the Standing Senate Committee on Banking Trade and Commerce (the "**Senate Committee**") recommended that the *CCAA* be amended to allow for DIP financing and cited with approval, the seven factors outlined by the JTF to guide the courts in their decision[37].

In 2005, the JTF issued supplemental reform proposals[38], stating that DIP financing should not be restricted to *CCAA* proceedings (as it had been in the case law) but should be available in *BIA* proposals as well. Moreover, the JTF recommended eight factors which the court should consider in DIP proposals[39].

Finally in November 2005, Bill C-55 received Royal assent, and thus formally entrenched the provisions related to DIP financing. The bill largely adopts the Senate Committee and JTF

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[37] "*Debtors and Creditors Sharing the Burden: A review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*" p. 102, Report of the Standing Senate Committee on Banking, Trade and Commerce, November 2003 ("**Report of the Senate Committee**"), available at www.senate-senat.ca/bancom.asp.

[38] Supplemental Report of the Joint Task Force of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals, June 30, 2005.

[39] ie. whether the DIP loans are necessary for the continuation of the business operations of the debtor or the preservation of its "assets".

recommendations. The Bill provides that DIP financing be available under both *CCAA* arrangements and *BIA* proposals and includes a list of factors, that are similar (though with certain variations) to those recommended by the JTF.

DIP financing under the *BIA*

It has been widely accepted that the "inherent jurisdiction" to make DIP financing orders has only been available under the *CCAA* and not the *BIA*. Therefore, while the modification of the *CCAA* is in large part a codification of the case law, the amendments to the *BIA* represent a major change to that regime[40]. The amendments to s.50.6(1) *BIA* setting down the regime regarding DIP financing are virtually identical to the *CCAA* provisions but for differences of mechanics and definitions. Our comments will be focussed therefore on the *CCAA*. While the 2002 JTF report recommended DIP financing only in *CCAA* applications, the 2003 Senate recommendations and the 2005 Supplemental JTF report encouraged DIP financing in cases under the *BIA*.

At the Senate committee hearings, the Canadian Bar Association recommended that DIP be allowed under the *BIA*, on the grounds that "the same factors that lead to the need for DIP financing in a *CCAA* reorganization also exist in *BIA* proposals"[41]. Similarly Max Mendelsohn a leading insolvency practitioner told the Senate Committee that "[i]f a reorganizing entity

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[40] However see Re: *Bearcat Explorations Ltd*. (2004), 3 C.B.R. (5th) 167 (Alta. Q.B.) where Romaine J. held that she had the "inherent jurisdiction" to make a DIP financing order under the BIA including priming of certain secured creditors (albeit with their consent). See also Re: *Meubles Fly America Inc.*, 500-11-026657-052, October 14, 2005, Quebec Superior Court, Journet j. ordering on "Directors and Officers Charge" after the filing of a notice of intention to file a proposal under the *BIA* but without any discussion of the existence of jurisdiction to do so.

[41] Report of the Senate Committee, *supra* note 37, at page 104.

believes that it is too expensive to seek DIP financing in its reorganization, it will not do it or it will not be able to do it. However, it should not be denied the opportunity to try to do it if the concept makes sense." Proponents suggest that some *BIA* proceedings can be quite large in size and scope and the corporate debtors should have access to DIP financing if needed, in the same way as their *CCAA* counterparts.

The opposing view suggests that allowing DIP financing in *BIA* proposals would have an adverse effect on pre-insolvency lending arrangements. Creditors, fearing that the priority position they negotiated is at a risk, may limit the access to available credit. As the Canadian Bankers Association told the Senate Committee, "If new and innovative companies are to receive adequate credit at reasonable costs, secured parties must be assured that their priority position will not be diminished."[42]

Additional arguments have been made suggesting that DIP lending should not be available in *BIA* cases. The nature of our adversarial system of justice is such that when determining whether to grant DIP financing, the courts will rely in great measure on creditors to challenge deals that are not in their best interests. Given the small scope of some *BIA* filings, there is a possibility that certain creditors will not challenge DIP financings that are not in their interests simply because the cost of raising an objection is disproportionate to the amount of their claims.

The debate as to whether to make DIP financing available under the *BIA* for proposals filed under that legislative regime seems to gravitate around the issue of small versus large companies referring to the five million dollar debt threshold in the *CCAA*. Perhaps the time is ripe to

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[42] *Ibid*. at page 102.

explore the possibility of differentiating filings between the *BIA* and the *CCAA* not on the size of the debt of the subject company but rather on the basis of the definition of "debtor" or "debtor company" which, details aside, revolves around the notion of insolvency. "All too often corporations will wait too long before applying for protection under the *CCAA*, at least this was a significant problem in the early 1990s" (sic), as observed by Justice Farley in Re: *Stelco Inc.*[43]. It appears that Stelco was the first instance where there was a seriously mounted objection to a company availing itself of the *CCAA* on the contention that the company was not insolvent. Using the same definition for many purposes often leads to strained judicial interpretation. The purpose of the *CCAA* is purely remedial to the financial well-being of a company whereas the *BIA* under the proposal regime is not merely remedial but also has as its goal immediate liquidation and distribution of assets where creditors do not accept the insolvent company's proposal[44]. For example, in considering whether a company is insolvent for purposes of whether or not a bankruptcy petition should be granted, it is questionable, from a policy perspective, whether long term debt should be considered. On the other hand, for restructuring purposes under the *CCAA* the existence of a heavy, albeit long-term debt load may be highly relevant. A looming, albeit not yet crystallized liquidity crisis would seem a good reason to seek protection under the *CCAA* and perhaps DIP financing. Why wait until the debt actually becomes due? Early filings could be useful in avoiding crisis situations which give rise to a number of problems in and of themselves, including the necessity of applications for DIP financings "to keep the lights on" often without adequate notice to stakeholders. The attempt to

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[43] (2004), 48 C.B.R. (4th) 299 (Ont.S.C.J.), Farley J.

[44] Refusal of creditors to accept an arrangement under the *CCAA* does not entail, legally, an automatic bankruptcy.

rehabilitate truly insolvent corporations under the *BIA* would, if unsuccessful, result in the automatic bankruptcy where the company's proposal is not accepted by the statutory majority of creditors or the court. Under the *CCAA*, avoiding a last-minute rush would allow companies to seek the assistance of the court in a timely fashion with at least the skeleton of a reorganization plan in hand and DIP financing which perhaps could avoid some of the more sensitive issues such as "priming" existing secured creditors. "The *CCAA* should not be the last gasp of a dying company. It should be implemented, if it is to be implemented, at a stage prior to the death throe"[45].

Factors to consider when granting DIP financing

Even though Bill C-55 has not been proclaimed in force we take its provisions as a starting point on the assumption that proclamation while perhaps not imminent, is inevitable.

The factors to be taken into account by the courts in order to determine whether to approve DIP financing, under the *CCAA* amendments in Bill C-55 are substantially those of the JTF recommendations. For ease of reference the following chart compares the factors recommended by the JTF compared with those contained in Bill C-55.

JTF Recommendations to amend the CCAA	**CCAA (as amended by Bill C-55)**
Provide in CCAA cases for an express statutory power to authorize borrowing ("D.I.P. loans") and grant security in specified amounts for post-filing	11.2(1) A court may, on application by a debtor company, make an order, on any conditions that the court considers appropriate, declaring that the property of the

[45] Re: *Inducon Development Corp*. (1991), 8 C.B.R. (3d) 306 (Ont.S.C.J.), Farley J., at page 310.

JTF Recommendations to amend the CCAA	**CCAA (as amended by Bill C-55)**
advance(s) […] necessary to fund the debtor during the restructuring proceedings, such power to be authorized according to criteria to be specified in the statute.	company is subject to a security or charge in favour of any person specified in the order who agrees to lend to the company an amount that is approved by the court as being required by the company, having regard to its cash-flow statement, [...] 11.2(3) The court may specify in the order that the security or charge ranks in priority over the claim of any secured creditor of the company.
Provide that in deciding whether or not to authorize a D.I.P. loan, the court should consider amongst other things, the following factors: (a) what arrangements have been made for the governance of the debtor during the proceedings; (b) whether management is trustworthy and competent, and has the confidence of significant creditors; (c) how long will it take to determine whether there is a going concern solution, either through a reorganization or a sale, that creates more value than a liquidation; (d) whether the D.I.P. loan will enhance the prospects for a going concern solution or rehabilitation; (e) the nature and value of the assets of the debtor; (f) whether any creditors will be materially prejudiced during	11.2(5) In deciding whether to make an order referred to in subsection (1), the court must consider, among other things, (a) the period during which the company is expected to be subject to proceedings under this Act; (b) how the company is to be governed during the proceedings; (c) whether the company's management has the confidence of its major creditors; (d) whether the loan will 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 assets; and (f) whether any creditor will be materially prejudiced as a result of the company's continued operations.

JTF Recommendations to amend the CCAA	CCAA (as amended by Bill C-55)
that period as a result of the continued operations of the debtor; and (g) whether the debtor has provided a detailed cash flow for at least the next 120 days. […] Provide that a further factor be added to Recommendation 2, being whether the D.I.P. loans are necessary for the continuation of the business operations of the debtor or the preservation of its assets.	

The criteria listed in s.11.2(5) are non-exhaustive, therefore other factors may be considered, and the teachings in the JTF recommendations are still very useful. The wording of s.11(5) is however mandatory such that while other criteria may be considered the six criteria "must" be considered as a minimum.

Examining the six factors in s.11.2(5) of Bill C-55 suggests that they can be conceptually divided into two groups. The first four criteria are concerned with whether or not providing the interim financing will ultimately result in a successful reorganization where the debtor's business survives as a going concern (and presumably creditors receive more than they would in an immediate liquidation). The fifth and sixth criteria are concerned with the interests of the creditors (other than the DIP lender). Ultimately, the question is if no DIP is granted and the company is liquidated what will be the payment to creditors? Our discussion will follow this division.

1) Successful Outcome of *CCAA* Proceedings

Forecasted Duration of *CCAA* Proceedings (s.11.2(5)(a) *CCAA*)

There is a quasi-presumption in reorganizations that "the shorter the better". Any protracted reorganization proceeding can lead to a loss of confidence on the part of suppliers of goods and services to the *CCAA* company, the possible loss of key employees and a loss of confidence by consumers and other customers of the subject company who may wonder whether, for example, the company will be there to ship the order next spring or whether the company will be there to honour the airline ticket purchased months in advance. The duration of the *CCAA* proceeding will obviously need to correspond to any deadlines imposed by the prospective DIP loan. The duration of the proceedings will correspond to the problem to be cured. In our model of the fish farm, the restructuring period would certainly last until at least the next crop of fish would mature and be ready for shipment to customers (ie. six months). Any proposed DIP financing would have to be offered for a period long enough to see the company through that period.

It should also be mentioned that under s.11.2(1), the court, in approving DIP financing, is required to have regard to the cash flow statement which the company is obliged to file with the initial *CCAA* application in virtue of s.10(2) of Bill C-55. Moreover, DIP financing can only be granted if the monitor reports that the company's cash flow statement is reasonable (s.11.2(2)).

Governance (s.11.2(5)(B) *CCAA*)

The viability of the company is tied to its corporate structures. While this criterion might appear self-evident, it is not to be taken for granted that in an insolvency situation the directors have not, for example, resigned "en masse". Without effective governance during the restructuring period,

there is reason to question the viability of the company and this question should be considered prior to the granting of any DIP facility. In the absence of proper governance, an immediate liquidation might be a better solution for the preservation of value in the corporate assets.

Major Creditors' Confidence in Management (s.11.2(5)(c) *CCAA*)

In evaluating whether the DIP facility is likely to succeed, s. 11.2(5)(c) instructs the court to gage whether the company's management has the confidence of its major creditors." The corresponding recommendation from the JTF added that management be trustworthy and competent. Post-filing financing would be overly difficult if creditors cannot rely on the honesty and abilities of the debtor company's management. The lack of faith in management could be due to a series of poor investments, lack of motivation or poor planning in the past. If we return briefly to our fictitious fish farm example, one can easily imagine a situation where creditors would have minimal confidence in management who possessed limited training or experience in fish farming.

In *Ge Capital Canada Inc.* v. *Euro United Corp*[46] the court refused to grant DIP financing based mainly on the grounds that there was "a high level of distrust and lack of confidence with respect to management and that this had permeated the creditors ranks and poisoned the relations and negotiations between the parties".

The wording of the legislation avoids the court forming its own opinion; the court need only weigh the evidence offered as to the opinions of major creditors. If strictly applied this criterion

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[46] (1999) 25 C.B.R. (4th) 250 (Ont. S.C.J.), Blair J.

will oblige *CCAA* applications to involve major creditors more closely in the DIP financing application than is often the case at present. Under existing case law, when evaluating whether the company's management has the confidence of its major creditors, it may not be required that the creditors be notified of a potential DIP financing. In *Royal Oak Mines*[47] for example, Justice Blair recognized that hedge lenders had not been given adequate notice or opportunity to evaluate their position, yet he authorized the super-priority DIP financing anyway. However under Bill C-55 any DIP order extending beyond 30 days must be preceded by notice to the secured creditors likely to be affected by the order. Moreover, one would think it difficult in most instances to prove that major creditors have confidence in management unless notice has been given to those creditors. Need affidavits be obtained from these creditors under the new legislation?

Viability (s.11.5(2)(d))

The final factor in evaluating whether interim financing is likely to succeed consists of determining whether "the loan will enhance the prospects of a viable compromise or arrangement being made in respect of the company" (11.5(2)(d)). This factor appears axiomatic requiring that the interim financing will help the company continue to operate on a going concern basis in order to subsequently reorganize. It should be noted at this junction that an *ex parte* DIP is only available for 30 days under Bill C-55 (s.11.2(a)) unless the collateral is free of existing security (s.11.2(b).

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[47] *Royal Oak Mines, supra* note 14.

Along these lines, in *Westar*[48] the court ordered a super-priority charge on the grounds that if it hadn't, "the company would have had no chance of completing a successful reorganization without the ability to continue with operations through the period of the stay." Moreover, in Re: *Sulphur Corp. of Canada Ltd*[49] the court authorized a DIP facility on the grounds that "Sulphur would have no chance to recover or restructure but for the provision of some interim financing…". In that case mechanics lien holders having contributed to the construction of a factory were primed because without money to complete construction no cash flow was envisaged and all creditors including the lienholders would suffer a shortfall.

The courts have held that an initial *CCAA* filing seeking a suspension of proceedings should be accompanied by or include at least an outline of a plan of arrangement. It could therefore be said that no DIP order should be made unless the court is presented with some idea of what the plan will be[50]. It seems however that in practice this requirement is either sometimes forgotten or that which constitutes an outline of a plan is loosely interpreted.

In our fish farm example, one is unaware whether the "problem" is merely temporary, short term liquidity or whether there is a problem in the industry or a defect endemic to this company (eg. cost structure) in respect of which additional time with DIP financing may only forestall an inevitable bankruptcy liquidation.

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48 *Westar*, *supra* note 29.

49 (2002), 35 C.B.R. (4th) 304 (Alta. Q.B.)**,** Loveecchio J.

50 See *Banque Laurentienne du Canada* v. *Groupe Bovac Ltée*. [1991] R.L. 593 (Qué. C.A.); *Mine Jeffrey*, *supra* note 35, and *Boutiques San* Francisco, *supra* note 35.

2) Interest of the Creditors

Nature and Value of Assets (s.11.2(5)(e) *CCAA*)

Under this criterion, the courts can analyse whether the assets are such that the ordinary creditors would be better off in a liquidation scenario. However, it should be noted that there does not appear to be an express provision requiring that ordinary, albeit major creditors, be notified of the DIP application. Attention is focused on the interests of secured creditors and, obviously, on the issue of "priming". The courts will then analyse whether there is sufficient equity in the assets so that the security of the existing secured creditor is sufficient for it to ultimately be paid if the restructuring results in a liquidation. The courts have gone through this exercise on a number of occasions in ordering priming (eg. *Dylex*). Any insolvency practitioner knows that the depreciation in the value of assets in a liquidation scenario can be quick and dramatic such that such analysis is difficult at best and all the more so when applications are made on an urgent basis, often without the benefit of detailed appraisals. In the case of the fish farm, it appears that the nature of the assets is such that time will enhance value beyond the amount of the DIP financing.

Prejudice (s.11.2(5)(f) CCAA)

The final criteria for the courts to consider when faced with a DIP financing scenario is "whether any creditor will be materially prejudiced as a result of the company's continued operations" (11.2(5)(f)). Even if the other five factors have supported the conclusion that interim financing would be opportune for the insolvent debtor, this sixth criteria appears to provide that if the creditor will be materially prejudiced, the DIP facility cannot be authorized.

This criteria specifically raises the significant issue of the fairness of subordinating existing lenders for the benefit of the DIP lender (ie. "priming"). When the DIP loan serves to benefit all stakeholders, this is not a concern. However there are cases where a creditor whose security has been primed may suffer unfairly. This is primarily the case where the secured creditor would be paid in full in the event of immediate liquidation. The court would have to be convinced that, should the DIP be granted and the existing secured creditor primed, it would have equal chance of payment in full. This can be a difficult conclusion to reach! By the same token, it has been held that existing secured creditors should not have a veto over the granting of DIP lending orders (and priming)[51].

The courts have had occasion to determine what constitutes a "material prejudice" and how this affects the granting of DIP financing orders. From a canvassing of the jurisprudence, this "material prejudice" criteria often refers to the balancing of prejudices test developed by the courts on a number of occasions under the *CCAA*.

In *Skydome*[52], Skydome Corporation filed an initial order under the *CCAA* and requested authorization to receive interim financing from the Blue Jays baseball club, secured by a first charge ahead of pre-filing encumbrances. A group of bondholders objected to the DIP financing charge which had primed their security. Under the guise of the courts inherent jurisdiction, the court established that super-priority financing could take place over the objection of creditors. The court specified that "DIP financing was to be based on a balancing of the relative prejudice

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[51] See Re: *United Used Auto* & *Truck Parts Ltd.* (1999), 12 C.B.R. (4th) 144 (B.C.S.C.), Tysoe J. ("***United Used Auto***") and Re: *Hunters Trailer and Marine ltd.* (2001), 27 C.B.R. (4th) 236 (Alta. Q.B.), Wachowich J.

[52] *Skydome*, *supra* note 33.

to be experienced by the creditors with the benefit to be gained should the financing be granted"[53]. The court found that potential benefits to Skydome far outweighed the ramifications of having to liquidate the Skydome, causing "very substantial economic and financial ripple effects"[54].

In *United Used Auto*[55], Justice Tysoe rejected an application for DIP financing using the same reasoning:

> "[…] while the DIP financing would obviously have a beneficial effect on the operating business, I am not satisfied that it is critical for the business to continue to operate or for the petitioners to successfully restructure their affairs." (at page 153)

As indicated above, the wording of s.11.2(5)(f) CCAA suggests that any material prejudice to a creditor would prohibit the DIP facility. However since the criteria are not exhaustive, it is arguable that the balance of relative prejudice between objecting creditor and debtor company is still to be considered.

In the case of our fish farm since the extra time produced by the DIP would result in an increase in value of assets beyond the amount of the DIP it would appear that existing creditors would only be benefited by the financing.

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53 Nadler, supra note 23, at page 13.

54 *Skydome*, *supra* note 33, at page 121

55 *United Used Auto*, *supra* note 51.

Comment

Bill C-55 does not address the quantum of financing that will be granted. Section 11.2(1) simply refers to the "amount that is approved by the court as being required by the Company, having regard to its cash flow statement". Obviously, the quantum of the loan will have direct impact on the prejudice to any existing secured creditor. Moreover, the issue as to whether and when DIP financing for an amount and a period longer than is merely required in the immediate future "to keep the lights on" is not really addressed in the statute. Support for either position can be found according to the circumstances – see for example in favour of addressing immediate urgent needs only (*Royal Oak Mines*[56]) and see for example against restricting DIP financing to minimal immediate and urgent needs (*Air Canada*[57]).

While there is room for criticism of the provisions of s.11.2 of Bill C-55 dealing with DIP financing and equally room for interpretation by the courts, any question as to whether the courts have the inherent jurisdiction to make DIP financing orders and prime the security of existing secured creditors has been obviated by the new legislation. Also, under the new legislation, it will no longer be possible to avoid giving appropriate notice when a priming order is sought[58]. Bill C-55 is silent on whether registration of a DIP order (particularly where there is priming of existing security) is required. It seems that under the existing practice and case law[59] no

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56 *Royal Oak Mines, supra* note 14

57 Re: *Air Canada* (2003), 2003 CarswellOnt 1220 (Ont. S.C.J.)

58 See Re: *Algoma Steel Inc*. (2001), 25 C.B.R. (4th) 194 (Ont. C.A.) where secured noteholders were primed without notice.

59 In Quebec see, for example, *Boutiques San Francisco*, supra note 35, and *Papier Gaspesia, supra* note 35

registration in any provincial recording scheme of securities (ie. RDPRM in Quebec) is required either for the validity or opposability or priming effects of the DIP.

Practical Matters

The mechanics of a DIP financing application will be an application to the Court either contained in the initial court application for a stay order under the *CCAA* or by way of subsequent application.

To the extent that priming is not requested, financing could be put in place without the DIP order. Even if priming is sought, this could be achieved with a consensual cession of priority. However a court order is beneficial for a number of reasons in that:

(i) priority can be achieved quickly and effectively and without registration in the securities recording system of the province;

(ii) an order provides assurance against any subsequent court attack in a possible and eventual bankruptcy against the financing as a fraudulent preference;

(iii) the granting of an order will ensure that the rights of the DIP lender (either a new DIP lender or an existing lender) are not subject to the stay order;

(iv) the order will obviate any discussion of the debtor company's authority to grant the DIP financing; and

(v) the application and the order serve to publicize the process and so bring it to the attention of all stakeholders and eliminate any lack of faith in the process.

A typical court order authorizing DIP financing will address a number of issues such as:

(i) permitting the loan and the security;

(ii) establishing the ranking of such security;

(iii) sanctioning the terms and conditions of the loan, often by approving the term sheet, which will include the skeleton of a loan agreement and provide for repayment terms, interest rate, fees and various other loan terms, conditions and covenants. The order will often contain a declaration that the entering into of the DIP financing agreements and security do not constitute a breach of any other agreement of the debtor company, including the existing loan agreements, which may contain prohibitions in such regard.

Some DIP financing may include "takeout provisions" ie. that the DIP lender, in addition to providing fresh funds, pays out and takes over the position of the existing secured lender. This may be by way of subrogation and/or by new loan and fresh security. Such financing, obviously avoids any issues and possible contestations from existing secured creditors over the priming issue.

Administrative Charge

It has become customary in practice and accepted in the case law to seek an order granting security on assets of the *CCAA* company to secure the fees and costs of the monitor and other professional fees of the restructuring. This has now been codified in s.11.5(2) of Bill C-55 and, while we do not propose to examine these provisions in detail, they must be mentioned since

they are an indirect way of financing the insolvent company. Professional fees are paid out of cash flow when possible and the administrative charge will stay in place as a collateral and ultimate security for the payment of such charges which may accumulate when there is inadequate cash to pay on an ongoing basis. It is thought to be in the best interests of all stakeholders in a restructuring that the appropriate professional assistance be available to the debtor company which may not be the case if fees cannot be paid.

Critical Supplier

There is precedent in the case law for the granting of security by order of the *CCAA* court in favour of a supplier to guarantee payment of goods required by the *CCAA* corporation and for which it cannot pay on a C.O.D. basis[60]. Section 11.4 of *CCAA* as amended by Bill C-55 provides for the possibility of a debtor company applying to the court for a declaration that a person is a "critical supplier to the company" where the goods or services are such that they are critical to the company's continued operations. The critical supplier can be ordered by the Court to supply the debtor company, but in consideration of this supply, the critical supplier can be given security for payment by order of the court. Section 11.4(4) gives the court the right to prime the security of any existing secured creditor in favour of such "critical supplier". Also, the court is not restricted on the property of the company to be subject to the security granted in favour of the critical supplier ie. the property subject to the security need not be that which was supplied so that the mechanism can be used to provide security that could not be had in a retention of ownership situation. While the provisions do not add anything where DIP financing

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[60] See, for example, *Smoky River Coal Limited* (2000), 19 C.B.R. (4th) 281 (Alta. Q.B.), Lovecchio J. confirmed (2001), 28 C.B.R. (4th) 127 (Alta. C.A.).

is in place with a lending institution and the cash availability is such so as to allow the debtor to pay for goods on a C.O.D. basis, the innovation of the statute finds itself in the power of the court to force a critical supplier to supply.

Conclusion

The most significant development in financing the insolvent company in the last year must be the enactment of the amendments to the *BIA* and *CCAA* in Bill C-55. All participants in the process obviously await with great interest the final amendments to be made before the statute is declared in force.

Once that statute is brought into force, certain questions that have been given much attention in the case law in the past number of years will be laid to definite rest. In this respect it will no longer be necessary to discuss the existence of the inherent jurisdiction to grant DIP financing or the jurisdiction to prime existing security or whether this can be done on an *ex parte* basis. Hopefully, the case law will now be able to further develop by concentrating on substantive issues concerning the application of the statutory criteria for the granting of DIP financing, the interplay in the relationship between DIP lenders and existing secured creditors and ordinary creditors, as well as the various terms and conditions imposed by DIP lenders as part of the restructuring process.

The availability of DIP lending under the *BIA* will undoubtedly present new challenges, since the smaller corporate structure will force all participants to accomplish the DIP financing in a quicker, cheaper and overall leaner manner.

Various questions are not directly addressed by the new legislation, such as lowering the threshold of insolvency for debtor corporations seeking to file under the *CCAA*, the cross-collateralization of security for fresh DIP financing provided by existing secured lenders and consolidation of assets of non-insolvent entities (which are not the subject of *CCAA* filings) being included in the package of collateral offered to DIP lenders.

While obviously the resolution of many issues will be a function of the particular facts of individual cases that present themselves to the courts, it is equally evident that the outcome of cases depends on the philosophy behind the approach of the courts to those issues. Will the courts favour the continuation of business enterprises at almost any cost or will they be severe in the initial assessment of the viability of companies filing for protection under the insolvency legislation? These decisions will surely impact on the judicial approach to applications for DIP financing orders.

Mark Schrager, Montreal, August 2006

TAB 14

Court of Queen's Bench of Alberta

Citation: Octagon Properties Group Ltd. (Re), 2009 ABQB 500

Date: 08282009
Docket: 0901 12182
Registry: Calgary

IN THE MATTER OF THE *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF OCTAGON PROPERTIES GROUP LTD., 1096907 ALBERTA LTD., 880512 ALBERTA LTD., 5448710 MANITOBA LTD., and 5433801 MANITOBA LTD.

Reasons for Judgment
of the
Honourable Madam Justice C.A. Kent

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[1] Octagon Properties Group Ltd. and related entities apply for relief pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c.C-36 as amended (*CCAA*). Octagon is the parent company and sole shareholder of the remaining applicants. Throughout these reasons reference to Octagon will include the subsidiaries. Octagon is a real estate company which purchases, holds and sells property. It is not a development company. Currently, it owns 20 properties, all of which would fall under the *CCAA* proceedings if granted. In addition, there is a property entitled Blackfalds which Octagon proposes not fall under the *CCAA* proceedings.

[2] Each of the 20 properties has at least one mortgage on it and in some cases a second and third mortgage. At the application, counsel for the mortgagees appeared and made representations. The majority of the first mortgagees opposed the application for relief under the *CCAA*. One mortgagee, Canada ICI, which has mortgages on 2 properties supported the application and one mortgagee, ATB, was essentially neutral but applied for an adjournment to deal with issues arising out of the proposed DIP financing.

[3] The reason that Octagon has applied for *CCAA* protection is that it has been unable to make all of its mortgage payments. This is a result of the economic downturn which in turn has meant that several tenants of properties owned by Octagon have defaulted on their lease. The cash flow has diminished which in turn means that the bills, specifically taxes and the mortgage interest payments, have not been paid. Some of the properties are currently in foreclosure.

[4] The company says that should *CCAA* protection be granted, its proposed plan is to market some of the properties which will not only reduce some of its mortgage obligations but also provide the equity to deal with the remaining properties. As part of its application, it proposes that DIP financing be ordered. It has a commitment from Echo Merchant Fund Ltd. for a total amount of $3,500,000.00, with the first draw being up to $1.5 million with 3 subsequent $500,000.00 draws. The interest rate in the letter of commitment is 15% per annum. A standby fee of 6% per annum on the undrawn portion of the DIP, a facility fee of 2.75% of the DIP facility and $10,000.00 deposit for lender expenses.

[5] The cash flow summary provided by Octagon shows that the majority of debt is a combination of mortgage arrears and unpaid property taxes. If the *CCAA* order permitted drawing $1.5 million of the DIP financing, the majority of that financing would go to pay the taxes and the arrears which Octagon says is for the benefit of the first mortgagees. From August to November, the cash flow summary shows a shortfall from $210,000 to $290,000 per month depending on the month.

[6] In support of its application Octagon provided a property summary which lists the 20 properties, their book value, the latest appraisal value, a company valuation and the outstanding amount of the mortgage which then results in a summary of the equity available on book value, latest appraisal value and the company's estimate. Because of the sensitive nature of some of that information the affidavit attaching that information was sealed. Generally, however the summary reveals that the latest appraisals for any of the properties occurred in November and December 2008 with most of the appraisals in either early 2008 or 2007. The summary also reveals that on the current company valuation there is some equity in most of the properties although in some cases it is a very small amount of equity. There is no equity in a few properties.

[7] The majority of the first mortgagees oppose the application. They argue that each of the mortgagees negotiated their arrangement individually with Octagon. Part of each of those agreements include remedies for default under the mortgage. The foreclosure remedy which is available under each of the mortgages should be permitted to run its course. The *CCAA* order would take away the mortgagees' right to exercise those remedies and in a situation where there is no other reason to grant the *CCAA*. They argue that the plan proposed by Octagon is really not a plan. In this case there are no employees. The only stakeholders beyond the secured lenders are shareholders and a small number of unsecured creditors (about $300,000.00). On the other hand, granting *CCAA* protection would mean that Octagon would incur professional fees estimated at about $300,000.00 to take the company to the end of December. They say that the proposed DIP financing is particularly onerous and of concern to the first mortgagees. It would prime them and

there is no proposed explanation for how the DIP financing would be allocated amongst the various properties.

[8] The mortgagees also argue that *CCAA* relief is a drastic remedy and unprecedented in the context of a business where reasonable commercial remedies are available. There is no public policy reason such as a business that is crucial to the economy or where there is a large group of employees affected that would require that *CCAA* proceedings trump those ordinary commercial remedies.

[9] In support of their opposition, the first mortgagees cite 3 cases. In *Marine Drive Properties Ltd. (Re)*, 2009 BCJ No. 207, Justice Butler allowed an application to set aside an *ex parte* order under the *CCAA* on the basis that the debtor's proposal was an inappropriate use of the *CCAA*. Justice Butler noted that the purpose of the *CCAA* was to facilitate the making of a compromise or arrangement between an insolvent debtor and its creditors to allow the company to stay in business (para. 31). In that case as in this case the major creditors were unlikely to approve any compromise proposed by the debtor. He found that the arrangement was doomed to fail.

[10] He also found that the debtor had sought *CCAA* protection to buy time in an attempt to raise new funding. He says at para. 38:

> To be it bluntly, the petitioners have sought *CCAA* protection to buy time to continue their attempts to raise new funding. As counsel for the petitioners stated in argument, they need time to "try to pull something of the hat." They have sought DIP financing so they can do this at the expense of their creditors. This is not an appropriate use of the extraordinary remedy offered by the *CCAA*.

[11] In *Cliffs over Maple Bay Investment Ltd. v. Fisgard Capital Corp.*, 2008 BCCA, the debtor was a business involved in a single land development. The Chambers judge had extended a *CCAA* stay and authorized financing. The Court of Appeal allowed an appeal from that order. Three points relevant to this case emerge from the Court's reasons. First, the fundamental purpose of the *CCAA* is to facilitate a compromise or arrangement and granting or continuing a stay is ancillary to that purpose. (paras. 26 and 27)

[12] Second, the court questions whether it should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted on by the creditors if the plan of arrangement intended to be made by the debtor will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors. (para. 32)

[13] Third, if the sole business of a company is a single land development, the company may have difficulty proposing an arrangement that would be more advantageous to the secured lenders than their exercise of remedies available pursuant to their security. In such circumstances the fundamental purpose of the *CCAA* to reach a compromise or arrangement is likely to be

thwarted by the secured creditors who have no incentive to do anything other than demand their right to exercise their remedies under their security. (para. 36)

[14] The final case is *Encore Developments Ltd. (Re)*, 2009 BCSC No. 13. Encore was a developer where the projects were either bare land or completed subdivisions awaiting sale. There was no active business being carried out. Chief Justice Brenner found that there was no reason for putting in place or maintaining a stay which would ... "prevent the real estate lenders from enforcing their security in the conventional manner should they so choose." (para. 24) He also held that in those circumstances it had not been appropriate to apply *ex parte* particularly since the terms of the DIP financing were particularly onerous on the secured lenders who would bear the costs of the restructuring.

[15] In response to those submissions counsel for Octagon urged that a 30 day stay under the *CCAA* would give the company breathing time and hopefully affect a sale. He also said that it would not be necessary during that 30 day period to grant an order allowing for the full amount of DIP financing to be available.

[16] I should note that I have not summarized the submissions made by or against ICI or ATB since these may reveal otherwise confidential information. I do, however, agree with the submissions of the other first mortgagees.

[17] This is not a case where it is appropriate to grant relief under the *CCAA*. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand if I granted *CCAA* relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for *CCAA* relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

[18] In the result, the application of Octagon is denied.

Heard on the 26th day of August, 2009.
Dated at the City of Calgary, Alberta this 28th day of August, 2009.

C.A. Kent
J.C.Q.B.A.

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