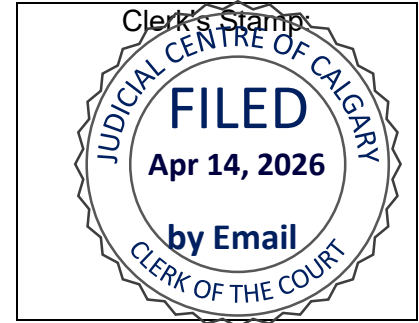


COURT FILE NUMBER 25-3336652
B301-336652

COURT COURT OF KING'S BENCH OF
ALBERTA

JUDICIAL CENTRE CALGARY



MATTER IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
RSC 1985, C B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE
A PROPOSAL OF IGNITE ALLIANCE CORP.

APPLICANT IGNITE ALLIANCE CORP.

DOCUMENT **BOOK OF AUTHORITIES OF IGNITE ALLIANCE CORP.**

Burnet, Duckworth & Palmer LLP
2400, 525 – 8th Avenue SW
Calgary, AB T2P 1G1

Address for service and contact information of parties filing this document:

Lawyers: Ryan Algar
David LeGeyt
Jessica MacKinnon

Phone: (403) 260-0126 / 0210 / 0112

Email: ralgar@bdplaw.com
dlegeyt@bdplaw.com
jmackinnon@bdplaw.com

File No. 69910-19

**Hearing via Webex before the Honourable Justice C.M. Jones on
the Commercial List, on April 23, 2026, commencing at 11:30 am**

TABLE OF AUTHORITIES

AUTHORITIES	
1.	<i>Bankruptcy and Insolvency Act</i> , RSC 1985, c B-3
2.	<i>Alberta Rules of Court</i> , Alta Reg 124/2010
3.	<i>Greenfire Hangingstone Operating Corporation (Re)</i> (22 January 2021), 25-2679073, Judicial Centre of Calgary (Alta QB Horner J)
4.	<i>Greenfire Oil and Gas Ltd. And Greenfire Hangingstone Operating Corporation (Re)</i> (12 March 2020), 25-2679073, Judicial Centre of Calgary (Alta QB Nixon J)
5.	<i>Kids Farm Inc., Re</i> , 2011 NBQB 240 at paras 13-14, 84 CBR (5th) 91
6.	<i>Petrolama Energy Canada Inc. (Re)</i> (10 August 2022), 25-2851343, Judicial Centre of Calgary (Alta QB Horner J)
7.	<i>Target Canada Co. (Re)</i> , 2015 ONSC 7574
8.	<i>Komtech Inc. (Re)</i> , 2011 ONSC 3230
9.	<i>OEL Projects Ltd. (Re)</i> , 2020 ABQB 365
10.	<i>Athabasca Workforce Solutions Inc. v Greenfire Oil & Gas Ltd.</i> , 2021 ABCA 66
11.	<i>Royal Bank of Canada v Soundair Corp.</i> , [1991] OJ No 1137, 83 DLR (4th) 76 (ONCA)
12.	<i>Elleway Acquisitions Limited v 4358376 Canada Inc.</i> , 2013 ONSC 7009
13.	<i>Re Sanjel Corporation</i> , 2016 ABQB 257
14.	<i>Tool-Plas Systems Inc., (Re)</i> (2008), 48 CBR (5th) 91 (Ont. S.C.J.)
15.	<i>Proposition de SRTX inc.</i> , 2026 QCCS 570
16.	<i>AbitibiBowater inc. (Arrangement relatif à)</i> , 2009 QCCS 6461
17.	<i>Ontario Securities Commission v Bridging Income Fund LP</i> , 2022 ONSC 4472
18.	<i>SemCanada Crude Company (Companies' Creditors Arrangement Act) (Re)</i> , 2009 ABQB 90
19.	<i>First Source Financial Management v Chacon Strawberry Fields</i> , 2024 ONSC 7229
20.	<i>Metcalf & Mansfeld Alternative Investments II Corp. (Re)</i> , 2008 ONCA 587
21.	<i>Kitchener Frame Limited (Re)</i> , 2012 ONSC 234

22.	<i>Arrangement relatif à Blackrock Metals Inc.</i> , 2022 QCCS 2828
23.	<i>Blackrock Metals Inc. (Re)</i> (7 January 2022), 500-11-060598-212, District of Montreal (QC SC Paquette J)
24.	<i>Walter Energy Canada Holdings, Inc. (Re)</i> , 2018 BCSC 1135
25.	<i>Royal Helium (Re)</i> (6 October 2025), 2501-02606, Judicial Centre of Calgary (Alta KB Johnston J)
26.	<i>Lydian International (Re)</i> , 2020 ONSC 4006
27.	<i>Delta 9 Cannabis Inc. (Re)</i> , 2025 ABKB 52
28.	<i>Re Green Relief Inc.</i> , 2020 ONSC 6837
29.	<i>9354-9186 Québec inc. v Callidus Capital Corp.</i> , 2020 SCC 10
30.	<i>Acerus Pharmaceuticals Corporation (Re)</i> , 2023 ONSC 3314
31.	<i>Canada v Canada North Group Inc.</i> , 2021 SCC 30
32.	<i>ENTREC Corporation (Re)</i> , 2020 ABQB 751
33.	<i>Long Run Exploration Ltd (Re)</i> , 2024 ABKB 710
34.	<i>Sherman Estate v Donovan</i> , 2021 SCC 25

TAB 1

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

KeyCite treatment

Most Recently Cited in: [In the Matter of the Notice of Intention to make a proposal of JointCraft Inc.](#), 2026 ONSC 965, 2026 CarswellOnt 2108 | (Ont. S.C.J., Feb 13, 2026)

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

s 50.4

[Currency](#)

50.4**50.4(1) Notice of intention**

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

- (a) the insolvent person's intention to make a proposal,
- (b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and
- (c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

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

50.4(2) Certain things to be filed

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

- (a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;
- (b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and
- (c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

50.4(3) Creditors may obtain statement

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

50.4(4) Exception

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

- (a) such release would unduly prejudice the insolvent person; and
- (b) non-release would not unduly prejudice the creditor or creditors in question.

50.4(5) Trustee protected

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

50.4(6) Trustee to notify creditors

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

50.4(7) Trustee to monitor and report

Subject to any direction of the court under [paragraph 47.1\(2\)\(a\)](#), the trustee under a notice of intention in respect of an insolvent person

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

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

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

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

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

50.4(8) Where assignment deemed to have been made

Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under [subsection 62\(1\)](#) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

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

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

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

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

50.4(9) Extension of time for filing proposal

The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

- (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
- (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- (c) no creditor would be materially prejudiced if the extension being applied for were granted.

50.4(10) Court may not extend time

Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

50.4(11) Court may terminate period for making proposal

The court may, on application by the trustee, the interim receiver, if any, appointed under [section 47.1](#), or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

- (a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
- (b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
- (c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
- (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

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

Amendment History

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

Judicial Consideration (3)**Currency**

Federal English Statutes reflect amendments current to February 12, 2026

Federal English Regulations Current to Gazette Vol. 159:18 (August 27, 2025)

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

KeyCite treatment

Most Recently Cited in: [Linza v. Metric Modular](#), 2025 BCSC 646, 2025 CarswellBC 1151 | (B.C. S.C., Apr 15, 2025)

R.S.C. 1985, c. B-3, s. 65.13

s 65.13

[Currency](#)

65.13**65.13(1) Restriction on disposition of assets**

An insolvent person in respect of whom a notice of intention is filed under [section 50.4](#) or a proposal is filed under [subsection 62\(1\)](#) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

65.13(2) Individuals

In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

65.13(3) Notice to secured creditors

An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

65.13(4) Factors to be considered

In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the trustee approved the process leading to the proposed sale or disposition;
- (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

65.13(5) Additional factors — related persons

If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

65.13(6)Related persons

For the purpose of subsection (5), a person who is related to the insolvent person includes

(a) a director or officer of the insolvent person;

(b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and

(c) a person who is related to a person described in paragraph (a) or (b).

65.13(7)Assets may be disposed of free and clear

The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

65.13(8)Restriction — employers

The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

65.13(9)Restriction — intellectual property

If, on the day on which a notice of intention is filed under [section 50.4](#) or a copy of the proposal is filed under [subsection 62\(1\)](#), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Amendment History

2005, c. 47, s. 44; 2007, c. 36, s. 27; 2018, c. 27, s. 266

Judicial Consideration (1)

Currency

Federal English Statutes reflect amendments current to February 12, 2026

Federal English Regulations Current to Gazette Vol. 159:18 (August 27, 2025)

TAB 2

Alberta Rules

Alta. Reg. 124/2010 — Alberta Rules of Court

Part 6 — Resolving Issues and Preserving Rights

Division 4 — Restriction on Media Reporting and Public Access to Court Proceedings

KeyCite treatment

Most Recently Cited in: [Kostic v. Thom](#), 2026 ABKB 34, 2026 CarswellAlta 98, [2026] A.W.L.D. 604, [2026] A.W.L.D. 645 | (Alta. K.B., Jan 14, 2026)

Alta. Reg. 124/2010, s. 6.34

s 6.34 Application to seal or unseal court files

Currency

6.34 Application to seal or unseal court files

6.34(1) An application to seal an entire court file or an application to set aside all or any part of an order to seal a court file must be filed.

6.34(2) The application must be made to

(a) the Chief Justice, or

(b) a judge designated to hear applications under subrule (1) by the Chief Justice.

6.34(3) The Court may direct

(a) on whom the application must be served and when,

(b) how the application is to be served, and

(c) any other matter that the circumstances require.

Currency

Alberta Current to S.A. 2025, c. 15 and Gazette Vol. 121:11 (June 14, 2025)

TAB 3

B201 679073

ESTATE NUMBER 25-2679073

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY



106586

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
RSC 1985, C B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A
PROPOSAL OF GREENFIRE HANGINGSTONE OPERATING
CORPORATION

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A
PROPOSAL OF GREENFIRE OIL & GAS LTD.

DOCUMENT

**Order (Extension of Time to File Proposal and Approval of D&O
Charge)**

ADDRESS FOR
SERVICE AND
CONTACT
INFORMATION OF
PARTIES FILING THIS
DOCUMENT

Burnet, Duckworth & Palmer LLP

2400, 525 - 8 Avenue SW
Calgary, Alberta T2P 1G1

Lawyer: David LeGeyt / Ryan Algar
Phone Number: (403) 260-0120/ 0126
Fax: (403) 260-0332
Email: dlegeyt@bdplaw.com / ralgar@bdplaw.com
File No. 077186-00004

DATE ON WHICH ORDER WAS PRONOUNCED: January 22, 2021

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton

JUSTICE WHO MADE THIS ORDER: The Honourable Justice R.A. Graesser

UPON THE APPLICATION of Greenfire Oil and Gas Ltd. ("**GOGL**") and Greenfire Hangingstone Operating Corporation ("**GHOPCO**" and collectively "**Greenfire**" or the "**Applicants**"); AND UPON reading Affidavit No. 8 of Robert B. Logan sworn January 12, 2021; AND UPON reading the Affidavit of Service of Anne-Marie Gillis-Tapp sworn January 21, 2021; AND UPON reading the Sixth Report of Alvarez & Marsal Canada Inc. in its capacity as the proposal trustee of Greenfire (the

"**Proposal Trustee**") dated January 12, 2021; AND UPON hearing submissions by counsel for Greenfire and any other counsel or other interested parties present,

IT IS HEREBY ORDERED THAT:

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today, and no other than those persons served is entitled to service of the notice of application.

INTERPRETATION

2. Capitalized terms not otherwise defined in this Order shall have the meaning set forth in:
 - (a) the Order (Approval of Procedural Consolidation and Administration Charge); granted by Justice D.R. Mah on October 16, 2020; and
 - (b) the Order (Approval of Interim Financing and Interim Financing Charge, Sealing) granted by Justice D.B. Nixon on December 17, 2020.

EXTENSION OF TIME TO FILE A PROPOSAL

3. The time within which Greenfire is required to file a proposal to its creditors with the Official Receiver, under section 50.4 of the *Bankruptcy and Insolvency Act* (the "**BIA**"), shall be and is hereby extended to March 15, 2021.
4. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

D&O CHARGE

5. Greenfire shall indemnify its current and future directors and officers against obligations and liabilities that they may incur as directors and or officers of Greenfire after the commencement of the within proceedings except to the extent that, with respect to any officer or director, the obligation was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

6. Greenfire's directors and officers shall be entitled to the benefit of and are hereby granted a charge (the "**D&O Charge**") over the Property, which charge shall not exceed an aggregate amount of \$250,000, as security for the indemnity provided in paragraph 5 of this Order. The D&O Charge shall rank junior to both the Administration Charge and the Interim Lender Charge previously granted in these proceedings, and for further clarity, as follows:

First – Administration Charge (to the maximum amount of \$500,000);

Second – Interim Lender Charge (to the maximum amount of \$20,000,000); and

Third – D&O Charge (to the maximum amount of \$250,000).

7. Notwithstanding any language in any applicable insurance policy to the contrary:
- (a) no insurer shall be entitled to be subrogated to or claim the benefit of the D&O Charge; and
 - (b) Greenfire's directors and officers shall only be entitled to the benefit of the D&O Charge to the extent that they do not have coverage under any directors' and officers' insurance policy or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 5 of this Order.

VALIDITY OF D&O CHARGE

8. The filing, registration or perfection of the D&O Charge shall not be required, and the D&O Charge shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the D&O Charge coming into existence, notwithstanding any such failure to file, register, record or perfect.
9. The D&O Charge (as constituted and defined herein) shall constitute a charge on the Property and subject always to section 88 of the BIA and the Administration Charge and Interim Lender Charge previously granted in these proceedings, such charge shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.
10. Except as otherwise expressly provided for herein, or as may be approved by this Court, no Applicant shall grant any Encumbrances over any Property that rank in priority to, or *pari passu*

with, the D&O Charge unless such Applicant also obtains the prior written consent of the Proposal Trustee and the beneficiaries of the D&O Charge, or further order of this Court.

11. The D&O Charge shall not be rendered invalid or unenforceable and the rights and remedies of Greenfire's directors and officers shall not otherwise be limited or impaired in any way by:
- (a) the pendency of these proceedings and the declarations of insolvency made herein;
 - (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;
 - (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;
 - (d) the provisions of any federal or provincial statutes; or
 - (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "Agreement") that binds any Applicant, and notwithstanding any provision to the contrary in any Agreement:
 - (i) neither the creation of the D&O charge nor the execution, delivery, perfection, registration or performance of any documents in respect thereof shall create or be deemed to constitute a new breach by any Applicant of any Agreement to which it is a party;
 - (ii) none of Greenfire's directors and officers shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the D&O Charge; and
 - (iii) the payments made by any Applicant pursuant to this Order, and the granting of the D&O Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

12. Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the Administration Charge, the Interim Lender Charge, and the D&O Charge amongst the various assets comprising the Property.



J.C.Q.B.A.


TAB 4



ESTATE NUMBER B201 679073
25-2679073
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
RSC 1985, C B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A
PROPOSAL OF GREENFIRE HANGINGSTONE OPERATING
CORPORATION

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A
PROPOSAL OF GREENFIRE OIL & GAS LTD.

DOCUMENT **Order (Extension of Time to File Proposal and Approval of D&O Charge)**

ADDRESS FOR
SERVICE AND
CONTACT
INFORMATION OF
PARTIES FILING THIS
DOCUMENT

Burnet, Duckworth & Palmer LLP
2400, 525 - 8 Avenue SW
Calgary, Alberta T2P 1G1

Lawyer: David LeGeyt / Ryan Algar
Phone Number: (403) 260-0120/ 0126
Fax: (403) 260-0332
Email: dlegeyt@bdplaw.com / ralgar@bdplaw.com
File No. 077186-00004

DATE ON WHICH ORDER WAS PRONOUNCED: March 12, 2021

LOCATION WHERE ORDER WAS PRONOUNCED: Calgary

JUSTICE WHO MADE THIS ORDER: The Honourable Justice D.B. Nixon

UPON THE APPLICATION of Greenfire Oil and Gas Ltd. ("**GOGL**") and Greenfire Hangingstone Operating Corporation ("**GHOPCO**") and collectively "**Greenfire**" or the "**Applicants**"; AND UPON reading Affidavit No. 10 of Robert B. Logan's sworn March 2, 2021; AND UPON reading the Affidavit of Service of Anne-Marie Gillis-Tapp sworn March 4, 2021; AND UPON reading the Eighth Report of Alvarez & Marsal Canada Inc. in its capacity as the proposal trustee of Greenfire (the

"Proposal Trustee") dated March 3, 2021; AND UPON hearing submissions by counsel for Greenfire and any other counsel or other interested parties present.

IT IS HEREBY ORDERED THAT:

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today, and no other than those persons served is entitled to service of the notice of application.

INTERPRETATION

2. Capitalized terms not otherwise defined in this Order shall have the meaning set forth in:
 - (a) the Order (Approval of Procedural Consolidation and Administration Charge); granted by Justice D.R. Mah on October 16, 2020;
 - (b) the Order (Approval of Interim Financing and Interim Financing Charge, Sealing) granted by Justice D.B. Nixon on December 17, 2020; or
 - (c) the Order (Extension of Time to File a Proposal and Approval of D&O Charge) granted by Justice R.A. Graesser on January 22, 2021 (the "**Initial D&O Charge Order**").

EXTENSION OF TIME TO FILE A PROPOSAL

3. The time within which Greenfire is required to file a proposal to its creditors with the Official Receiver, under section 50.4 of the *Bankruptcy and Insolvency Act* (the "**BIA**"), shall be and is hereby extended to April 7, 2021.
4. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

D&O CHARGE

5. Greenfire shall indemnify its current and future directors and officers against obligations and liabilities that they may incur as directors and or officers of Greenfire after the commencement of

the within proceedings except to the extent that, with respect to any officer or director, the obligation was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

6. The charge granted in favour of Greenfire's directors and officers over the Property in the amount of \$250,000 (the "**Initial D&O Charge**"), as further detailed in the Initial D&O Charge Order, is hereby increased to \$500,000 (the "**Increased D&O Charge**"). The Increased D&O Charge shall rank junior to both the Administration Charge and the Interim Lender Charge previously granted in these proceedings, and for further clarity, as follows:

First – Administration Charge (to the maximum amount of \$500,000);

Second – Interim Lender Charge (to the maximum amount of \$20,000,000); and

Third – Increased D&O Charge (to the maximum amount of \$500,000).

7. Notwithstanding any language in any applicable insurance policy to the contrary:
 - (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Increased D&O Charge; and
 - (b) Greenfire's directors and officers shall only be entitled to the benefit of the Increased D&O Charge to the extent that they do not have coverage under any directors' and officers' insurance policy or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 5 of this Order.

VALIDITY OF D&O CHARGE

8. The filing, registration or perfection of the Increased D&O Charge shall not be required, and the Increased D&O Charge shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Increased D&O Charge coming into existence, notwithstanding any such failure to file, register, record or perfect.
9. The Increased D&O Charge (as constituted and defined herein) shall constitute a charge on the Property and subject always to section 88 of the BIA and the Administration Charge and Interim Lender Charge previously granted in these proceedings, such charge shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

10. Except as otherwise expressly provided for herein, or as may be approved by this Court, no Applicant shall grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, the Increased D&O Charge unless such Applicant also obtains the prior written consent of the Proposal Trustee and the beneficiaries of the D&O Charge, or further order of this Court.
11. The Increased D&O Charge shall not be rendered invalid or unenforceable and the rights and remedies of Greenfire's directors and officers shall not otherwise be limited or impaired in any way by:
 - (a) the pendency of these proceedings and the declarations of insolvency made herein;
 - (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;
 - (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;
 - (d) the provisions of any federal or provincial statutes; or
 - (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds any Applicant, and notwithstanding any provision to the contrary in any Agreement:
 - (i) neither the creation of the Increased D&O charge nor the execution, delivery, perfection, registration or performance of any documents in respect thereof shall create or be deemed to constitute a new breach by any Applicant of any Agreement to which it is a party;
 - (ii) none of Greenfire's directors and officers shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Increased D&O Charge; and
 - (iii) the payments made by any Applicant pursuant to this Order, and the granting of the Increased D&O Charge, do not and will not constitute preferences,

fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

12. Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the Administration Charge, the Interim Lender Charge, and the Increased D&O Charge amongst the various assets comprising the Property.



J.C.Q.B.A

TAB 5

Re : 2011 NBQB 240

COURT NO: NB 17490
ESTATE NUMBER : 51-1523569

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
IN BANKRUPTCY AND INSOLVENCY

**IN THE MATTER OF THE NOTICE OF INTENTION TO
MAKE A PROPOSAL OF KIDS' FARM INC.**, a corporation
incorporated under the laws of the Province of New Brunswick

**AND IN THE MATTER OF AN APPLICATION BY KIDS'
FARM INC.** for the granting of an extension of time for filing a
Proposal pursuant to Section 50.4 of the *Bankruptcy and
Insolvency Act*

APPEARANCES: Kevin C. Toner, E.J. Mockler Professional Corporation for Kid's
Farm Inc.
Josh J. B. McElman and Rebecca M. Atkinson, Cox & Palmer for
Bank of Montreal
HEARD: September 9, 2011
DECISION: September 14, 2011

DECISION

INTRODUCTION

This matter comes before the court as an application for a 45 day extension to file a proposal pursuant to subsection 50.4 (9) of the *Bankruptcy and Insolvency Act* ("the Act").

FACTS

1. Kids' Farm Inc. ("KFI") is a farming enterprise being prepared to produce hay for feed pellets. It is noted that the corporation was referred to as Kid's Farm Inc. in the Superintendent's documents. In this decision the spelling used in the style of cause in documents presented to the Court has been followed.

2. Green Grass Comfort Inc. (“GGC”) is the proposed purchaser of the hay for pellet production at a plant to be constructed for this purpose on land presently owned by KFI.
3. Since 2002 KFI has received its financing from Bank of Montreal (“the Bank”). KFI’s former dairy production activity had become unprofitable and between 2008 and 2009 it sold milk quotas to pay down its liability to the Bank, its major secured creditor.
4. There was a disagreement between KFI and the Bank concerning the distribution of funds received from the milk quota sales and KFI became unable to meet its obligations as they became due. Gerben Klomp maker, Managing Director of KFI, attests to this disagreement but the details thereof are not material to the present instance.
5. The Bank issued a Notice of Intention to enforce security on October 28, 2010 and appointed PricewaterhouseCoopers Inc. as receiver on August 2, 2011.
6. Attempts to achieve a resolution under the Farm Debt Mediation Act were apparently to no avail. KFI had filed a Notice of Intention to Make a Proposal pursuant to subsection 50.4 (1) of the Act on July 27, 2011 with A.C. Poirier & Associates Inc. to be the Trustee administering the intended proposal.
7. On August 26, 2011, KFI filed a Notice of Motion requesting a 45 day extension to file the proposal. On the same day the Bank, when served, notified the court office that it opposed the motion being heard on an *ex parte* basis and requested a hearing. The Deputy Registrar arranged for a date to be set for the Registrar to hear the motion.
8. An affidavit filed by Paul A. Stehelin of A.C. Poirier & Associates Inc. attests that the Bank and other creditors have security over sufficient real property and chattels to avoid their being prejudiced by an extension.
9. Randolph Jones, the receiver of the Bank, deposes to the fact that the Bank is not fully secured and to his belief that there is no certainty of the date of completion of the proposed pellet production plant.

ISSUES

10. Does the delay between the filing of the motion, its hearing and consequent decision constitute a deemed assignment since the hearing date is more than thirty days from the filing of the Notice of Intention?
11. Has KFI met the burden of proof of showing an extension to be justified and that no creditor will be prejudiced by this extension?

ANALYSIS

12. Concerning the question of time limitation, subsection 50.4(9) of the Act reads as follows:

50.4 (9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

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

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

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

13. The Bank argues that the fact that the extension was not granted by the court within the thirty day period means that the debtor must be deemed to have made an assignment. The case of Re Royalton Banquet & Convention Centre Ltd., (2003) 33 C.B.R. (5th) 278, was listed in support.

14. With the greatest respect to Deputy Registrar Diamond, I do not interpret the section in a similar manner. The language is clear in subsection (9) concerning the obligations incumbent upon the debtor. It must apply to the court for an extension prior to the expiration of the thirty day period. This was done. The court may grant the extension but may require notice to interested persons. Surely this notice presupposes that such interested persons have the right to appear and make representations before an order is granted. It would obviously be impractical in many if not most cases to do this appropriately in less than one day. One cannot postulate that Parliament legislated a provision that would be incongruous in its practical application. The Act is a commercial code amenable to common-sense interpretation and the conclusions of such interpretation should be accepted unless clear language of the drafting otherwise dictates. Pursuant to Rule 3 of the Act, Rules of Court of New Brunswick not inconsistent with the Act and its associated Rules are may apply. In a motion such as that currently under

consideration Rule 3.02(1) could be applied for an expedited hearing in a case of demonstrated urgency. Parliament could have clearly mandated limits to the court's discretion to deal with applications for extension. It did not do so with the exception of subsection 50.4 (10).

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

15. I read this provision to be limited to restricting the court from extending the debtor's time for making an application beyond that of 30 days or from granting extensions in excess of 45 days or for a total period exceeding five months.
16. The applicant, not being deemed to have made an assignment and being allowed to present its request, must convince the court that the extension is justified, that there are diligent efforts being pursued with a probability that a viable proposal can be achieved and that no creditor will be prejudiced by the extension, if granted.
17. Although documents submitted for the consideration as evidence gave a wide contextual view of the applicant's prior dealings with the Bank and possible future litigation concerning differences and alleged wrongdoing, the court on a motion pursuant to subsection 50.4(9) of the Act, is constrained by the confines of the manner in which paragraphs a), b), and c) are drafted. Only those considerations are material and the provisions are conjunctive so the applicant must prove all three.
18. The affidavit of Mr. Klompmaker, President and Managing Director of KFI, attests that he is acting diligently and in good faith. The Bank counters that this is a shallow statement and otherwise unsupported. The reference made in this affidavit to his partner's arrangements with the ACOA, Province of New Brunswick and BDC to supplement his personal resources, however, are not contradicted. The extent of his efforts might not appear to be maximal but they are sufficient to meet a minimal test of diligence if the other two criteria are clearly met.
19. Allegations of wrongdoing by the Bank and possible misunderstandings in interpreting agreements between the parties will not be accepted either to show bad faith on the part of the applicant or misconduct by the Bank. These issues are not subject to adjudication in this forum.
20. Although the evidence is not fulsome, I am satisfied there is adequate reason to postulate for this analysis that the Applicant is acting in good faith and with sufficient diligence.

21. As to whether the Bank will be materially prejudiced we have the affidavit of Mr. Stehelin attesting that the Bank is sufficiently secured to avoid prejudice. The Bank counters that the statement by the intended administrator is brief and is not well supported.
22. The affidavit of Anna Graham, the Senior Account Manager of the Special Accounts Management of the Bank, attests to KFI's capital indebtedness of \$1,006, 973.77 plus interest of approximately \$57,000.00. Mention is made of security in inventory and accounts receivable. There is a general statement that inventory will be depleted, accounts receivable will be more difficult to collect and assets will depreciate.
23. Unless there is a danger of assets being removed and sequestered and of agricultural inventory being abandoned with a failure of harvesting, I view with difficulty that a short extension of time will significantly alter the security position.
24. The ratio of security to the value of the assets secured in KFI is not stated. The Bank says that it is unable to quantify. It would however, be helpful to know the probable extent of the asset diminution compared to the total value of security held.
25. There may well be some level of prejudice to the Bank if an extension is granted but would it be a "material" prejudice? By "material" I understand that which is more than a minor change such as those which happen in the daily operations of a business that is a going concern. Would the change in the security position be such that a reasonable creditor would probably not consent thereto? To evaluate this without the ratio of debt to security position of the parties being clearly exposed is difficult.
26. The affidavit of Mr. Klompmaker attests to assets of \$4,437,000.00 being owned by KFI with an equity of \$2,437,000.00, making an asset to debt ratio of more than 2:1. The Bank objects that the appraisal annexed as an exhibit in support is incomplete and should not be given weight because important portions that would give context have been omitted.
27. The Bank has had an appraisal done by the Altus Group which it alleges shows a much lesser value based upon the assumption of a forced sale. The Bank considered submitting this as an exhibit if a sealing order were granted to avoid a publication of information that might adversely affect any potential sale. The Court was disposed to grant that relief but would direct that the applicant have a period to respond, its agents having never before seen the document. The Bank elected not to file the appraisal.

28. The Court is placed in the inappropriate position of speculation having been given contradictory sworn testimony without adequate support.
29. The issue of whether the Applicant would be likely to make a viable proposal if the extension were granted will therefore be the turning point of this particular application.
30. In the [Baldwin Valley](#) case at para. 4, Farley J. discussed a viable proposal as contemplated by the second branch of the test as follows:

4 It seems to me that "viable proposal" should have to take on some meaning akin to one that seems reasonable on its face to the "reasonable creditor"; this ignores the possible idiosyncrasies of any specific creditor. However, it does appear to me that the draft proposal being floated by the debtor companies is one which proposes making the Bank (which has lost faith with the management of the debtor companies) a partner with the owners of the debtor companies, failing which (a likely certainty in these circumstances) the debtor companies propose that third parties become equity participants instead of the Bank; yet there is no indication of the names and substance of these fallback partners. It does not appear to me that the debtor companies have shown that they are likely to be able to make a viable proposal. While that need not be a certainty: see my views at pp. 10 - 11 in *Re Cumberland Trading Inc.* released January 2, 1999. "Likely" as defined in the Concise Oxford Dictionary of Current English, 7th ed. (1987; Oxford, The Clarendon Press) means: *likely* 1. such as *might well happen*, or turn out to be the thing specified, *probable* 2. to be *reasonably expected* [emphasis added] I do not see the conjecture of the debtor companies' rough submission as being "*likely*".

Baldwin Valley Investors Inc., Re [\(1994\), 23 C.B.R. \(3d\) 219](#) (Ont. Gen. Div. [Commercial List])

31. No draft of the proposal has been filed with the Court. There have been no cash flow projections nor marketing surveys presented to support Mr. Klompmaker's assertions that a net profit of \$1,750,000.00 would be realized in the first three years. If he is correct there is reason to believe that a proposal would be viable.
32. It is unclear from the evidence, however, if the restructuring plan is dependent upon the pellet mill being built on the specified ten acres upon which it is alleged that the Bank refuses to discharge its mortgage, thereby stymieing any progress. If the plan is thus structured and no other property is available, affordable or

otherwise appropriate to the requirements, it would appear that the Bank holds the trump card and has shown itself to be opposed to the proposal. The conclusion would be that a proposal is not viable.

33. The Court on a section 50.4(9) application will not examine a secured creditor's motivations for its lack of support. If triable issues are involved therein they belong in another forum. In this instance we are limited to an objective evaluation of good faith and diligence, the absence of material prejudice and whether the projected proposal is viable. As previously noted, this is difficult to ascertain based on the available evidence.

DISPOSITION

34. The applicant has attested to his meeting of the three required criteria with supporting evidence that questionably meets the burden of proof incumbent upon him to convince the Court of these factors on a balance of probabilities.
35. The application for a forty-five day extension for filing the proposal is denied. The applicant will be granted an extension to file a proposal until October 4, 2011. No request for any further extension will be considered by the Court unless the applicant files a draft of the proposal, a clear cash-flow projection, a complete appraisal of KFI assets and a business plan for the establishment of a feed production facility including a projected time for completion, a detailed indication of funding available and the sources thereof, and the contingency arrangements should the Bank not release its security on the land identified as the construction site.

Michael J. Bray, Q.C.
Registrar

TAB 6

Schedule A

COURT/ESTATE FILE NUMBER	B201 851343/25-2851343	Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY	
APPLICANT	IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER SECTION 50.4(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, OF PETROLAMA ENERGY CANADA INC.	
DOCUMENT	<u>ORDER</u> (Extension of Time to File Proposal, etc.)	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	JENSEN SHAWA SOLOMON DUGUID HAWKES LLP 800, 304 - 8 Avenue SW Calgary, Alberta T2P 1C2 Christa Nicholson QC / Angad Bedi Tel: 403 571 1053 Fax: 403 571 1528 nicholsonc@jssbarristers.ca / bedia@jssbarristers.ca File: 15378.001	

DATE ON WHICH ORDER WAS PRONOUNCED: August 10, 2022

NAME OF JUDGE WHO MADE THIS ORDER: Justice K.M. Horner

LOCATION OF HEARING: **Calgary, Alberta**

UPON THE APPLICATION of Petrolama Energy Canada Inc. (the “**Company**”) filed August 2, 2022 (the “**Application**”); **AND UPON** having read the Application and the Affidavit of Paul Farley Joslyn sworn August 2, 2022, filed (the “**Joslyn Affidavit**”), and the further Affidavit of Paul Farley Joslyn sworn August 9, 2022 to be filed; **AND UPON** having read the First Report of the Proposal Trustee, Alvarez & Marsal Canada Inc. (the “**Proposal Trustee**”) filed on August 4, 2022; **AND UPON** noting the Brief filed by the Company on August 4, 2022; **AND UPON** having read the Affidavit of Service of Amy Kuang, affirmed on August 4, 2022, to be filed, and the Affidavits of Service of Sarah Sklar, sworn August 9, 2022 to be filed, 2022; **AND UPON** noting the submissions of counsel for the Company, counsel for the Proposal Trustee and the other parties present;

IT IS HEREBY ORDERED AND DECLARED THAT:**Service of the Application**

1. The time for service of the Application together with all supporting materials, upon the parties named in the Service List attached as Schedule "A" (the "**Service List**") is hereby abridged and declared to be good, valid, timely and sufficient and no other person is required to have been served with such documents, and this hearing is properly returnable before this Honourable Court today and further service thereof is hereby dispensed with.

Defined Terms

2. Unless otherwise expressly indicated, all capitalized terms used herein and not otherwise defined shall have the meanings used in the Sales and Investment Solicitation Process (the "**SISP**") attached as **Schedule "B"**.

Administration Charge

3. The Proposal Trustee, counsel to the Proposal Trustee, and counsel to the Company, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a first ranking charge (the "**Administration Charge**") on all of the Collateral, which charge shall not exceed \$150,000 in an aggregate amount.

Interim Financing

4. The Applicant is hereby authorized and empowered to obtain and borrow under a credit facility from 884304 Alberta Ltd., (in such lender capacity, the "**Interim Lender**"; also referred to as the "**Stalking Horse Bidder**") in order to finance the Company's restructuring expenses, provided that borrowings under such credit facility (the "**Interim Facility**") shall not exceed \$300,000 unless permitted by further order of this Court. The Interim Facility shall be extended on the terms and subject to the conditions set forth in the agreement entitled "Interim Financing Terms" between the Company and the Interim Lender, a copy of which is attached as **Exhibit "5"** to the Joslyn Affidavit (the "**Interim Financing Terms**").
5. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the "**Interim Lender Charge**") on all of the Collateral to secure the Interim Financing Obligations (as defined in the Interim Financing Terms), which charge shall not exceed the aggregate amount advanced on or after the date of this Order together with any Interim Financing Obligations under the Interim Financing Terms, and which charge shall not secure an obligation that exists before this Order is made. The Interim Lender Charge shall have the priority set out in paragraphs 8 and 10 hereof.

Directors' and Officers' Charge

6. The Company shall indemnify its directors and officers against obligations and liabilities that they may incur as its directors or officers after the commencement of the BIA Proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.
7. Each of the directors and officers of the Company shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' and Officers' Charge**") on all of the Collateral, which charge shall not exceed an aggregate amount of \$65,000, as security for the indemnity provided in this Order. The Directors' and Officers' Charge shall have the priority set out in paragraphs 8 and 10 hereof.

Priority of the BIA Charges

8. The priorities of the Administration Charge, the Interim Lender Charge and the Directors' and Officers' Charge (collectively, the "**BIA Charges**"), as among them, shall be as follows:
 - (a) First: Administration Charge, up to the maximum amount of \$150,000;
 - (b) Second: Directors' and Officers' Charge, up to the maximum amount of \$65,000. and
 - (c) Third: Interim Lender Charge up to a maximum principal amount of \$300,000 plus all other Interim Financing Obligations.
9. The filing, registration or perfection of the BIA Charges shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.
10. Each of the BIA Charges (all as constituted and defined herein) shall constitute a charge on all the Collateral and each such charge shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person except in the case of the Interim Lender Charge which shall be subject to the Permitted Priority Liens as defined in the Interim Financing Terms.
11. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Company shall not grant any Encumbrances over any Collateral that rank in priority to, or *pari passu* with, any of the BIA Charges, unless the Company also obtains the prior written consent of the Proposal Trustee and the beneficiaries of the Administration Charge, the Interim Lender Charge, and the Directors' and Officers' Charge, or same is authorized by further order of this Court.

12. The BIA Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by:
- (a) The pendency of these proceedings and the declarations of insolvency made in this Order;
 - (b) Any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;
 - (c) The filing of any assignments for the general benefit of creditors made pursuant to the BIA;
 - (d) The provisions of any federal or provincial statutes; or
 - (e) Any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds the Company, and notwithstanding any provision to the contrary in any Agreement:
 - (i) neither the creation of the BIA Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof shall create or be deemed to constitute a new breach by the Company of any Agreement to which it is a party;
 - (ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any agreement caused by or resulting from the creation of the BIA Charges; and
 - (iii) the payments made by the Company pursuant to this Order, and the granting of the BIA Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.
13. Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the BIA Charges amongst the various assets comprising the Collateral.

Approval of SISP including Stalking Horse Proposal as a Qualified Bid

14. The SISP, including the SISP Procedures, substantially in the form attached as Schedule "B", shall be and are hereby approved, including its deeming of the Stalking Horse Proposal (a copy of which is attached as **Schedule "C"**) as a Qualified Bid and the Company and the Proposal Trustee are authorized and directed to carry out the SISP in accordance with the SISP Procedures and this Order, and are hereby authorized and directed to take such steps as they consider necessary or appropriate in carrying out each

of their obligations thereunder, subject to prior approval of this Court being obtained before the completion of any transaction(s) resulting pursuant to the SISP.

15. For greater certainty, nothing herein approves the transaction contemplated in the Stalking Horse Proposal, and the approval of any transaction contemplated by the SISP shall be determined on a subsequent application made to this Court.

Extension of Time to file a Proposal

16. Pursuant to subsection 50.4(9) of the BIA, the period within which the Company is required to file a proposal to its creditors with the Official Receiver under subsection 62(1) of the BIA shall be and is hereby extended to 11:59 pm (local Calgary time) on October 10, 2022.

Service of This Order

17. Service of this Order shall be deemed to be achieved by posting a copy of this Order on the website of the Proposal Trustee, namely www.alvarezandmarsal.com/petrolama and by delivering an electronic copy of this Order to those parties listed on the Service List.

Justice of the Court of Queen's Bench of Alberta

TAB 7

CITATION: Target Canada Co. (Re), 2015 ONSC 7574
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-12-11

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP. AND TARGET CANADA PROPERTY LLC.**

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *J. Swartz and Dina Milivojevic*, for the Target Corporation

Jeremy Dacks, for the Target Canada Entities

Susan Philpott, for the Employees

Richard Swan and S. Richard Orzy, for Rio Can Management Inc. and KingSett Capital Inc.

Jay Carfagnini and Alan Mark, for Alvarez & Marsal, Monitor

Jeff Carhart, for Ginsey Industries

Lauren Epstein, for the Trustee of the Employee Trust

Lou Brzezinski and Alexandra Teodescu, for Nintendo of Canada Limited, Universal Studios, Thyssenkrupp Elevator (Canada) Limited, United Cleaning Services, RPJ Consulting Inc., Blue Vista, Farmer Brothers, East End Project, Trans Source, E One Entertainment, Foxy Originals

Linda Galessiere, for Various Landlords

ENDORSEMENT

[1] Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants (the “Monitor”) seeks approval of Monitor’s Reports 3-18, together with the Monitor’s activities set out in each of those Reports.

[2] Such a request is not unusual. A practice has developed in proceedings under the Companies’ Creditors Arrangement Act (“CCAA”) whereby the Monitor will routinely bring a

motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted.

[3] Such is not the case in this matter.

[4] The requested relief is opposed by Rio Can Management Inc. (“Rio Can”) and KingSett Capital Inc. (“KingSett”), two landlords of the Applicants (the “Target Canada Estates”). The position of these landlords was supported by Mr. Brzezinski on behalf of his client group and as agent for Mr. Solomon, who acts for ISSI Inc., as well as Ms. Galessiere, acting on behalf of another group of landlords.

[5] The essence of the opposition is that the request of the Monitor to obtain approval of its activities – particularly in these liquidation proceedings – is both premature and unnecessary and that providing such approval, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future be asserted and relied upon by the Applicants, or any other party, seeking to limit or prejudice the rights of creditors or any steps they may wish to take.

[6] Further, the objecting parties submit that the requested relief is unnecessary, as the Monitor has the full protections provided to it in the Initial Order and subsequent orders, and under the CCAA.

[7] Alternatively, the objecting parties submit that if such approval is to be granted, it should be specifically limited by the following words:

“provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.”

[8] The CCAA mandates the appointment of a monitor to monitor the business and financial affairs of the company (section 11.7).

[9] The duties and functions of the monitor are set forth in Section 23(1). Section 23(2) provides a degree of protection to the monitor. The section reads as follows:

(2) Monitor not liable – if the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person’s reliance on the report.

[10] Paragraphs 1(b) to (d.1) primarily relate to review and reporting issues on specific business and financial affairs of the debtor.

[11] In addition, paragraph 51 of the Amended and Restated Order provides that:

... in addition to the rights, and protections afforded the Monitor under the CCAA or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for great certainty in the Monitor's capacity as Administrator of the Employee Trust, save and except for any gross negligence or wilful misconduct on its part.

[12] The Monitor sets out a number of reasons why it believes that the requested relief is appropriate in these circumstances. Such approval

- (a) allows the monitor and stakeholders to move forward confidently with the next step in the proceeding by fostering the orderly building-block nature of CCAA proceedings;
- (b) brings the monitor's activities in issue before the court, allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;
- (c) provides certainty and finality to processes in the CCAA proceedings and activities undertaken (eg., asset sales), all parties having been given an opportunity to raise specific objections and concerns;
- (d) enables the court, tasked with supervising the CCAA process, to satisfy itself that the monitor's court-mandated activities have been conducted in a prudent and diligent manner;
- (e) provides protection for the monitor, not otherwise provided by the CCAA; and
- (f) protects creditors from the delay in distribution that would be caused by:
 - a. re-litigation of steps taken to date; and
 - b. potential indemnity claims by the monitor.

[13] Counsel to the Monitor also submits that the doctrine of issue estoppel applies (as do related doctrines of collateral attack and abuse of process) in respect of approval of the Monitor's activities as described in its reports. Counsel submits that given the functions that court approval serves, the availability of the doctrine (and related doctrines) is important to the CCAA process. Counsel submits that actions mandated and authorized by the court, and the activities taken by the Monitor to carry them out, are not interim measure that ought to remain open for second guessing or re-litigating down the road and there is a need for finality in a CCAA process for the benefit of all stakeholders.

[14] Prior to consideration of these arguments, it is helpful to review certain aspects of the doctrine of *res judicata* and its relationship to both issue estoppel and cause of action estoppel.

The issue was recently considered in *Forrest v. Vriend*, 2015 Carswell BC 2979, where Ehrcke J. stated:

25. “TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque v. Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:

21 *Res judicata* is mainly concerned with two principles. First, there is a principle that “... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.”: see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This “... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.”: *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.

...

30. It is salutary to keep in mind Mr. Justice Cromwell’s caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30 and 37, he wrote:

25. The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that “could” have been raised does not fully reflect the present law.

....

30. The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matter not actually raised and decided, the

test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.

...

37. Although many of these authorities cite with approval the broad language of *Henderson v. Henderson, supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on “new” evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

[15] In this case, I accept the submission of counsel to the Monitor to the effect that the Monitor plays an integral part in balancing and protecting the various interests in the CCAA environment.

[16] Further, in this particular case, the court has specifically mandated the Monitor to undertake a number of activities, including in connection with the sale of the debtors assets. The Monitor has also, in its various Reports, provided helpful commentary to the court and to Stakeholders on the progress of the CCAA proceedings.

[17] Turning to the issue as to whether these Reports should be approved, it is important to consider how Monitor’s Reports are in fact relied upon and used by the court in arriving at certain determinations.

[18] For example, if the issue before the court is to approve a sales process or to approve a sale of assets, certain findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the monitor in its report. The approval issue is put squarely before the court and the court must, among other things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

[19] On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that *res judicata* and related doctrines apply to approval

of a Monitor's report in these circumstances. (See: *Toronto Dominion Bank v. Preston Spring Gardens Inc.*, [2006] O.J. No. 1834 (SCJ Comm. List); *Toronto Dominion Bank v. Preston Spring Gardens Inc.*, 2007 ONCA 145 and *Bank of America Canada v. Willann Investments Limited*, [1993] O.J. No. 3039 (SCJ Gen. Div.)).

[20] The foregoing must be contrasted with the current scenario, where the Monitor seeks a general approval of its Reports. The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.

[21] In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of *res judicata* and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.

[22] I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

[23] By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:

- (a) allows the Monitor to move forward with the next steps in the CCAA proceedings;
- (b) brings the Monitor's activities before the Court;
- (c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,
- (d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;
- (e) provides protection for the Monitor not otherwise provided by the CCAA; and
- (f) protects the creditors from the delay and distribution that would be caused by:
 - (i) re-litigation of steps taken to date, and
 - (ii) potential indemnity claims by the Monitor.

[24] By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

[25] Further, limiting the effect of the approval does not impact on prior court orders which have approved other aspects of these CCAA proceedings, including the sales process and asset sales.

[26] The Monitor's Reports 3-18 are approved, but the approval is limited by the inclusion of the wording provided by counsel to Rio Can and KingSett, referenced at paragraph [7].

Regional Senior Justice G.B. Morawetz

Date: December 11, 2015

TAB 8

In the Matter of the Proposal of Komtech Inc.

[Indexed as: Komtech Inc. (Re)]

106 O.R. (3d) 654

2011 ONSC 3230

Ontario Superior Court of Justice,
Kane J.
July 8, 2011

Bankruptcy and insolvency -- Sale of assets -- Court approval
-- Presentation by debtor of proposal to its creditors or
ability to present proposal not prerequisite for court approval
of sale of debtor's assets under s. 65.13 of Bankruptcy and
Insolvency Act -- Bankruptcy and Insolvency Act, R.S.C. 1985,
c. B-3, s. 65.13.

K Inc. filed a Notice of Intention to make a proposal under
s. 50.4 of the Bankruptcy and Insolvency Act ("BIA"), and a
proposal trustee was appointed. K Inc. subsequently brought a
motion for approval of a bidding process for the auction of its
assets and the preliminary approval of an asset purchase
agreement. The trustee recommended that the motion be granted.
It was unlikely that K Inc. would be able to present a proposal
for approval by its creditors.

Held, the motion should be granted.

Presentation of, or the ability to present, a proposal is not
a condition to the exercise of the court's jurisdiction under

s. 65.13 of the BIA to authorize a sale of assets.

The position of K Inc.'s secured and unsecured creditors would not improve if the motion was dismissed, given the past unsuccessful attempts to sell the business and the estimate of the realizable value of the company's assets. The requirements under s. 65.13 of the BIA were met.

Cases referred to

Brainhunter Inc. (Re), [2009] O.J. No. 5578, 62 C.B.R. (5th) 41 (S.C.J.); Hypnotic Clubs Inc. (Re), [2010] O.J. No. 2176, 2010 ONSC 2987, 68 C.B.R. (5th) 267; Nortel Networks Corp. (Re) [Bidding Procedures], [2009] O.J. No. 3169, 55 C.B.R. (5th) 229 (S.C.J.) [page655]

Statutes referred to

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

14.06(7) [as am.], 50.4, (1) [as am.], 64.1 [as am.], 64.2 [as am.], 65.13 [as am.], (1), (3), (4), 81.4(4), 81.6(2)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 36 [as am.]

MOTION by the debtor for the approval of the sale of assets.

Keith A. MacLaren, for Komtech Inc.

John O'Toole and Andr Ducasse, for Business Development Bank of Canada.

Karen Perron, for Hubbell Canada LP.

[1] KANE J.: -- The applicant, Komtech Inc. ("Komtech"), designs and manufactures plastic injection products at two facilities in Ontario and employs approximately 150 employees. Faced with serious financial difficulties, Komtech filed a Notice of Intention ("NOI") to make a proposal ("Proposal") under s. 50.4(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ("BIA") on March 2, 2011. A. Farber & Partners Inc. was appointed Proposal Trustee ("Trustee").

[2] This court, on March 31, 2011, granted an extension to file the Proposal until May 16, 2011.

[3] On April 20, 2011, Komtech by motion sought approval of a bidding process ("Bid Process") for the auction of its assets and the preliminary approval of the Stalking Horse Asset Purchase Agreement (the "APA") between itself as vendor and 2279591 Ontario Inc. as purchaser. Pursuant to the APA, most of the assets of the vendor, including accounts receivable, inventory equipment, assigned contracts, intellectual property, products and prepaid expenses, are to be sold subject to the bid process, for a purchase price of \$2,800,000 (the "Purchase Price", or the "MBA").

[4] All secured creditors of Komtech were served with this motion pursuant to s. 65.13(3) of the BIA. Section 65.13(3) of the Act does not require service on unsecured creditors.

[5] The two primary secured lenders support this motion, namely, the Business Development Bank of Canada ("BDB") and HSBC Canada ("HSBC"). Demand for payment by each of these secured lenders has been made of Komtech. Komtech has been unsuccessful in obtaining alternative credit facilities. Combined, these two secured lenders are presently owed approximately \$6 million. The NOI dated February 26, 2011 lists approximately \$3,600,000 additional debt owing to other creditors of Komtech in addition to BDB and HSBC. [page656]

[6] The Purchase Price may be increased in an auction under the Bid Process. The Trustee recommends that the motion be granted and, in support thereof, filed a second report dated April 19, 2011 and a supplement to the second report dated April 27, 2011. The Trustee expresses the opinion that the greatest chance of return to creditors of Komtech is proceeding with the APA coupled with an auction using the APA and the Purchase Price as the floor.

[7] The Trustee in the second report confirms that the purchaser under the APA will carry on the business now being operated by Komtech and continue the employment of most of the 150 unionized and non-unionized employees of Komtech.

Evaluation of the APA and Bid Process

[8] I have reviewed the asset realization value estimate of Komtech's assets, the analysis prepared by the Trustee as well as an independent manufacturing equipment evaluation dated April 8, 2011. This estimate of liquidation value strongly supports the recommendation of the Trustee that Komtech be authorized to execute the APA as it represents consideration materially in excess of the liquidation value likely obtainable on a forced sale of assets.

[9] I am satisfied on the material filed that Komtech has made reasonable efforts in search of alternate financing, equity partnership or a purchaser of the business. I am further satisfied that Komtech has co-operated with the Trustee to identify and engage prospective purchasers of the company and its assets.

[10] In the event this motion is granted, the Trustee has undertaken to conduct further marketing in the hope of obtaining higher bids from prospective purchasers above that contained in the APA. That potential may increase consideration and payment to secured and unsecured creditors.

[11] It is my understanding that 2279591, as purchaser in the APA, is not a related party to Komtech.

[12] The position of Komtech's secured and unsecured creditors will not improve if this motion is dismissed given the past unsuccessful attempts to sell the business and the estimate of the realizable value of the company's assets. The use of the Stalking Horse APA in the marketing and Bid Process represents the only remaining potential recovery for creditors beyond BDB and HSBC.

[13] The Trustee in his reports has satisfied the requirements under s. 65.13(4). Alternative sources of financing were sought and are unavailable. A process was undertaken to identify and seek interest from potential purchasers under the direction of [page657] the Proposal Trustee. Negotiations took place with the knowledge of BDB and

HSBC which led to the presentation for approval of the APA.

[14] Involvement by the BDB since April 20, 2011 has increased the level of consideration payable under the APA by \$100,000.

[15] The APA represents continued employment to a large majority of the existing employees of Komtech. The APA represents a lower level of financial disruption to the existing customer base and suppliers of Komtech.

[16] Given the realization value estimate, it appears that the consideration to be paid under the APA is reasonable and fair considering the book value, the market value and the estimate of liquidation value of such assets.

[17] It is contemplated that a motion seeking a vesting order will be brought in the next several weeks. The Trustee has undertaken to provide all secured creditors and a representative group of the largest unsecured creditors with notice of that motion. That motion will provide creditors with an opportunity to express concerns regarding this initial approval of the APA, the auction bid process and amounts.

[18] There is also value to suppliers and the greater community if this business is continued by a purchaser under the APA or the Bid Process.

[19] Subject to the issue stated below, the moving party has satisfied me as to the requisite elements under s. 65.13 of the BIA.

Remaining Issue

[20] On the facts in this case, it is unlikely that Komtech will be able to present a Proposal for approval by its creditors. The issue is whether court approval of the sale of assets is available under s. 65.13 of the BIA when the debtor is unable to present a Proposal to its creditors.

[21] Parliament enacted s. 65.13 of the BIA at the same time as enacting s. 36 of the Companies' Creditors Arrangement Act,

R.S.C. 1985, c. C-36 ("CCAA"). Both amendments were enacted in 2005.

[22] The wording of s. 65.13 under the BIA and s. 36 under the CCAA are remarkably similar.

[23] Section 65.13(1) of the BIA prohibits the sale and disposition of assets outside the ordinary course of business in respect of an insolvent person which has filed an NOI under s. 50.4, unless authorized by the court to do so. [page658]

[24] *Hypnotic Clubs Inc. (Re)*, [2010] O.J. No. 2176, 68 C.B.R. (5th) 267 (S.C.J.) involved an NOI by the debtor under the BIA and a motion for approval of a sale of assets to a related third party under s. 65.13. The trustee was this Proposal Trustee. The court refused to approve that asset purchase agreement as it was not satisfied that good faith efforts had been made to sell the debtor's assets to unrelated parties. In coming to that conclusion, the court, at paras. 36 and 37, states:

Given these circumstances, and taking into account the underlying policy of the BIA of letting creditors vote as they choose in respect of accepting or rejecting a proposal, in my view, the factor of required good faith efforts stipulated by s. 65.13(5)(a) has not been met.

It is obvious that a deemed assignment into bankruptcy by s. 50.1(8), consequential to no proposal having being made, will quite probably result in Ms. Telios and the other unsecured creditors not recovering anything at all. However, that is a consequence that should be determined by the unsecured creditors through a vote upon a proposal without a prior disposition of Hypnotic's assets through the proposed Revised APA.

[25] Under s. 65.13, the court's jurisdiction to authorize the sale of assets outside of the ordinary course of business is not expressed as limited to cases where the debtor is capable of presenting a Proposal to its creditors. The ability to present a Proposal is not one of the listed factors to be

considered on a motion under s. 65.13(4). Parliament could have, but did not include language in s. 65.13 requiring the presentation of or the ability to present a Proposal and the vote thereon by creditors, as a condition to the exercise of the court's jurisdiction to authorize a sale of assets.

[26] A comparable issue under the CCAA with wording remarkably similar to s. 65.13 of the BIA has concluded that the court has jurisdiction to authorize the sale of business assets absent a formal plan of compromising arrangement under s. 36 of the CCAA.

[27] Section 36 of the CCAA reads as follows:

Restriction on disposition of business assets

36(1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition. [page659]

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or

disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors -- related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

- (a) a director or officer of the company;
- (b) a person who has or has had, directly or indirectly, control in fact of the company; and
- (c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the

creditor whose security, charge or other restriction is to be affected by the order.

Restriction -- employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement. [page660]

[28] In Nortel Networks Corp. (Re) [Bidding Procedures], [2009] O.J. No. 3169, 55 C.B.R. (5th) 229 (S.C.J.), the court found jurisdiction under the CCAA absent a plan of an arrangement which was described as "skeletal in nature". That court held that an important consideration, in addition to whether the business continues under the debtor stewardship or under a new equity structure, is whether the business can be continued as a going concern in the form of a sale by the debtor.

[29] Following the amendments creating s. 36 of the CCAA, the court in Brainhunter Inc. (Re), [2009] O.J. No. 5578, 62 C.B.R. (5th) 41 (S.C.J.) determined that s. 36 of the CCAA expressly permits the sale of substantially all of the debtor's assets even in the absence of the presentation and vote upon a plan of arrangement.

[30] Section 65.13 of the BIA and s. 36 of the CCAA were introduced in 2005 in 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).

[31] There were two Senate Committee meetings. At one of those, the Honourable Jerry Pickard, Parliamentary Secretary to the Minister of Industry, stated:

It is widely accepted that inadequate provisions exist for workers whose employers becomes bankrupt. Previous attempts to bring about better protection for workers have failed, as

the Minister of Labour has pointed out[.]

Experience has shown that restructuring provides much greater protection than liquidations through bankruptcy. Jobs are saved, creditors obtain better recovery and more competition is stimulated. Therefore, it is a cornerstone of Bill C-55 to promote restructuring. Bill C-55 encourages a culture of restructuring by increasing transparency in the proceedings, providing better opportunities for affected parties to participate, and improving the system of checks and balances to create greater fairness and efficiency.

To achieve its aims, the bill provides the courts with legislative guidance to ensure greater certainty and predictability with reference to such items as interim financing, the disclaimer and assignment of agreements, the sale of assets out of the ordinary course of business, governance arrangements of the debtor company, and the application of regulatory measures during the restructuring process. These issues were addressed in recommendations contained in your 2003 committee report and are largely reflected in the provisions of this bill.

(Emphasis added)

[32] The resulting Senate Committee Report discusses how a sale of assets, at times, is necessary to effect a successful restructuring, resulting in added protection for both creditors and employees. [page661]

[33] Although different legislation, the similarity of language of s. 65.13 of the BIA and s. 36 of the CCAA, including the listed factors for court consideration as to a sale of assets outside the ordinary course of business notwithstanding (a) the filing of an NOI or (b) an order under the CCAA, together with the factors listed above, leads me to conclude that the presentation of a Proposal to creditors is not a condition to this court's authority to approve, if appropriate, a sale of assets under s. 65.13 of the BIA.

Interim Charges

[34] The Stalking Horse Bidders Charge as security for the

breakup fee and expense reimbursement under the APA, the director's and officer's charge to indemnify against statutory liability and the administration charge related to the fees of the Proposal Trustee and the debtor as presented are authorized under s. 64.1 and s. 64.2 of the BIA. They are appropriate priorities and charges in this case subject to ss. 14.06(7), 81.4(4) and 81.6(2) of the BIA.

[35] For the above reasons, the relief sought in this motion is granted.

Motion granted.

TAB 9

Court of Queen's Bench of Alberta

Citation: OEL Projects Ltd (Re), 2020 ABQB 365

Date: 20200619
Docket: 25 2646438
Registry: Calgary

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

- and -

In the Matter of the Notice of Intention to Make a Proposal of OEL Projects Ltd.

**Oral Decision
of the
Honourable Justice April Grosse**

Context

[1] OEL Projects Ltd. filed a Notice of Intention to Make a Proposal under section 50.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 on May 20, 2020. BDO Canada Limited is acting as the Proposal Trustee.

[2] The 30-day period for making a proposal has not yet expired; however, on May 21, 2020, OEL entered an Asset and Share Purchase Agreement with McIntosh Perry Energy Limited, which I will refer to as the Purchaser.

[3] OEL now seeks approval and a vesting order in respect of that transaction, pursuant to section 65.13 of the *Bankruptcy and Insolvency Act*. OEL also seeks a distribution order with respect to the sale proceeds.

[4] The Proposal Trustee supports OEL's application and recommends the transaction. OEL has two secured creditors: CIBC and its parent, McIntosh Perry Engineering Consulting Engineering Limited, which I will refer to as McIntosh Perry. Both approve of the transaction.

[5] OEL's application came on for hearing before me yesterday. We adjourned to allow for some further information to be provided to the Court, and for me to have an opportunity to reflect on the submissions made by counsel. We reconvened this morning, and counsel have provided further submissions, and I have told them that I am now prepared to give an oral decision.

OEL and its Stakeholders

[6] I am going to start by giving some more information about OEL and its stakeholders. OEL is an engineering services firm operating in Alberta and surrounding provinces in the energy sector. It is a private company, wholly owned by McIntosh Perry since 2017.

[7] OEL has been experiencing declining revenues and operations given the downturn in the Canadian energy sector. The recent collapse in oil and gas prices, COVID-19 restrictions, and associated impacts on usual OEL clients in the energy sector have only made the situation more difficult for OEL. The record shows that OEL is projected to have negative cash flow this fiscal year without this transaction. Four years ago, OEL had approximately 115 employees. By March 15, 2020, OEL was down to about 54 employees. In preparation for filing its NOI, OEL gave notice of termination to another approximate 20 employees earlier this month. The remaining 34 employees have been offered employment by the Purchaser, if the transaction goes ahead.

[8] OEL is a party to an Amended and Re-stated Credit Agreement with CIBC, along with McIntosh Perry and related companies. To my understanding, the credit facilities under the Credit Agreement are not maxed out, and are also secured by the other entities in the McIntosh Perry family. CIBC has not taken steps to enforce its security. OEL also owes net approximately \$7.9 million to its parent, McIntosh Perry, pursuant to an Amended and Re-stated Promissory Note dated April 1, 2017. The debt is secured pursuant to a General Security Agreement, also dated April 1, 2017. On May 8, 2020, McIntosh Perry issued a formal demand to OEL, calling the amount owing under the Promissory Note. The Proposal Trustee has obtained a legal opinion confirming the validity of the McIntosh Perry security. I am advised that other than CIBC and McIntosh Perry, OEL has no other secured creditors.

[9] In its materials, OEL identified two liabilities, or potential liabilities, in particular that pose a great difficulty to OEL moving forward in its current structure.

[10] First, OEL rents two office spaces for which it pays a total of almost \$1.6 million per month. The leases were entered into in 2013 and 2014, when the energy industry -- and Calgary in general -- were enjoying more prosperity. OEL's lease rates are high compared to the current market, and with its reduced staff, OEL does not need near so much space. Counsel for OEL confirmed that OEL has been in discussions with both landlords, and both were served with the notice for this application. The notice time was short, service having been affected by email on May 21, for a May 26 hearing. However, they were served to email addresses of specific representatives, not general email boxes, and the landlords did not seek to participate or contact OEL or its counsel to oppose the application. Apparently, negotiations have already commenced with one of the landlords for a new lease for continued operations if the transaction proceeds. I

am satisfied that the landlords had notice and do not oppose the transaction before the Court. I understand that rent was paid up to May 1.

[11] The second particular difficulty identified by OEL is that three senior employees have filed claims against OEL, based on their recent termination or lay offs. I understand that these employees have been paid their wages, but that they claim contractual severance and perhaps other relief. Their claims total approximately \$491,000 at present, and are, both individually and collectively, by far the largest unsecured claims on the list of creditors attached by the Proposal Trustee to the NOI. These parties are represented by Mr. Wilson, who was notified of the application and participated in the hearing. These three gentlemen are obviously not happy with the situation, but they neither consented nor opposed OEL's application, recognizing the reality in the numbers.

[12] With respect to employees more generally, I am advised that all employees have been paid their wages up to date, and employees who have been terminated were also paid up on vacation pay. The Purchaser has agreed to pay any outstanding vacation pay for employees to whom the Purchaser has made offers of employment. The Proposal Trustee is satisfied that there are no claims that would otherwise be afforded a security interest in current assets pursuant to section 81.4 of the Act.

[13] Because the Notice of Intention was only filed on May 20, 2020, the other unsecured creditors do not yet have effective notice of the NOI, let alone the application. The NOI was mailed to them on May 25, so they could not have received it prior to the application. In any event, the NOI itself does not mention the application. So, this is not a case where creditors have had an opportunity to file proofs of claim, and accordingly, the unsecured debt of OEL is not fully fleshed out. However, according to the list of creditors used by the Proposal Trustee, once the claims of McIntosh Perry and another related entity are removed, and then the claims of Mr. Wilson's clients are removed -- which I have already discussed -- there is approximately \$91,500 in unsecured debt. Out of those amounts, all individual amounts are under \$5,000, except for \$27,000, and some to Beck Engineering Limited, and approximately \$12,500 to M5 Engineering Inc.

[14] Based on the further information provided after our adjournment yesterday, I understand that all but approximately \$3,000 of those amounts are considered trade debt that will be assumed by the Purchaser, if the transaction goes ahead. That includes the larger amounts owing to the two engineering firms I have just mentioned.

[15] The parties have provided me with various financial statements and the cash-flow statement for OEL. On the record, OEL is insolvent.

Section 65.13 of the *Bankruptcy and Insolvency Act*

[16] Section 65.13 of the *BIA* precludes a person who is the subject of an NOI from selling or disposing of assets outside the ordinary course of business, without authorization of the Court. Section 65.13(4) sets out the factors the Court must consider. It is a non-exclusive list. I will not read all of the factors into the record.

[17] Important in this case is section 65.13(5), which applies where a proposed sale or disposition is to a person who is related to the insolvent person. That is the case here. The Purchaser is a newly created subsidiary of McIntosh Perry.

[18] Pursuant to section 65.13(5), after considering the factors that apply to all transactions under subsection (4), the Court may only grant authorization for the sale if it is satisfied that:

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and.
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

[19] In applying section 65.13 to the facts of this case, as I outlined to counsel during the hearing yesterday, the concern I wanted to make sure was addressed in this case was the potential combined effect of three factors.

[20] First, not all of the unsecured creditors were given notice of the application. In fact, they likely do not even have notice of the NOI yet. OEL and the Proposal Trustee argue that in this particular case, the unsecured creditors really have no material interest because with or without this transaction, and regardless of whether the company is sold as a going concern to the Purchaser or any other entity, or liquidated, all the figures show that the unsecured creditors stand to be paid zero. The delta between the secured debt and available funds is so high that there is no realistic scenario where the remaining unsecured creditors get paid. That is the argument.

[21] The second factor that goes into this combination is that the proposed sale is to a related party. Again, this on its own is not a disqualifying factor, and is specifically contemplated by section 61.13(5). However, it brings additional scrutiny to bear.

[22] The third factor is that there was no sale process, per se. The Board of OEL hired FTI in March to do an analysis of the return that might be expected in both a going concern sale scenario and a liquidation of assets scenario. The going concern sale was expected to yield a higher return, and the Purchaser is paying at the high end of the range estimated by FTI. However, there was no bid or other sale process. There is no evidence of even approaches to potential buyers.

[23] OEL's evidence is that its Board considered a sale process, and determined that it was not feasible. The company's circumstances, combined with a highly mobile clientele and workforce - both of whom could simply go elsewhere in the face of a sales process -- meant that the Board did not consider a third-party sale process to be realistic. The Board considered that the likely departure of employees and clients would probably mean that the sale process would erode the value that OEL still had. The company also lacks the liquidity to fund a sale process, and would lose an estimated \$600,000 during the process. In other words, from the Board's perspective, as I understand it, it was not just a case of having nothing to lose by giving a third-party sale process a try, even if the prospects of finding a buyer were slim. The Board considered that the sale process itself would erode the value that was left in OEL, and there would be nothing left to sell at the end.

[24] In its report, the Proposal Trustee does not specifically endorse nor disagree with the Board's reasoning, per se. However, the Proposal Trustee is of the view that it is unlikely that incurring the costs of a public marketing process would yield sufficient funds to otherwise render funds available for unsecured creditors, and the Proposal Trustee also notes that OEL no longer has the ability to fund its operations, or the time available to administer a protracted public sales process, in light of the calling of the Promissory Note by McIntosh Perry.

[25] I appreciate that section 65.13(3) only references notice to secured creditors. There is no specific requirement, per se, that all unsecured creditors be served. However, the *Bankruptcy and Insolvency Act* is, to a great extent, focused on addressing creditor claims and rights, when a party has become insolvent. Here, there is no realistic chance of there being a proposal if the transaction proceeds. Creditors would still have their rights in bankruptcy, but any value in OEL will be gone. It is at least fair to consider whether creditors should have an opportunity to know about the transaction, scrutinize it, and take any position that might be available to them. The extent to which creditors were consulted is an express factor for consideration under section 65.13(4)(d). In reviewing some of the reported decisions under section 65.13, it seems that in most cases, at least representatives of the unsecured creditors were notified or will be notified somewhere before a final vesting order is granted.

[26] The role of the creditor takes on more potential importance in a circumstance where there is a proposed sale to a related party, with no actual third-party sale process. Their involvement would provide one more potential source of scrutiny in terms of whether the assessment by the company and the Proposal Trustee of the merits of a third-party sale process, and the merits of the proposed transaction are fair and reasonable. It is fine to say that under any scenario, the unsecured creditors will not get paid. However, perhaps they should be able to at least test that proposition.

[27] On the particular facts of this case, my concern as I just outlined has been answered, and am satisfied that I can and should approve the transaction and grant the relief sought by OEL. My reasons, including my analysis of the factors and requirements of section 65.13(4) and (5) follow in bullet form:

- While not all unsecured creditors had notice of the application, the largest unsecured creditors were notified and were represented by counsel. These are not just any unsecured creditors. They are unsecured creditors whose claims are not trade debt being assumed by the Purchaser under the proposed transaction, and they are senior employees, presumably familiar with the engineering business. If anyone were in a position to critique the analysis of OEL, FTI, or the Proposal Trustee, it would be them. While they do not consent, they have raised no particular opposition. I think it would be safe to say that after analyzing the materials, they are resigned to the situation in terms of this transaction. I appreciate that they may well be pursuing whatever rights are available to them going forward. The unsecured creditors, and those not being taken on as assumed debt by the Purchaser, may never recover or may never recover their full amounts. But if that is the case, I am satisfied on the record that it will not be as a result of this transaction, but rather, would be a result of the more general circumstances facing the company.
- OEL's landlords, who will be materially impacted by the proposed transaction, have been consulted, and had notice of the application. They did not come to Court to oppose.
- The number and value of non-served unsecured claims is relatively small. All but one such unsecured claim for just under \$3,000 is being taken on as assumed

trade debt by the Purchaser. So for the most part, with that one exception, the unserved unsecured creditors are not prejudiced by the transaction.

- In any event, the delta between the valuation of OEL or its assets, and the secured debt is so large that unless there have been serious errors by OEL, FTI, and the Proposal Trustee, there is no scenario where the unsecured creditors would be paid, unless their debt was assumed by a purchaser. In other words, the proposed transaction does not prejudice them. In fact, arguably, most of them are better off, given the assumption of their accounts by the Purchaser.
- The process leading to the transaction was not as robust as we would often expect to see, particularly for a related-party transaction. There was no public or even private third-party marketing process. However, I find that this was reasonable in the circumstances. The Board did have the independent advice of FTI, both on going concern and liquidation value. The Board's reasoning as to why a sales process is not feasible in this particular set of circumstances makes sense, particularly given the financial circumstances of the company, the lack of liquidity to fund the sale process, the portable nature of the employees and clients, and the circumstances in which a process would have to take place, including the very depressed price of oil, which has a direct impact on work available to engineering consultants who only work in the energy sector, like OEL, and COVID-19 restrictions.
- The Proposal Trustee's opinion is not determinative; however, the Proposal Trustee is aware of his duties to all stakeholders and sees no scenario in which a third-party sale, or a third-party sales process, leads to a better result for OEL or any of its creditors, whether secured or unsecured. The Proposal Trustee approves the process leading up to the transaction and has filed the report required by section 65.13(4)(c) of the *Act*.
- The secured creditors are supportive, and they are not being paid in full.
- As already outlined, the unsecured creditors are not being prejudiced in fact. On the other hand, the transaction is designed to at least potentially preserve 34 jobs in at least the short term. Jobs are not easy to come by for engineers working in the oil and gas sector right now, so that is a relevant consideration.
- Based on both the FTI analysis and the Proposal Trustee's analysis, the Purchaser is paying consideration at the very highest end of the possible range of value that could be recovered for either the company as a going concern, or on a liquidation basis. And in fact, the purchase price is significantly more than would be achieved in a liquidation. Even though there was no bid process, the analysis of FTI and the Proposal Trustee do provide us with some independent benchmarks of value. I am satisfied that the consideration is reasonable and fair.

- The transaction is going to proceed quickly, so as to avoid further erosion of value. It does not contemplate any interim or debt financing, which would be required for any longer sale process. Such financing may or may not be available, and if it were, it would further add to the costs to OEL.

[28] The wording of section 65.13(5) has given me some pause. On its face, subparagraph (a) contemplates that there must be some actual effort made to sell or dispose of the assets to unrelated parties. Subparagraph (b) follows up on this by referring to the consideration in the proposed transaction being superior to the consideration that would be received under any other offer made in accordance with the process. Again, the contemplation seems to be that there would be some process that could at least generate other offers.

[29] The question is whether the Court can approve a sale under section 65.13(5), where there has been no actual sale process. While I am of the view that the Court should be cautious in so doing, I am persuaded that the Court may do so where the particular circumstances warrant. While section 65.13(5) refers to good faith efforts being made to sell, it does not actually mandate a particular sales process, or for that matter, any sales process at all. For instance, it does not say that the Court must be satisfied that there was a good faith sales process. Rather, the wording of the provision focuses on the efforts that were made. In most cases, I expect that the efforts would have to involve some actual approaches to other purchasers. However, I am not convinced that these are strictly required in every case in a proper interpretation of the provision.

[30] Time has not permitted a thorough investigation into the legislative history of section 65.13(5); however, I note that in *Re Komtech*, 2011 ONSC 3230, Justice Kane reviewed the history of section 65.13. At paragraph 31, Justice Kane cited from some Senate committee meetings that were part of the process leading up to the introduction of the bill that included section 65.13. One of the comments in those meetings was that the bill in question is designed to promote restructuring, which had been found to provide greater protection than liquidations in bankruptcy. This does not mean that anything goes. In fact, the comments at the committee also confirmed that the bill sought to increase transparency, provide better opportunities for participation, and approve checks and balances. But I must keep in mind that the provision is designed to be facilitative of restructuring. In *Komtech*, Justice Kane found that a transaction could be approved under section 65.13, even when the insolvent party would not be in a position to actually make a proposal.

[31] Counsel provided me with the decision of Justice Morawetz in *Re Target Canada Co.*, 2015 ONSC 2066. Justice Morawetz was considering the analogous provision to section 65.13(5) under the CCAA. While the facts in *Target* are distinguishable in many ways, Justice Morawetz's decision did approve an asset sale where there had been no marketing process for the assets in question. In so doing, he held that the Court should not take a formulaic approach to the provision, and must be satisfied overall that: (as read)

Sufficient safeguards were adopted to ensure that the related-party transaction is in the best interests of the stakeholders of the applicants, and that the risk to the estate associated with a related-party transaction have been mitigated.

And that's from paragraph 15.

[32] In that case, he was satisfied that the risk theoretically associated with a related-party transaction had been addressed through the efforts to evaluate the saleability of the assets to an unrelated party. He also considered the particular circumstances of the assets in question.

[33] It would be somewhat absurd from an interpretive perspective to suggest that, for example, a party could make one call to a potential purchaser, and that would bring the party's efforts at least into consideration under section 65.13(5), but that coming to a reasoned conclusion that such a call would actually harm the value that could be achieved for stakeholders, would disqualify the insolvent person from even having the transaction considered under section 65.13(5).

[34] It is also noteworthy as well that in appropriate circumstances, courts approve pre-packaged and quick-flip transactions in the receivership context, where there is no sales process. This can occur even when a related party is involved. For example, see **Tool-Plas Systems Inc.**, [2008] OJ No 4218 (SC) (QL), which is a decision of the Superior Court of Justice Commercial List by Justice Morawetz. I appreciate that these cases in the receivership context do not involve the specific legislative requirements of section 65.13(5), but they provide some analogous circumstances that assist in the interpretation of section 65.13(5).

[35] In this particular case, the efforts that were made that I need to consider under section 65.13(5) include retaining FTI, considering categories of potential purchasers, and then with all of the financial information and the FTI estimated values in mind, considering whether a sales process to try to solicit purchasers was feasible. The nature of the business, including the portable nature of the both employees and clients is relevant. Whether it would be enough on its own need not be decided, because other factors are at play here. This review by OEL, in consultation with its secured creditors, took place in March and April 2020, after huge drops in oil prices and unprecedented public health lock downs due to COVID-19. A sale process would have had to unfold in those difficult circumstances. The mix of secured and unsecured creditors and the evidence that the unsecured claims are relatively small in number of relatively small values, and were not going to be paid in any scenario, unless accepted as assumed debt by the Purchaser, is also relevant to whether the company's decision not to pursue a sales process amounts, in effect, to a good faith effort to sell or otherwise dispose, as required by section 65.13(5). Of course, the lack of liquidity in the company, and the cost and risk involved in the sales process are also relevant and were accounted for. In the particular circumstances of this case, I conclude that section 65.13(5) is satisfied.

[36] I have had reference to the decision in **(Re) Hypnotic Clubs Inc.**, 2010 ONSC 2987. The circumstances are analogous to the ones at bar in many respects; however, ultimately Justice Cumming found that the related-party purchaser had, in effect, created a situation where there was no other market for the asset through its control of the sublease. There is no such lack of good faith effort in the case before me. Further, the *Hypnotic* situation was one where the value of the unsecured claims was somewhat higher, and also where there was a history of significant litigation between some of the parties involved that Justice Cumming seemed to take into account. He did note, though, that even in that case, there was unlikely to be recovery by the unsecured creditors.

[37] I am satisfied that the circumstances before me are sufficiently distinguishable so as to lead to a different result in this case. Also, I note that Justice Cumming did not find that section 65.13(5)(a) could never be met without a formal third-party sale process of some sort. Rather, he

simply found that in the circumstances before him, the required good faith efforts had not been made.

[38] So I am granting your application, Mr. Van de Mosselaer.

Oral Decision delivered on the 27th day of May, 2020.

Dated at the City of Calgary, Alberta this 19th day of June, 2020.

April D. Grosse
J.C.Q.B.A.

Appearances:

R.S. Van de Mosselaer and K. Armstrong
for OEL Projects Ltd.

J.L. Oliver
for the Trustee

J.H. Wilson
for Three Former Employees

R. Jaipargas
for CIBC

TAB 10

In the Court of Appeal of Alberta

Citation: Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd, 2021 ABCA 66

Date: 20210218

Docket: 2101-0002-AC

2101-0004-AC

Registry: Calgary

Docket: 2101-0002-AC

Between:

Athabasca Workforce Solutions Inc.

Applicant

- and -

**Greenfire Oil & Gas Ltd. and
Greenfire Hangingstone Operating Corporation**

Respondents

- and -

**Alvarez Marsal Canada Inc., in its capacity as Proposal Trustee of
Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation**

Not a Party to the Application

- and -

**Trafigura Canada General Partnership, McIntyre Partners and Greenfire Acquisition
Corporation**

Respondents on Application

Docket: 2101-0004-AC

Between:

**Behrokh Azarian, Homayoun Hodaie, Mandana Rezaie, Mehran Pooladi-Darvish,
Meysam Ovaici, Firooz Abbaszadeh, Mehran Joozdani, Layla Amjadi,
Meer Taher Shabani-Rad, Zahra Ahmadi-Naghdehi, Afshin Shameli,**

**Maryam Mohsen Zadeh, Parham Minoo, Haleh Peiravi,
 Mohammad Ahadzadeh Ardebili, Ramin Jalalpoor, Elham Vakili Azghandi,
 Tariq Mahmood Roshan, Amin Jalalpoor, Faisal Khan, Poonam Dharmani
 and Ali Nilforoush**

Applicants

- and -

**Greenfire Oil & Gas Ltd. and
 Greenfire Hangingstone Operating Corporation**

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- and -

**Alvarez Marsal Canada Inc., in its capacity as Proposal Trustee of
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Not a Party to the Application

- and -

**Trafigura Canada General Partnership, McIntyre Partners and Greenfire Acquisition
 Corporation**

Respondents on Application

**Reasons for Decision of
 The Honourable Madam Justice Marina Paperny**

Application for Permission to Appeal

**Reasons for Decision of
The Honourable Madam Justice Marina Paperny**

Introduction

[1] The applicants seek a declaration that they, as proposed appellants, do not require leave to appeal the decision of a supervising judge under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (BIA). If leave is required, they seek leave to appeal the decision.

[2] The impugned decision approved a sale and vesting order (SAVO), an interim financing order, and an interim financing charge order (collectively, the IFO) over the assets of Greenfire Hangingstone Operating Corporation. The applicant Athabasca Workforce submits it is a creditor of Greenfire Hangingstone as well as a significant shareholder of its parent company, Greenfire Oil & Gas Ltd. (collectively, Greenfire). The second set of applicants are individual investors in Greenfire.

Background

[3] On April 3, 2018, Greenfire purchased the Hangingstone Facility, a bitumen production plant in Alberta's oilsands region. On July 5, 2019, Athabasca and Greenfire Hangingstone entered into a transportation agreement related to the plant's operations. Athabasca Workforce says that, after Athabasca was required to purchase shares in the parent company, Greenfire failed to pay them for their services. On August 20, 2020, Athabasca Workforce filed an application that Greenfire be declared bankrupt. Greenfire disputed the bankruptcy, claimed that in fact it was a creditor of Athabasca Workforce, and, in an effort to keep the facility viable, filed a Notice of Intention to Make a Proposal under the BIA on October 8, 2020.

[4] During this time, Greenfire sought interim financing from potential lenders. Greenfire was required to extend its time to submit a proposal on several occasions thereafter. Meanwhile, the Hangingstone facility was non-operational and began to accrue damage due to freezing temperatures and inactivity. In December 2020, Greenfire sought court approval of the SAVO and IFO. Absent an interim lender and therefore a resumption in operations, damage to the Hangingstone facility and associated environmental liability would continue to increase. With respect to the SAVO and IFO, Greenfire negotiated an Asset Purchase Agreement with an arm's length party, Greenfire Acquisition Co, and negotiated an Interim Financing Agreement with Trafigura Canada General Partnership (Trafigura), the terms of which were contingent on court approval. In December 2020, Greenfire filed an application to approve interim financing, grant Trafigura a priority charge (the interim lender), and approve the Asset Purchase Agreement.

[5] On December 17, 2020, the chambers judge granted the requested orders. The applicants wish to appeal those orders and submit that leave is not required, or in the alternative, that leave ought to be granted in the circumstances.

[6] For the reasons that follow, I have concluded that leave to appeal is required. I have considered the leave application and conclude that the test for leave has not been met.

Is leave to appeal required?

[7] Under section 193 of the BIA, an appeal exists as of right from bankruptcy proceedings in limited circumstances:

- (a) if the point at issue involves future rights;
- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; or
- (e) in any other case by leave of a judge of the Court of Appeal.

[8] While at first blush the section, and in particular s 193(c), appears broad, the provision has been narrowly interpreted. The provision, and the BIA generally, are to be interpreted purposively, to ensure bankruptcy proceedings are administered efficiently and expeditiously.

[9] Applicants seeking to avoid the requirement for leave often rely on ss 193(a) and (c), and this appeal is no exception.

[10] Looking first at s 193(a), the investors submit that the SAVO approves vesting title to assets free and clear of all charges and claims, including those of the investors, and thus their future rights are being negatively impacted. I do not accept that submission. Future rights are not procedural rights or commercial advantages, which is in reality what the investors assert. The submission that they no longer have a claim against the assets of Greenfire overlooks the reality that they are not asserting future rights, but rather present rights, and that any proceeds of sale will be available for distribution to creditors in accordance with the BIA. See *Business Development Bank of Canada v Pine Tree Resorts Inc.*, 2013 ONCA 282 at para 15; *Ravelston Corp., Re*, 2005 CanLII 63802 at para 17, [2005] OJ No 5351 (Ont CA); *Ditchburn Boats & Aircraft (1936) Ltd., Re* (1938), 19 CBR 240 (Ont CA); *Dominion Foundry Co., Re* (1965), 1965 CanLII 596, 52 DLR (2d) 79 (Man CA); and *Fiber Connections Inc. v SVCN Capital Ltd.*, 2005 CanLII 15454, 10 CBR (5th) 201 (Ont CA).

[11] The situation is similar to that in *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225. In *Bending Lake*, the Ontario Court of Appeal considered whether leave

to appeal a sale and vesting order was required under s 193, it having been submitted that “future rights” were engaged. The court held that to the extent a SAVO affects the rights of those with an economic interest in the debtor, only the present, existing rights of the debtor’s creditors and shareholders are affected, not their future rights (para 27). The court examined the applicant’s real complaint - the “commercial advantages or disadvantages that may accrue from the order challenged on appeal” (para 28), for example eliminating shareholder equity or precluding efforts by the shareholders to raise financing (the precise circumstances here). The court determined that those are existing, not future rights. The same is true in this case.

[12] Applicants also rely on s 193(c). They assert that the value of the property far exceeds the threshold of ten thousand dollars, because the value of the asset being sold exceeds that amount. This is a broad interpretation of “value of the property” within the meaning of s 193(c), and has been rejected. In *Dominion Foundry*, the Manitoba Court of Appeal noted that to allow an appeal as of right under subsection (c) where the property of the bankrupt exceeds this threshold would undermine the purpose of the BIA, which is to allow for the disposition of the bankrupt’s assets and the distribution of the proceeds amongst creditors. Almost every case would qualify, making the requirement for leave meaningless and undermining one of the most important purposes of the act, expeditious determination and the prospect of finality.

[13] The court in *Bending Lake* also considered the scope of s 193(c). Justice Brown adopted a contextual approach and identified two factors that should inform any interpretation of the subsections: first, the predecessor section to s 193(c) was enacted at a time when the BIA did not include the right to seek leave to appeal, and this prompted courts to give categories of appeals as of right a wide and liberal interpretation to avoid shutting out meritorious appeals. Second, Canada’s other major insolvency statute, the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, requires leave under s. 13. No principled basis exists to distinguish the treatment of a sale by a receiver or trustee from that under the CCAA. Brown JA concluded that these factors militated against employing an expansive interpretation. He favoured an approach alive to the needs of modern, real time insolvency litigation. He concluded that s 193(c) does not apply to: (i) orders procedural in nature; (ii) orders that do not bring into play the value of the debtor’s property; and (iii) orders that do not result in a loss.

[14] In *Dominion Foundry*, an attempt to set aside a sale of assets by a trustee as being improvident was considered procedural, and therefore not falling within s. 193(c). In *Alternative Fuel Systems Inc. v EDO (Canada) Limited*, 1997 ABCA 273, 206 AR 295, this court concluded that where the issue was an order directing acceptance of a tender for the assets of a bankrupt estate, the order was procedural – it was a challenge to the method by which assets were sold. The same is true here. The issue before the supervising judge was whether the SAVO and IFO were appropriate methods of securing financing for the current operation and a purchase of the assets so as to ultimately monetize them to satisfy creditors to the extent possible.

[15] In *Bending Lake*, an issue was raised as to whether a transaction ought to be postponed to let shareholders re-finance the company. The court held, and I agree, that such an appeal does not bring into play the value of the debtor's property. Rather, the effect of the SAVO is to generate sale proceeds that stand in place of the assets; it is a means to monetize the estate. As to whether the order results in a gain or loss, an approval and vesting order does not determine the entitlement of any party with an economic interest in the sale proceeds. No interested party has gained or lost as a result of the order.

[16] For these reasons, I conclude that neither s 193(a) nor (c) apply to the proposed appeal, and leave to appeal is therefore required.

Should leave to appeal be granted?

[17] The following factors are considered on an application for leave to appeal under s 193(e) of the BIA:

- a) whether the point on appeal is of significance to the practice;
- b) whether the point raised is of significance to the action itself;
- c) whether the appeal is *prima facie* meritorious or frivolous; and
- d) whether the appeal will unduly hinder the progress of the action.

[18] In addition, leave should only be granted if the judgment appears to be contrary to law, amounts to an abuse of judicial power or involves an obvious error, causing prejudice for which there is no remedy: see *Alternate Fuel Systems* at para 12; *Dykun v Odishaw*, 1998 ABCA 220 at para 4; *West Edmonton Mall Property Inc. v Duncan & Craig*, 2001 ABCA 40 at para 9; *DGDP-BC Holdings Ltd. v Third Eye Capital Corporation*, 2020 ABCA 442 at para 18.

(a) Is the point on appeal significant to the practice?

[19] The applicants submit the orders are novel in that approval of the IFO required the approval of the proposed sale of assets as a condition. Therefore, the SAVO was granted in the absence of a proper sale process being conducted and with inadequate evidence of value. I disagree. The approval of interim financing and sales of assets under sections 50.6 and 65.13 of the BIA are matters of judicial discretion and are highly fact dependent. The BIA includes a list of non-exhaustive factors to inform the exercise of that discretion. The reasons of the supervising judge demonstrate a balancing of interests of all stakeholders, having regard to the precarious financial situation, the already serious damage done to the asset, and the restarting and environmental risks. Having regard to the lack of other viable alternative proposals, the support of key stakeholders, the lack of prejudice to Greenfire's creditors as a result of the interim financing, and the attendant lenders charge, there is no basis on the record to suggest the appeal will have any broad significance to the practice.

(b) Is the point raised of significance to the action?

[20] It would be a rare case where an interested party does not view a proposed appeal to be significant to the action. In most instances the answer to this question will be in the affirmative, and will be balanced against the other criteria. That is the case here.

(c) Is the proposed appeal prima facie meritorious?

[21] The applicants submit that the supervising judge made several errors of law or palpable and overriding errors in his assessment of the facts. While they recognize that the granting of the SAVO and the interim financing orders are discretionary, they submit the conclusions were based on incorrect inferences relating to the parties' positions and upon unwarranted findings. For instance, they submit that the supervising judge erred in concluding: there was no better recovery for the creditors, Greenfire had the confidence of its major creditors, the interim financing enhanced the prospects of a viable proposal, the sale would benefit creditors, and if the interim financing orders were not approved, the most likely outcome would be the transfer of the assets to the Orphan Well Association.

[22] The supervising judge reviewed the criteria that guides discretion under the BIA. He was aware of the leading authorities and principles for the approval of a sale of assets in insolvency proceedings as set forth in *Royal Bank of Canada v Soundair Corp*, 4 OR (3d), 83 DLR (4th) 76 (ONCA). He understood the purposes of the interim financing and appreciated that such financing would not be available absent a priority charge securing same. He considered the process that had been undertaken to secure that financing and that it eventually resulted in the Trafigura offer. He recognized that the granting of the order and charge was critical, failing which the facility faced enormous risk of damage and increased repair and restart costs. The record does not support the conclusion that the chambers judge misdirected himself or misapprehended the evidence when he concluded that the IFO and SAVO warranted his approval.

[23] In addressing the consideration payable under the APA, the supervising judge found it to be fair and reasonable having regard to the *Soundair* principles. He recognized that there had not been a formal auction process, nor is one required or advisable in every case. He commented that Alberta courts have acknowledged that "pre-pack sales" resulting from processes conducted prior to insolvency proceedings can satisfy the *Soundair* requirements. He considered the relevant factors, including the deteriorating financial condition of the debtor; that other options were considered even though the sale would only provide returns to the debtor's primary secured creditors; the prospect of employment and utilization of existing trade creditors and the fairness of the consideration having regard to the price paid by Greenfire to acquire the facility less than three years earlier.

[24] The supervising judge weighed the evidence before him, and his finding that any potential alternative source of interim financing was “too little too late” was grounded in that evidence. With respect to the applicants being denied an opportunity to test evidence through cross-examination, the critical information had already been filed in previous affidavits, and the supervising judge was aware of concerns with respect to the seventh affidavit. He put questions to Greenfire’s counsel about this evidence and was satisfied with the responses. He recognized that this transaction was not “the usual” transaction, but that no one had provided any other viable alternative. Speculation about what might be possible did not replace the significance of a certain transaction.

[25] The applicants do not point to any error of law in the analysis that would warrant judicial intervention. This was a discretionary decision that warrants a high degree of deference. The prospect of a successful appeal is doubtful.

(d) Will the appeal unduly delay the proceedings?

[26] Not only will an appeal delay the proceedings, it will also create further jeopardy for the stakeholders of Greenfire. Pursuant to the interim financing agreement, Trafigura has already advanced \$4 million between December 19 and 21, and a further \$4.5 million between December 29 and January 19. That is, \$8.5 million of a total of \$20 million has already been advanced. Granting leave to appeal in these circumstances risks serious potential damage to the facility, given that the additional funds are required to perform repairs and for maintainance. Moreover, there is no reason to believe that the sanctioned transaction can be delayed pending the outcome of an appeal, or for that matter that there will be another viable transaction for anyone to consider. Repairing the damage and returning the facility to an operational state depends on the transaction closing.

Fresh evidence application

[27] The applicant investors also seek leave to file an additional affidavit in which they put forward a term sheet to provide for further interim financing options. They submit the test for fresh evidence has been met because the affidavit material was not available before the chambers judge as it was yet to be completed, but now it could bear decisively on the issue before me – whether leave ought to be granted to appeal the decision to approve the interim financing and SAVO.

[28] In my view such affidavit evidence ought not to be allowed. This court in *Roswell Group Inc. v 1353141 Alberta Ltd*, 2020 ABCA 428 reiterated the test. That this document was not available to the chambers judge was due to the fact that it had not yet been agreed to. This supports his conclusion of “too little too late”. Moreover, I am persuaded that the conditional nature of the document would have been insufficient to displace the conclusion arrived at by the supervising judge. I also note that trying to bring an improved or better offer to the court on appeal is a dubious practice and may have the effect of undermining the principles of fairness articulated in *Soundair*.

Conclusion

[29] I have concluded that leave to appeal is required. The test for leave has not been met, and leave to appeal is denied.

Application heard on February 10, 2021

Reasons filed at Calgary, Alberta
this 18th day of February, 2021

Paperny J.A.

Appearances:

R. Zahara

J.J. Bouchier (no appearance)

for the Athabasca Workforce Solutions Inc.

D. LeGeyt

R.E. Algar

J.D. Murphy (no appearance)

for Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation

A.C. Maerov

K. Ryland (no appearance)

for Alvarez Marsal Canada Inc.

K.L. Fellows Q.C.

J.J. Maslowski

R.L.R. Hamilton (no appearance)

for Trafigura Canada General Partnership

K. Kashuba

J. Mann (no appearance)

for McIntyre Partners

D.S. Nishimura

for Behrokh Azarian et al.

G.G. Plester

for Regional Municipality of Wood Buffalo

J.W. Reid

for ABC Funding LLC

TAB 11

Royal Bank of Canada v. Soundair Corp., Canadian Pension
Capital Ltd. and Canadian Insurers Capital Corp.

Indexed as: Royal Bank of Canada v. Soundair Corp.
(C.A.)

4 O.R. (3d) 1
[1991] O.J. No. 1137
Action No. 318/91

ONTARIO
Court of Appeal for Ontario
Goodman, McKinlay and Galligan JJ.A.
July 3, 1991

Debtor and creditor -- Receivers -- Court-appointed receiver accepting offer to purchase assets against wishes of secured creditors -- Receiver acting properly and prudently -- Wishes of creditors not determinative -- Court approval of sale confirmed on appeal.

Air Toronto was a division of Soundair. In April 1990, one of Soundair's creditors, the Royal Bank, appointed a receiver to operate Air Toronto and sell it as a going concern. The receiver was authorized to sell Air Toronto to Air Canada, or, if that sale could not be completed, to negotiate and sell Air Toronto to another person. Air Canada made an offer which the receiver rejected. The receiver then entered into negotiations with Canadian Airlines International (Canadian); two subsidiaries of Canadian, Ontario Express Ltd. and Frontier Airlines Ltd., made an offer to purchase on March 6, 1991 (the OEL offer). Air Canada and a creditor of Soundair, CCFL, presented an offer to purchase to the receiver on March 7, 1991 through 922, a company formed for that purpose (the 922 offer). The receiver declined the 922 offer because it contained an unacceptable condition and accepted the OEL offer. 922 made a

second offer, which was virtually identical to the first one except that the unacceptable condition had been removed. In proceedings before Rosenberg J., an order was made approving the sale of Air Toronto to OEL and dismissing the 922 offer. CCFL appealed.

Held, the appeal should be dismissed.

Per Galligan J.A.: When deciding whether a receiver has acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer, and should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. The decision to sell to OEL was a sound one in the circumstances faced by the receiver on March 8, 1991. Prices in other offers received after the receiver has agreed to a sale have relevance only if they show that the price contained in the accepted offer was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. If they do not do so, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If the 922 offer was better than the OEL offer, it was only marginally better and did not lead to an inference that the disposition strategy of the receiver was improvident.

While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

The failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto did not result in the process being unfair, as there was no proof that if an offering memorandum had been widely

distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL.

The fact that the 922 offer was supported by Soundair's secured creditors did not mean that the court should have given effect to their wishes. Creditors who asked the court to appoint a receiver to dispose of assets (and therefore insulated themselves from the risks of acting privately) should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale by the receiver. If the court decides that a court-appointed receiver has acted providently and properly (as the receiver did in this case), the views of creditors should not be determinative.

Per McKinlay J.A. (concurring in the result): While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the assets involved, it was not a procedure which was likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): The fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. The creditors in this case were convinced that acceptance of the 922 offer was in their best interest and the evidence supported that belief. Although the receiver acted in good faith, the process which it used was unfair insofar as 922 was concerned and improvident insofar as the secured creditors were concerned.

Cases referred to

Beauty Counsellors of Canada Ltd. (Re) (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.); British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.); Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.); Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C.

(2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (H.C.J.); *Salima Investments Ltd. v. Bank of Montreal* (1985), 41 Alta. L.R. (2d) 58, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 21 D.L.R. (4th) 473 (C.A.); *Selkirk (Re)* (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.); *Selkirk (Re)* (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.)

Statutes referred to

Employment Standards Act, R.S.O. 1980, c. 137

Environmental Protection Act, R.S.O. 1980, c. 141

APPEAL from the judgment of the General Division, Rosenberg J., May 1, 1991, approving the sale of an airline by a receiver.

J.B. Berkow and Steven H. Goldman, for appellants.

John T. Morin, Q.C., for Air Canada.

L.A.J. Barnes and Lawrence E. Ritchie, for Royal Bank of Canada.

Sean F. Dunphy and G.K. Ketcheson for Ernst & Young Inc., receiver of Soundair Corp., respondent.

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

GALLIGAN J.A.:-- This is an appeal from the order of Rosenberg J. made on May 1, 1991 (Gen. Div.). By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

It is necessary at the outset to give some background to the dispute. Soundair Corporation (Soundair) is a corporation

engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the Royal Bank) is owed at least \$65,000,000. The appellants Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively called CCFL) are owed approximately \$9,500,000. Those creditors will have a deficiency expected to be in excess of \$50,000,000 on the winding-up of Soundair.

On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the receiver) as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

(b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person ...

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the receiver:

(c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale

to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers whether direct or indirect. They were Air Canada and Canadian Airlines International.

It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1991. On March 6, 1991, the receiver received an offer from Ontario

Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited (922) for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the 922 offers.

The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

There are only two issues which must be resolved in this appeal. They are:

- (1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?
- (2) What effect does the support of the 922 offer by the secured creditors have on the result?

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY

IN AGREEING TO SELL TO OEL?

Before dealing with that issue there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person". The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.R., of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
2. It should consider the interests of all parties.
3. It should consider the efficacy and integrity of the process by which offers are obtained.
4. It should consider whether there has been unfairness in the working out of the process.

I intend to discuss the performance of those duties separately.

1. Did the receiver make a sufficient effort to get the best price and did it act providently?

Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In doing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

When the receiver got the OEL offer on March 6, 1991, it was over ten months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer which was acceptable, and the 922 offer which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust v. Rosenberg*, supra, at p. 112 O.R., p. 551 D.L.R.:

Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.

If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

(Emphasis added)

I also agree with and adopt what was said by Macdonald J.A.

in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), at p. 11 C.B.R., p. 314 N.S.R.:

In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

(Emphasis added)

On March 8, 1991, the receiver had two offers. One was the OEL offer which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL. Air Canada had the benefit of an "exclusive" in negotiations for Air Toronto and had clearly indicated its intention to take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it

contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

(Emphasis added)

I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after ten months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the Receiver in the OEL offer was not a reasonable one. In *Crown Trust v. Rosenberg*, supra, Anderson J., at p. 113 O.R., p. 551 D.L.R., discussed the comparison of offers in the following way:

No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a

sale should be considered by the court. The first is *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.), at p. 247:

If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.), at p. 243:

If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.), at p. 142, McRae J. expressed a similar view:

The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or where there are substantially higher offers which would tend to show that the sale was improvident will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

(Emphasis added)

What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to

show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was, that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that

the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

The 922 offer provided for \$6,000,000 cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of five years up to a maximum of \$3,000,000. The OEL offer provided for a payment of \$2,000,000 on closing with a royalty paid on gross revenues over a five-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

The court appointed the receiver to conduct the sale of Air Toronto and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced

that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

I am, therefore, of the opinion that the receiver made a sufficient effort to get the best price and has not acted improvidently.

2. Consideration of the interests of all parties

It is well established that the primary interest is that of the creditors of the debtor: see *Crown Trust Co. v. Rosenberg*, supra, and *Re Selkirk* (1986, Saunders J.), supra. However, as Saunders J. pointed out in *Re Beauty Counsellors*, supra, at p. 244 C.B.R., "it is not the only or overriding consideration".

In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg*, supra, *Re Selkirk* (1986, Saunders J.), supra, *Re Beauty Counsellors*, supra, *Re Selkirk* (1987, McRae J.), supra, and *Cameron*, supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the efficacy and integrity of the process by which the offer was obtained

While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to *Re Selkirk* (1986), *supra*, where Saunders J. said at p. 246 C.B.R.:

In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:

In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a finding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard -- this would be an intolerable situation.

While those remarks may have been made in the context of a

bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

In *Salima Investments Ltd. v. Bank of Montreal* (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473 (C.A.), at p. 61 Alta. L.R., p. 476 D.L.R., the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

Finally, I refer to the reasoning of Anderson J. in *Crown Trust Co. v. Rosenberg*, supra, at p. 124 O.R., pp. 562-63 D.L.R.:

While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.

(Emphasis added)

It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways

in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in *Crown Trust Co. v. Rosenberg*, supra, at p. 109 O.R., p. 548 D.L.R.:

The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

It would be a futile and duplicitous exercise for this court to examine in minute detail all of the circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record and it seems to me to be little more than puffery, without any hard information which a sophisticated

purchaser would require in order to make a serious bid.

The offering memorandum had not been completed by February 11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

Moreover, I am not prepared to find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it

contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested, as a possible resolution of this appeal, that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within seven days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, it would have told the court that it needed more information before it would be able to make a bid.

I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

There are two statements by Anderson J. contained in *Crown Trust Co. v. Rosenberg*, supra, which I adopt as my own. The first is at p. 109 O.R., p. 548 D.L.R.:

The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 O.R., p. 550 D.L.R.:

It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this [at p. 31 of the reasons]:

They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

I agree.

The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline

which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. THE EFFECT OF THE SUPPORT OF THE 922 OFFER BY THE TWO SECURED CREDITORS

As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as

to which offer ought to be accepted is something to be taken into account. But, if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtors' assets.

The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an interlender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the interlender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive \$3,375,000 of the \$6,000,000 cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

On April 5, 1991, the Royal Bank and CCFL agreed to settle the interlender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only \$1,000,000 and the Royal Bank would receive \$5,000,000 plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

The Royal Bank's support of the 922 offer is so affected by

the very substantial benefit which it wanted to obtain from the settlement of the interlender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline, if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the Employment Standards Act, R.S.O. 1980, c. 137, and the Environmental Protection Act, R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that

Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-and-client scale. I would make no order as to the costs of any of the other parties or interveners.

MCKINLAY J.A. (concurring in the result):-- I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.). While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefrom), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in

no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

GOODMAN J.A. (dissenting):-- I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto two competing offers were placed before Rosenberg J. Those two offers were that of Frontier Airlines Ltd. and Ontario Express Limited (OEL) and that of 922246 Ontario Limited (922), a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively CCFL) and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada (the Bank). Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to nor am I aware of any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

In *British Columbia Development Corp. v. Spun Cast Industries Inc.* (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.), Berger J. said at p. 95 B.C.L.R., p. 30 C.B.R.:

Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not have a roving commission to decide what

is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately \$50,000,000. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J., Gen. Div., May 1, 1991, that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds it is difficult to take issue with that finding. If on the other hand he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons [pp. 17-18]:

I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately \$3,000,000 to \$4,000,000. The Bank submitted that it did not wish to gamble any further with respect to its investment and that the acceptance and court approval of the OEL offer, in effect, supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial downpayment on closing.

In *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), Hart J.A., speaking for the majority

of the court, said at p. 10 C.B.R., p. 312 N.S.R.:

Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that the contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers nor are

they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.) Saunders J. said at p. 243:

This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

I agree with that statement of the law. In *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.) Saunders J. heard an application for court approval for the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246 C.B.R.:

In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with the commercial efficacy and integrity.

I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in *Cameron*, supra, at pp. 92-94 O.R., pp. 531-33 D.L.R., quoted by Galligan J.A. in his reasons. In *Cameron*, the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a

deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 C.B.R., p. 314 N.S.R.:

There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

I agree that the same reasoning may apply to a negotiation process leading to a private sale but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

It is important to note at the outset that Rosenberg J. made the following statement in his reasons [p. 15]:

On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The receiver at that time had no other

offer before it that was in final form or could possibly be accepted. The receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1. The receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

In my opinion there was no evidence before him or before this court to indicate that Air Canada with CCFL had not bargained in good faith and that the receiver had knowledge of such lack of good faith. Indeed, on this appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase which was eventually refused by the receiver that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing Air Canada may have been playing "hard ball" as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position as it was entitled to do.

Furthermore there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event although it is clear that 922 and through it CCFL and Air Canada were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

To the extent that approval of the OEL agreement by Rosenberg

J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

I would also point out that, rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was no unconditional offer before it.

In considering the material and evidence placed before the court I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned and improvident insofar as the two secured creditors are concerned.

Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of \$18,000,000. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada", it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the Receiver to Air Canada was of short duration at the receiver's option.

As a result of due diligence investigations carried out by Air Canada during the month of April, May and June of 1990, Air Canada reduced its offer to 8.1 million dollars conditional upon there being \$4,000,000 in tangible assets. The offer was made on June 14, 1990 and was open for acceptance until June

29, 1990.

By amending agreement dated June 19, 1990 the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement the receiver had put itself in the position of having a firm offer in hand with the right to negotiate and accept offers from other persons. Air Canada in these circumstances was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990 Air Canada served a notice of termination of the April 30, 1990 agreement.

Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto Division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990 in part as follows:

Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

This statement together with other statements set forth in the letter was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto to Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990 the receiver was of the opinion that the fair value of Air Toronto was between \$10,000,000 and \$12,000,000.

In August 1990 the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of \$3,000,000 for the good will relating to certain Air Toronto routes but did not

include the purchase of any tangible assets or leasehold interests.

In December 1990 the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991 culminating in the OEL agreement dated March 8, 1991.

On or before December, 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

By late January CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

By letter dated February 25, 1991, the solicitors for CCFL made a written request to the Receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be

noted that exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers and specifically with 922.

It was not until March 1, 1991 that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at any time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL) it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid and, indeed, suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime by entering into the letter of intent with OEL it put itself in a position where it could not negotiate with CCFL or provide the information requested.

On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

By letter dated March 1, 1991 CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an interlender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control and accordingly would not have been acceptable on that ground alone. The receiver did not, however,

contact CCFL in order to negotiate or request the removal of the condition although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately three months the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining:

... a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period.

The purchaser was also given the right to waive the condition.

In effect the agreement was tantamount to a 45-day option to purchase excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

In my opinion the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991 to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result no offer was sought from CCFL by the receiver prior to February 11, 1991 and thereafter it put itself in the position of being unable to

negotiate with anyone other than OEL. The receiver, then, on March 8, 1991 chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of three months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of three months notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

In his reasons Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said [p. 31]:

They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of

its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard as it contained a condition with respect to financing terms and conditions "acceptable to them".

It should be noted that on March 13, 1991 the representatives of 922 first met with the receiver to review its offer of March 7, 1991 and at the request of the receiver withdrew the inter-lender condition from its offer. On March 14, 1991 OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991 to submit a bid and on April 5, 1991, 922 submitted its offer with the interlender condition removed.

In my opinion the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer constitutes approximately two-thirds of the contemplated sale price whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately \$3,000,000 to \$4,000,000.

In *Re Beauty Counsellors of Canada Ltd.*, supra, Saunders J. said at p. 243 C.B.R.:

If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

I accept that statement as being an accurate statement of the

law. I would add, however, as previously indicated, that in determining what is the best price for the estate the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J. the stated preference of the two interested creditors was made quite clear. He found as a fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard and it is his primary duty to protect the interests of the creditors. In my view it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors who have already been seriously hurt more unnecessary contingencies.

Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer and the court should so order.

Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and

procedure adopted by the receiver.

I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique having regard to the circumstances of this case. In my opinion the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991 and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent, it knew that CCFL was interested in purchasing Air Toronto.

I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to

court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

In conclusion I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991 and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

For the above reasons I would allow the appeal with one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-and-client basis. I would make no order as to costs of any of the other parties or interveners.

Appeal dismissed.

TAB 12

CITATION: Elleway Acquisitions Limited v. 4358376 Canada Inc., 2013 ONSC 7009

COURT FILE NO.: CV-13-10320-00CL

DATE: 20131203

**SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)**

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243 OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c.B-3, AS
AMENDED, AND SECTION 101 OF THE COURTS OF JUSTICE ACT,
R.S.O. 1990, c.C.43, AS AMENDED.**

RE: ELLEWAY ACQUISITIONS LIMITED, Applicant

AND:

**4358376 CANADA INC. (OPERATING AS ITRAVEL 2000.COM), THE
CRUISE PROFESSIONALS LIMITED (OPERATING AS THE CRUISE
PROFESSIONALS), AND 7500106 CANADA INC. (OPERATING AS
TRAVELCASH), Respondents**

BEFORE: MORAWETZ J.

COUNSEL: Jay Swartz and Natalie Renner, for the Applicant

John N. Birch, for the Respondents

David Bish and Lee Cassey, for Grant Thornton, Proposed Receiver

HEARD

&ENDORSED: NOVEMBER 4, 2013

REASONS: DECEMBER 3, 2013

ENDORSEMENT

[1] At the conclusion of argument on November 4, 2013, the motion was granted with reasons to follow. These are the reasons.

[2] On November 4, 2013, Grant Thornton Limited was appointed as Receiver (the “Receiver”) of the assets, property and undertaking of each of 4358376 Canada Inc., (operating as itravel2000.com (“itravel”)), 7500106 Canada Inc., (operating as Travelcash (“Travelcash”)), and The Cruise Professionals Limited, operating as The Cruise Professionals (“Cruise” and, together with itravel2000 and Travelcash, “itravel Canada”). See reasons reported at 2013 ONSC 6866.

[3] The Receiver seeks the following:

- (i) an order:
 - (a) approving the entry by the Receiver into an asset purchase agreement (the “itravel APA”) between the Receiver and 8635919 Canada Inc. (the “itravel Purchaser”) dated on or about the date of the order, and attached as Confidential Appendix I of the First Report of the Receiver dated on or about the date of the order (the “Report”);
 - (b) approving the transactions contemplated by the itravel APA;
 - (c) vesting in the itravel Purchaser all of the Receiver’s right, title and interest in and to the “Purchased Assets” (as defined in the itravel APA) (collectively, the “itravel Assets”); and
 - (d) sealing the itravel APA until the completion of the sale transaction contemplated thereunder; and
- (ii) an order:
 - (a) approving the entry by the Receiver into an asset purchase agreement (the “Cruise APA”, and together with the itravel APA and the Travelcash APA, the “APAs”) between the Receiver and 8635854 Canada Inc. (the “Cruise Purchaser”), and together with the itravel Purchaser and the Travelcash Purchaser, the “Purchasers”) dated on or about the date of the order, and attached as Confidential Appendix 2 of the Report;
 - (b) approving the transactions contemplated by the Cruise APA; and
 - (c) vesting the Cruise Purchaser all of the Receiver’s right, title and interest in and to the “Purchased Assets” (as defined in the Cruise APA) (the “Cruise Assets”, and together with the itravel Assets and the Travelcash Assets, the “Purchased Assets”); and
 - (d) sealing the Cruise APA until the completion of the sales transaction contemplated thereunder; and
- (iii) an order:

- (a) approving the entry by the Receiver into an asset purchase agreement (the “Travelcash APA”) between the Receiver and 1775305 Alberta Ltd. (the “Travelcash Purchaser”) dated on or about the date of the order, and attached as Confidential Appendix 3 of the Report;
- (b) approving the transactions contemplated by the Travelcash APA;
- (c) vesting in the Travelcash Purchaser all of the Receiver’s right, title and interest in and to the “Purchased Assets” (as defined in the Travelcash APA) (collectively, the “Travelcash Assets”); and
- (d) sealing the Travelcash APA until the completion of the sale transaction contemplated thereunder.

[4] The Receiver further requests a sealing order: (i) permanently sealing the valuation reports prepared by Ernst & Young LLP and FTI Consulting LLP, attached as Confidential Appendices 4 and 5 of the Report, respectively; and (ii) sealing the Proposed Receiver’s supplemental report to the court dated on or about the date of the order (the “Supplemental Report”), for the duration requested and reasons set forth therein.

[5] The motion was not opposed. It was specifically noted that Mr. Jonathan Carroll, former CEO of itravel, did not object to the relief sought.

[6] The Receiver recommends issuance of the Orders for the factual and legal bases set forth herein and in its motion record. The purchase and sale transactions contemplated under the APAs (collectively, the “Sale Transactions”) are conditional upon the Orders being issued by this court.

General Background

[7] Much of the factual background to this motion is set out in the endorsement which resulted in the appointment of the Receiver (2013 ONSC 6866), and is not repeated.

[8] The Receiver has filed the Report to provide the court with the background, basis for, and its recommendation in respect of the relief requested. The Receiver has also filed the Supplemental Report (on a confidential basis) as further support for the relief requested herein.

[9] In the summer of 2010, Barclays Bank PLC (“Barclays”) approached Travelzest and stated that it no longer wished to act as the primary lender of Travelzest and its subsidiaries, as a result of certain covenant breaches under the Credit Agreement. This prompted Travelzest to consider and implement where possible, strategic restructuring arrangements, including the divestiture of assets and refinancing initiatives.

[10] In September 2010, Travelzest publicly announced its intention to find a buyer for the Travelzest business.

Travelzest's Further Sales and Marketing Processes

[11] In the fall of 2011, a competitor of ittravel Canada contacted Travelzest and expressed an interest in acquiring the Travelzest portfolio. Negotiations ensued over a period of three months. However, the parties could not agree on a Purchase Price or terms, and negotiations ceased in December 2011.

[12] In early 2012, an informal restructuring plan was developed, which included the sale of international companies.

[13] The first management offer was received in April 2012. In addition, a sales process continued from May to October 2012, which involved 50 potential bidders within the industry. Counsel advised that 14 parties pursued the opportunity and four parties were provided with access to the data room. Four offers were ultimately made but none were deemed to be feasible, insofar as two were too low, one withdrew and the management offer was withdrawn after equity backers were lost.

[14] In September 2012, a second management offer was received, which was subsequently amended in November 2012. The second management offer did not proceed.

[15] In January 2013, discussions ended and the independent committee was disbanded.

[16] In March and April 2013, three Canadian financial institutions were approached about a refinancing. However, no acceptable term sheet was obtained.

[17] In May 2013, Travelzest entered into new discussions with a prior bidder from a previous sales process. Terms could not be reached.

[18] In May 2013, a third management offer was received which was followed by a fourth management offer in July, both of which were rejected.

[19] In July 2013, a press release confirmed that Barclays was not renewing its credit facilities with the result that the obligations became payable on July 12, 2013. However, Barclays agreed to support restructuring efforts until August 30, 2013.

[20] In August 2013, a fifth management offer was made for the assets of ittravel Canada, which included limited funding for liabilities. This offer was apparently below the consideration offered in the previous management offers. The value of the offer was also significantly lower than the Barclays' indebtedness and lower than the aggregate amount of the current offer from the Purchasers.

Barclays' Assignment of the Indebtedness to Elleway

[21] On August 21, 2013, a consortium led by LDC Logistics Development Corporation ("LDC"), which included Elleway (collectively, the "Consortium") submitted an offer for

Barclays debt and security, as opposed to the assets of Ittravel Canada. On August 29, 2013, Elleway and Barclays finalized the assignment deal, which was concluded on September 1, 2013.

[22] The consideration paid by Elleway was less than the amount owing to Barclays. Barclays determined, with the advice of KPMG London, that the sale of its debt and security, albeit at a significant discount, was the best available option at the time.

[23] Ittravel Canada is insolvent. Elleway has agreed pursuant to the Working Capital Facility agreement to provide the necessary funding for Ittravel Canada up to and including the date for a court hearing to consider the within motion. However, if a sale is not approved, there is no funding commitment from Elleway.

Proposed Sale of Assets

[24] The Receiver and the Purchasers have negotiated the APAs which provide for the going-concern purchase of substantially all of the Ittravel Canada's assets, subject to the terms and conditions therein. The purchase prices under the APAs for the Purchased Assets will be comprised of a reduction of a portion of the indebtedness owed by Elleway under the Credit Agreement and entire amount owed under the Working Capital Facility Agreement and related guarantees, and the assumption by the Purchasers of the Assumed Liabilities (as defined in each of the Purchase Agreements and which includes all priority claims) and the assumption of any indebtedness issued under any receiver's certificates issued by the Receiver pursuant to a funding agreement between the Receiver and Elleway Properties Limited. The aggregate of the purchase prices under the APA is less the amount of the obligations owed by Ittravel Canada to Elleway under the Credit Agreement and Working Capital Facility Agreement and related guarantees.

[25] Pursuant to the APAs, the Purchasers are to make offers to 95% of the employees of Ittravel Canada on substantially similar terms of such employees current employment. The Purchasers will also be assuming all obligations owed to the customers of Ittravel Canada.

[26] In reviewing the valuation reports of FTI Consulting LLP and Ernst & Young LLP and considering the current financial position of Ittravel Canada, the Receiver came to the following conclusions:

- (a) FTI Consulting LLP and Ernst & Young LLP concluded that under the circumstances, the Ittravel Canada companies' values are significantly less than the secured indebtedness owed under the Credit Agreement;
- (b) Barclays, in consultation with its advisor, KPMG London, sold its debt and security for an amount lower than its par value;
- (c) the book value of the Ittravel Canada's tangible assets are significantly less than the secured indebtedness; and

- (d) Elleway has the principal financial interest in the assets of itravel Canada, subject to priority claims.

[27] The Receiver is of the view that the Sale Transactions with the Purchasers are the best available option as it stabilizes itravel Canada's operations, provides for additional working capital, facilitates the employment of substantially all of the employees, continues the occupation of up to three leased premises, provides for new business to itravel Canada's existing suppliers and service providers, assumes the liability associated with pre-existing gift certificates and vouchers, allows for the uninterrupted service of customer's travel arrangements and preserves the goodwill and overall enterprise value of the Companies. In addition, the Receiver believes that the purchase prices under the APAs are fair and reasonable in the circumstances, and that any further marketing efforts to sell itravel Canada's assets may be unsuccessful and could further reduce their value and have a negative effect on operations.

[28] The Receiver's request for approval of the Orders raises the following issues for this court.

- A. What is the legal test for approval of the Orders?
- B. Does the legal test for approval change in a so-called "quick flip" scenario?
- C. Does partial payment of the purchase price through a reduction of the indebtedness owed to Elleway preclude approval of the Orders?
- D. Does the Purchasers' relationship to itravel Canada preclude approval of the Orders?
- E. Is a sealing of the APAs until the closing of the Sale Transactions contemplated thereunder and a permanent sealing of the FTI Consulting LLP and Ernst & Young LLP valuation and the Supplemental Report Warranted?

A. What is the Legal Test for Approval of the Orders?

[29] Receivers have the powers set out in the order appointing them. Receivers are consistently granted the power to sell property of a debtor, which is, indeed, the case under the Appointment Order.

[30] Under Section 100 of the *Courts of Justice Act (Ontario)*, this Court has the power to vest in any person an interest in real or personal property that the Court has authority to order be conveyed.

[31] It is settled law that where a Court is asked to approve a sales process and transaction in a receivership context, the Court is to consider the following principles (collectively, the "Soundair Principles"):

- a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;

- b. the interests of all parties;
- c. the efficacy and integrity of the process by which the party obtained offers; and
- d. whether the working out of the process was unfair.

Royal Bank of Canada v. Soundair Corp. (1991), 4 O.R. (3d) 1 (C.A.); *Skyepharm PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J., appeal quashed, (2000), 47 O.R. (3d) 234 (C.A.)).

[32] In this case, I am satisfied that evidence has been presented in the Report, the Jenkins Affidavit and the Howell Affidavit, to demonstrate that each of the *Soundair* Principles has been satisfied, and that the economic realities of the business vulnerability and financial position of ittravel Canada (including that the result would be no different in a further extension of the already extensive sales process) militate in favour of approval of the issuance of the Orders.

B. Does the Legal Test for Approval Change in a So-called “Quick Flip” Scenario?

[33] Where court approval is being sought for a so-called “quick flip” or immediate sale (which involves, as is the case here, an already negotiated purchase agreement sought to be approved upon or immediately after the appointment of a receiver without any further marketing process), the court is still to consider the *Soundair* Principles but with specific consideration to the economic realities of the business and the specific transactions in question. In particular, courts have approved immediate sales where:

- (a) an immediate sale is the only realistic way to provide maximum recovery for a creditor who stands in a clear priority of economic interest to all others; and
- (b) delay of the transaction will erode the realization of the security of the creditor in sole economic interest.

Fund 321 Ltd. Partnership v. Samsys Technologies Inc. (2006), 21 C.B.R. (5th) 1 (Ont. S.C.J.); *Bank of Montreal v. Trent Rubber Corp.* (2005), 13 C.B.R. (5th) 31 (Ont. S.C.J.).

[34] In the case of *Re Tool-Plas*, I stated, in approving a “quick flip” sale that:

A “quick flip” transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a “quick flip” transaction, the court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the “quick flip” transaction would realistically be any different if an extended sales process were followed.

Tool-Plas Systems Inc., Re (2008), 48 C.B.R. (5th) 91 (Ont. S.C.J.).

[35] Counsel submits that the parties would realistically be in no better position were an extended sales process undertaken, since the APAs are the culmination of an exhaustive marketing process that has already occurred, and there is no realistic indication that another such process (even if possible, which it is not, as itravel Canada lacks the resources to do so) would produce a more favourable outcome.

[36] Counsel further submits that a “quick flip” transaction will be approved pursuant to the *Soundair* Principles, where, as in this case, there is evidence that the debtor has insufficient cash to engage in a further, extended marketing process, and there is no basis to expect that such a process will result in a better realization on the assets. Delaying the process puts in jeopardy the continued operation of itravel Canada.

[37] I am satisfied that the approval of the Orders and the consummation of the Sale Transactions to the Purchasers pursuant to the APAs is warranted as the best way to provide recovery for Elleway, the senior secured lender of itravel Canada and with the sole economic interest in the assets. The sale process was fair and reasonable, and the Sale Transactions is the only means of providing the maximum realization of the Purchased Assets under the current circumstances.

C. Does Partial Payment of the Purchase Price Through a Reduction of the Indebtedness Owed to Elleway Preclude Approval of the Orders?

[38] Partial payment of the purchase price by Elleway reducing a portion of the debt owed to it under the Credit Agreement and the entire amount owed under the Working Capital Facility Agreement does not preclude approval of the Orders. This mechanism is analogous to a credit bid by a secured lender, but with the Purchasers, instead of the secured lender, taking title to the purchased assets. As noted, the Receiver understands that following closing of the transactions contemplated under the APAs, that Elleway (or an affiliate thereof) will hold an indirect equity interest in the Purchasers. It is well-established in Canada insolvency law that a secured creditor is permitted to credit bid its debt in lieu of providing cash consideration.

Re White Birch Paper Holding Co. (2010), 72 C.B.R. (5th) 74 (Qc. C.A.); *Re Planet Organic Holding Corp.* (June 4, 2010), Toronto, Court File No. 10-86699-00CL, (S.C.J. [Commercial List]).

[39] This court has previously approved sales involving credit bids in the receivership context. See *CCM Master Qualified Fund, Ltd., v. Blutip Power Technologies Ltd.* (April 26, 2012), Toronto, Court File No. CV-12-9622-00CL, (S.C.J. [Commercial List]).

[40] It seems to me that, in these circumstances, no party is prejudiced by Elleway reducing a portion of the debt owed to it under the Credit Agreement and the entire amount owed under the Working Capital Facility Agreement as part of the Purchasers’ payment of the purchase prices, as the Purchasers are assuming all claims secured by liens or encumbrances that rank in priority to Elleway’s security. The reduction of the indebtedness owed to Elleway will be less than the total amount of indebtedness owed to Elleway under the Credit Agreement. As such, if cash was paid in lieu of a credit bid, such cash would all accrue to the benefit of Elleway.

[41] Therefore, it seems to me the fact that a portion of the purchase price payable under the APAs is to be paid through a reduction in the indebtedness owed to Elleway does not preclude approval of the Orders.

D. Does the Purchasers' Relationship to itravel Canada preclude approval of the Orders?

[42] Even if the Purchasers and itravel Canada were to be considered, out of an abundance of caution, related parties, given that LDC is an existing shareholder of Travelzest and part of the Consortium or otherwise, this does not itself preclude approval of the Orders.

[43] Where a receiver seeks approval of a sale to a party related to the debtor, the receiver shall review and report on the activities of the debtor and the transparency of the process to provide sufficient detail to satisfy the court that the best result is being achieved. It is not sufficient for a receiver to accept information provided by the debtor where a related party is a purchaser; it must take steps to verify the information. See *Toronto Dominion Bank v. Canadian Starter Drives Inc.*, 2011 ONSC 8004 (Ont. S.C.J. [Commercial List]).

[44] In addition, the 2009 amendments to the BIA relating to sales to related persons in a proposal proceedings (similar amendments were also made to the *Companies' Creditors Arrangement Act* (Canada)) are instructive. Section 65.13(5) of the BIA provides:

If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that:

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

[45] The above referenced jurisprudence and provisions of the BIA (Canada) demonstrate that a court will not preclude a sale to a party related to the debtor, but will subject the proposed sale to greater scrutiny to ensure a transparency and integrity in the marketing and sales process and require that the receiver verify information provided to it to ensure the process was performed in good faith. In this case, the Receiver is of the view that the market for the Purchased Assets was sufficiently canvassed through the sales and marketing processes and that the purchase prices under the APAs are fair and reasonable under the current circumstances. I agree with and accept these submissions.

[46] The Receiver requests that the APAs be sealed until the closing of the Sale Transactions contemplated thereunder. It is also requesting an order permanently sealing the valuation reports prepared by Ernst & Young LLP and FIT Consulting LLP and, attached as Confidential Appendices 4 and 5 of the Report, respectively.

[47] The Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, held that a sealing order should only be granted when:

- (a) an order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk; and
- (b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53; *Re Nortel Networks Corporation* (2009), 56 C.B.R. (5TH) 224, (Ont. S.C.J. [Commercial List]), at paras. 38-39.

[48] In my view, the APAs subject to the sealing request contain highly sensitive commercial information of ittravel Canada and their related businesses and operations, including, without limitation, the purchase price, lists of assets, and contracts. Courts have recognized that disclosure of this type of information in the context of a sale process could be harmful to stakeholders by undermining the integrity of the sale process. I am satisfied that the disclosure of the APAs prior to the closing of the Sale Transactions could pose a serious risk to the sale process in the event that the Sale Transactions do not close as it could jeopardize dealings with any future prospective purchasers or liquidators of ittravel Canada's assets. There is no other reasonable alternative to preventing this information from becoming publicly available and the sealing request, which has been tailored to the closing of the Sale Transactions and the material terms of the APAs until the closing of the Sale Transactions, greatly outweighs the deleterious effects. For these same reasons, plus the additional reason that the valuations were provided to Travelzest on a confidential basis and only made available to Travelzest and the Receiver on the express condition that they remain confidential, the Receiver submits that the FTI Consulting LLP and Ernst & Young LLP valuations be subject to a permanent sealing order. Further, the Receiver submits that the information contained in the Supplemental Report also meets the foregoing test for the factual basis set forth in detail in the Supplemental Report (which has been filed on a confidential basis). I accept the Receiver's submissions regarding the permanent sealing order for the valuation materials. For these reasons, (i) the APA is to be sealed pending closing, and (ii) only the valuation material is to be permanently sealed.

Disposition

[49] For the reasons set forth herein, the motion is granted. Orders have been signed to give effect to the foregoing.

MORAWETZ J.

Date: December 3, 2013

TAB 13

Court of Queen's Bench of Alberta

Citation: Sanjel Corporation (Re), 2016 ABQB 257

Date: 05162016
Docket: 1601 03143
Registry: Calgary

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

**And in the matter of the Compromise or Arrangement of Sanjel Corporation, Sanjel
Canada Ltd., Terracor Group Ltd., Suretech Group Ltd., Suretech Completions Canada
Ltd., Sanjel Energy Services (USA) Inc., Sanjel (USA) Inc., Suretech Completions (USA)
Inc., Sanjel Capital (USA) Inc., Terracor (USA) Inc., Terracor Resources (USA) Inc.,
Terracor Logistics (USA) Inc., Sanjel Middle East Ltd., Sanjel Latin America Limited and
Sanjel Energy Services DMCC**

**Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine**

I. Introduction

[1] The Sanjel debtors seek orders approving certain sales of assets generated through a SISP that was conducted prior to the debtors filing under the *Companies' Creditors Arrangement Act*. The proceeds of the sales will be insufficient to fully payout the secured creditor, and will generate no return to unsecured creditors, including the holders of unsecured Bonds.

[2] The Trustee of the Bonds challenged the process under which the SISP was conducted, and the use of what he characterized as a liquidating CCAA in this situation. He alleged that the use of the CCAA to effect a pre-packaged sale of the debtors' assets for the benefit of the secured creditor was an abuse of the letter and spirit of the CCAA. He also alleged that bad faith and collusion tainted the integrity of the SISP.

[3] After reviewing extensive evidence and hearing submissions from interested parties, I decided to allow the application to approve the sales, and dismiss the application of the Trustee. These are my reasons.

II. Facts

[4] On April 4, 2016, the Sanjel Corporation and its affiliates were granted an Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as amended. PricewaterhouseCoopers Inc., ("PWC") was appointed as Monitor of the applicants.

[5] Sanjel and its affiliates (the "Sanjel Group" or "Sanjel") provide fracturing, cementing, coiled tubing and reservoir services to the oil and gas industry in Canada, the United States and Saudi Arabia. Sanjel Corporation, the parent company, is a private corporation, the shares of which are owned by the MacDonald Group Ltd. It was incorporated under the *Alberta Business Corporations Act* in 1980, and its principal executive and registered office is located in Calgary. Four of the other members of the group were incorporated in Alberta, seven in various American states and three in offshore jurisdictions.

[6] The sole director of all Canadian and US Sanjel companies resides in Calgary, as do all of the officers of these companies. The affidavit in support of the Initial Order sets out a number of factors relevant to the Sanjel Group's ability to file under the CCAA and that would be relevant to a determination of a Centre of Main Interest ("COMI") of the Sanjel Group. In subsequent Chapter 15 proceedings in the United States, the US Court declared COMI to be located in Canada and the CCAA proceedings to be a "foreign main proceeding." It is clear that the Sanjel Group is a fully integrated business centralized in Calgary.

[7] Sanjel Corporation and Sanjel (USA) Inc. are borrowers under a credit agreement (the "Bank Credit Facility") dated April 21, 2015 with a banking syndicate (the "Syndicate") led by Alberta Treasury Branches as agent. The total amount outstanding under the Bank Credit Facility at the time of the CCAA filing was approximately \$415.5 million. The Syndicate has perfected security interests over substantially all of the assets of the Sanjel Group, and is the principal secured creditor of the Sanjel Group in these CCAA proceedings.

[8] On June 18, 2014, Sanjel Corporation issued US \$300 million 7.5% Callable Bonds due June 19, 2019. Interest is payable on the Bonds semi-annually on June 19 and December 19. The Bonds are unsecured. Nordic Trust ASA (the "Trustee") is the trustee under the Bond Agreement.

[9] The Sanjel Group has been severely impacted by the catastrophic drop in global oil and gas prices since mid-2014. Over the last 18 months, the Sanjel Group has taken aggressive steps to cut costs, including by reducing staffing levels by more than half. However, by late October, 2015, Sanjel Corporation was in breach of certain covenants under the Bank Credit Facility. By late December, 2016, the Syndicate was in a position to exercise enforcement rights. In addition, an interest payment of USD \$11,250,000 was due on the Bonds on December 19, 2015. Since late 2015, the Sanjel Group has been in negotiations with both the Syndicate and two bondholders, Ascribe Capital LLC and Clearlake Capital Group L.P., (the "Ad Hoc Bondholders"). The Ad Hoc Bondholders hold over 45% of the Bonds.

[10] In the fall of 2015, Sanjel Corporation engaged Bank of America Merrill Lynch ("BAML") to identify strategic partners and attempt to raise additional capital for the Sanjel Group. BAML contacted 28 private equity firms; 19 non-disclosure agreements were executed and 9 management presentations were made. However, the BAML process did not result in a successful transaction.

[11] In December, 2015, the Ad Hoc Bondholders retained a New York law firm, Fried Frank, as their legal advisor and Moelis & Company as their financial advisor.

[12] On December 10, 2015, Fried Frank conveyed a proposal from the Ad Hoc Bondholders to Sanjel. Under this proposal, Sanjel would be required to pay the USD \$11,250,000 interest payment. Provided that the interest payment was made, the bondholders would agree to a standstill agreement for the same period as may be agreed with the Syndicate. In return, the Ad Hoc Bondholders would lend back their pro rata share of that interest payment to Sanjel in return for secured notes ranking *pari passu* with the Bank Credit Facility, bearing interest at the same rate as the Bank Credit Facility plus 2%. The new notes would not be repaid until the Bank Credit Facility was repaid.

[13] The Ad Hoc Bondholders indicated that they would consider acting as standby lenders to Sanjel for the remainder of the interest payment and would offer the other bondholders the option of lending back their pro-rata share to Sanjel on the same basis. If they agreed to be standby lenders, the Ad Hoc Bondholders would receive a commitment fee equal to 10% of their standby commitment, payable in new notes.

[14] The proposal letter indicated that the Ad Hoc Bondholders were aware that Sanjel had been engaged in a process to address liquidity and leverage issues over the past few months, including attempting to raise equity to sell assets. In their view, Sanjel had exhausted those efforts, and the only remaining option was a deal negotiated with the bondholders. However, the Ad Hoc Bondholders would only embark on such a process if the December 19, 2015 interest payment was made.

[15] Sanjel rejected the proposal on December 14, 2015. It is noteworthy that the Bank Credit Facility includes a negative covenant prohibiting Sanjel from granting a security interest over its assets. The Syndicate advised Sanjel that the Ad Hoc Bondholders' proposal to have their existing unsecured position elevated to rank *pari passu* with the Bank Credit Facility was unacceptable, and that it would not provide its consent.

[16] On December 15, 2015, the Ad Hoc Bondholders advised counsel to the Syndicate that they wished to work towards a restructuring, which they envisaged would involve paying down a portion of the Syndicate's debt "in an amount to be mutually agreed on". They also suggested that Sanjel would implement a rights offering to holders of Bonds and then to existing equity, with a conversion of the Bonds into new debt and equity.

[17] On or about December 15, 2015, the Ad Hoc Bondholders sent Sanjel a draft waiver and standstill agreement, which required the payment of part of the December 19 interest payment by December 23, 2015 and the payment of the fees and disbursements of Fried Frank and Moelis in return for arranging for a bondholder meeting to be called to consider a period of forbearance to March 31, 2016.

[18] Fried Frank and Moelis executed Non-Disclosure Agreements ("NDAs") on December 24, 2015, but the Ad Hoc Bondholders did not, thus not restricting their right to trade the Bonds. Fried Frank and Moelis were granted access to a Sanjel virtual database ("VDR") on January 9, 2016.

[19] By January, 2016, given the prolonged downturn in oil and gas prices, Sanjel's liquidity was limited. Events of default under the Bank Credit Facility that had occurred as of October 31, 2015 were exacerbated by a cross-default based on the non-payment of interest under the Bond

Agreement. As of January 31, 2016, the Sanjel Group had total consolidated liabilities of approximately \$1.064 billion.

[20] Sanjel was facing very significant negative cash flow projections over the next few months. As of early January, 2016, Sanjel's projected cash flows showed that its cash position would deteriorate by more than half as of the first week of April, 2016, and would be further reduced by anticipated forbearance payments.

[21] In the circumstances, Sanjel agreed with the Syndicate to implement a Sales and Investment Solicitation Process ("SISP"). Sanjel states that it hoped that if a SISP was implemented, it might find a transaction that preserved the business as a going concern, which would maximize stakeholder value and preserve goodwill and jobs.

[22] In mid-January, 2016, Sanjel engaged PWC as a proposed Monitor in the event it would become necessary to file under the CCAA.

[23] The SISP was commenced on behalf of Sanjel by its financial advisors, PJT Partners Inc. ("PJT") and Credit Suisse Securities (CANADA), Inc. ("CS") on January 17, 2016. The advisors contacted prospective bidders, many of whom had already been identified through the BAML process of late 2015.

[24] The process of soliciting non-bidding indications of interest ran from January 17, 2016 to February 22, 2016. On January 26, 2016, the advisers updated and opened a VDR available to anyone who had signed a NDA. A teaser letter was distributed and meetings and conference calls were held with bidders. A process letter was distributed on January 28, 2016. Nine indications of interest were submitted on or about February 22, 2016.

[25] Before and during the SISP process, Sanjel was negotiating with both the Syndicate and the Ad Hoc Bondholders with respect to separate forbearance agreements, and with the Ad Hoc Bondholders with respect to NDAs to be signed by the Ad Hoc Bondholders. The Ad Hoc Bondholders complain that there was a delay of almost a month before Sanjel's counsel responded to a mark-up of a NDA provided by Fried Frank, but negotiations were stymied by the Ad Hoc Bondholders' insistence that the December interest payment be paid. Until this issue was settled, there was no reason to finalize the NDAs. In addition, it was not until January 29, 2016 that representatives of the Ad Hoc Bondholders advised Sanjel that they were prepared to be restricted from trading and therefore able to receive confidential information. During this period of time, the Ad Hoc Bondholders refused to meet with Sanjel management when they travelled to New York on January 20, 2016.

[26] On February 1, 2016, counsel to Sanjel sent counsel to the Ad Hoc Bondholders a copy of the draft forbearance agreement between the Syndicate and Sanjel, which set out the key dates of the SISP, including the completion of definitive purchase and sales agreements by March 24, 2016. It would have been clear to the Ad Hoc Bondholders from this draft that Sanjel was proceeding on a dual track basis, considering both a potential stand-alone restructuring of the company and a sales process.

[27] The Ad Hoc Bondholders made a second proposal to Sanjel on February 2, 2016, very shortly after the NDAs were signed. This proposal involved the Syndicate recovering a portion of its loan from Sanjel's existing cash reserves and a rights offering backstopped by the Ad Hoc Bondholders. A portion of the Bonds would be converted into equity. The December interest payment would have to be paid. Sanjel's management team met with the Ad Hoc Bondholders

and their advisors in New York on February 3, 2016 and Sanjel's team, the Syndicate and its advisors and the Ad Hoc Bondholders met on February 8, 2016.

[28] Sanjel delivered an indicative restructuring term sheet to the Ad Hoc Bondholders on February 12, 2016, as required by the forbearance agreement that the parties were negotiating. The restructuring term sheet emphasized that a bondholder-led restructuring would require significant new money, a significant capital commitment and ongoing capital, with a significant pay-down of the Syndicate's debt.

[29] Commencing on February 15, 2016, Sanjel allowed representatives of Alvarez and Marsal ("A&M"), advisors to the Ad Hoc Bondholders, to attend in Calgary and conduct due diligence.

[30] On February 18, 2016, Sanjel uploaded to its VDR the final, unsigned versions of the Syndicate Amending and Forbearance Agreement and the Bondholders Forbearance Agreement.

[31] Under the SISP, preliminary, non-binding indications of interest were delivered to the advisors and the company by February 22, 2016. Six such indications of interest were received, all of which were materially superior to the Ad Hoc Bondholders proposal of February 2, 2016. The Ad Hoc Bondholders have admitted that they were aware of the milestones under the SISP and the Bank Forbearance Agreement by mid-February, 2016, although it is clear that their advisors would have been aware of these milestones from February 1, 2016.

[32] As part of finalizing the form of Bond Forbearance Agreement, counsel for Sanjel and for the Ad Hoc Bondholders had negotiated a form of summons that would be used to call a bondholder meeting to consider the agreement. The only item for consideration to be considered at the meeting was to be the Bond Forbearance Agreement. The plan was to have 2/3 of the bondholders approve and execute the Bond Forbearance Agreement, and then to hold a bondholders meeting.

[33] Instead, on February 25, 2016, the Ad Hoc Bondholders caused the Trustee to issue a summons for a meeting on March 10, 2016 to consider and vote on a) whether to declare the Bonds in default, accelerate them and exercise remedies, including commencing involuntary bankruptcy proceedings against Sanjel under Chapter 11 of the *United States Bankruptcy Code*, including claims against the MacDonald family and MacBain Properties Ltd., which owns the business premises that are leased by the Sanjel Group or b) approve the Bond Forbearance Agreement.

[34] On March 2, 2016, the Ad Hoc Bondholders submitted a restructuring proposal to Sanjel. This proposal provided no cash recovery to the Syndicate. Instead, a portion of the debt owed to the Syndicate would be converted to a new loan and the remainder extinguished, with the Syndicate receiving warrants in a reorganized company. There would be a Chapter 11 filing and the bondholders would provide a debtor-in-possession ("DIP") facility to rank *pari passu* with the Syndicate debt. Bondholders who contributed to the DIP would receive new 2nd lien notes for part of their previous notes, the remainder being extinguished. The DIP facility would be converted into 100% of the equity of the reorganized company. Sanjel would be required to appoint a Chief Restructuring Officer ("CRO") designated by the Ad Hoc Bondholders.

[35] On March 4, 2016, in a follow-up letter to a telephone meeting on March 3, 2016, US counsel to the Syndicate wrote to Fried Frank requesting that the March 10 bondholders meeting

be adjourned to March 31, 2016. Canadian counsel to Sanjel made the same request of the Trustee.

[36] Also on March 4, 2016, a template Asset Purchase Agreement (“APA”) for SISP bidders was posted on the VDRs, which disclosed a CCAA/Chapter 15 filing with PWC as designated Monitor. This template agreement was available to the Ad Hoc Bondholders and their advisors.

[37] Counsel for the Ad Hoc Bondholders replied on March 5, 2016 that they would advise the Trustee to postpone the March 10 meeting subject to:

- a) a response to their March 2 proposal by March 10, 2016;
- b) full disclosure of company records for A&M’s representative, “so that [that representative] is ready and best positioned to commence his duties as Chief Restructuring Officer for the Company”.
- c) payment by March 7, 2016 of roughly USD \$2.2 million in fees and disbursements for the Ad Hoc Bondholders’ legal and financial advisors.

[38] After some negotiation, Sanjel agreed to these terms for an adjournment, other than with respect to a small deduction in fees and disbursements. Sanjel made it clear that it reserved all rights with respect to the appointment of a CRO and a filing under Chapter 11, which it would not agree to at that time. On March 8, 2016 the Trustee confirmed that the meeting would be postponed to March 31.

[39] On March 9, 2016, second round bids under the SISP were received. Five bids were received, all of which were materially superior to the Ad Hoc Bondholders’ March 2, 2016 proposal in terms of cash recovery for the Syndicate.

[40] An information update conference for bondholders was scheduled to be held on March 11, 2016, at which Sanjel, the Trustee and the Ad Hoc Bondholders would provide an update to any bondholder that wished to call in. This was rescheduled by the Trustee to March 31, 2016.

[41] On March 11, 2016, the Syndicate sent the counter-offer required by the postponement of meeting agreement to the Ad Hoc Bondholders. This counter-proposal made it clear that there would be a CCAA/Chapter 15 process, rather than a Chapter 11 process. While this counter-proposal is confidential, it is fair to say that the parties were far apart in their negotiations, particularly with respect to treatment of the Syndicate indebtedness.

[42] Also on March 11, 2016, a representative of Sanjel met with A&M’s representative and discussed Sanjel’s intention to disclaim certain leases in the anticipated CCAA proceedings.

[43] Following receipt of the second round bids, Sanjel and its advisors identified the top three bidders and began negotiations with them with the goal of finalizing due diligence and being in a position to execute final APAs on March 24, 2016, as indicated in the Bank Forbearance Agreement.

[44] In the meantime, Sanjel continued meetings with the A&M representative, who asked for, and was provided with:

- a) access to the newly created VDR for second stage bidders/investors in the SISP on March 12, 2016.

- b) draft materials relating to the CCAA filing, including current drafts of cash flow projections and drafts of stakeholder communication regarding the CCAA, on March 21, 2016.

[45] On March 20, 2016, the Ad Hoc Bondholders provided Sanjel and the Syndicate with a third restructuring proposal. This one provided for some paydown of the Syndicate's debt, but involved less than half of that recovery in new money, about the same amount in debt secured by accounts receivable and a substantial amount of bank debt rolled over into a new loan. It also provided for a DIP facility to rank *pari passu* with a new bank credit facility in the event of a liquidation and the conversion of some bondholder debt into secured notes.

[46] On March 23, 2016, counsel for Sanjel requested that the Trustee postpone the bondholder meeting scheduled for March 31, 2016 to April 14, 2016. He also proposed to set up the requested informational update on March 31, 2016. On March 25, 2016, counsel for the Trustee consented to this request.

[47] In the SISP, final bids were received from the three top bidders on March 24, 2016, with negotiations to continue on final APAs. On the same day, Sanjel and its advisors hosted a call with A&M and Moelis, during which they walked through a 13 week cash forecast.

[48] On March 31, 2016 the Syndicate and the Ad Hoc Bondholders had discussions with respect to the Ad Hoc Bondholders' March 20 proposal. In previous correspondence, the Syndicate's counsel had questioned the adequacy of the proposed DIP financing in the proposal and noted Sanjel's significant cash needs following exit from an insolvency proceeding, as opposed to the proposal's assumption that there would be better cash flow. At the conclusion of the call, the Ad Hoc Bondholders indicated that they would provide further modelling with respect to their proposal.

[49] On April 3, 2016, Sanjel entered into final APAs with the proposed purchasers, STEP and Liberty. On April 4, 2016, the Sanjel Group filed for CCAA protection. Counsel for Sanjel Group disclosed that the application was made without notice to the Ad Hoc Bondholders. He submitted that notice would imperil the CCAA proceedings as the bondholders may, with notice, have pre-empted the CCAA filing by an involuntary filing under Chapter 11. There is no requirement to give notice to unsecured creditors of a CCAA filing. There are circumstances, and this was one of them, where it is appropriate to seek an initial order on an ex parte basis:

This may be an appropriate – even necessary – step in order to prevent “creditors from moving to realize on their claims, essentially a ‘stampede to the assets’ once creditors learn of the debtor’s financial distress”: J.P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2007), at p. 55 (“Rescue!”); see also *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.), at para. 7

[50] On April 11, 2016, the Ad Hoc Bondholders presented their fourth proposal for restructuring, not to Sanjel but to the Syndicate. This proposal increases the amount the bondholders would contribute to Sanjel for new equity, which would be used to repay a portion of the Syndicate's loan.

[51] According to Fried Frank, the Syndicate's counsel responded on April 13, 2016 advising that while they appreciated the work done by the Ad Hoc Bondholders, the Syndicate preferred the sale route. The Syndicate proposed alternatives that it might consider involving a higher pay-

out of the Syndicate's debt than offered by the April 11, 2016 proposal. The Ad Hoc Bondholders have not responded.

[52] The Sanjel Group apply for an order approving the sales transactions generated through the SISP, being a sales agreement between Sanjel and STEP Energy Services Ltd., including an assignment of the sale of the debtor's cementing assets in favour of 1961531 Alberta Ltd., and a sales agreement between Sanjel and Liberty.

[53] The Trustee applied for an order dismissing the application for approval of these transactions, allowing the Ad Hoc Bondholders to propose a plan of arrangement, lifting the stay to allow the Trustee to commence a Chapter 11 filing and directing a new Court-monitored SISP, among other applications

III. Applicable Law

[54] Section 36(3) of the CCAA sets out six non-exhaustive factors that must be considered in approving a sale by a CCAA debtor of assets outside the ordinary course of business. They are:

- (a) whether the process leading to the proposed sale was reasonable in the circumstances;
- (b) whether the Monitor approved the process leading to the proposed sale;
- (c) whether the Monitor filed with the court a report stating that in its opinion the sale would be more beneficial to creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale on creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[55] In this case, the Monitor was not in place at the time of the process leading to the proposed sales, nor at the time the SISP was commenced. However, the Monitor has given an opinion on the process, which I will consider as part of my review.

[56] Prior to the enactment of section 36, CCAA courts considered what are known as the Soundair principles in considering approval application, and they are still useful guidelines:

- a) Was there a sufficient effort made to get the price at issue? Did the debtor company act improvidently?
- b) Were the interests of all parties considered?
- c) Are there any questions about the efficacy and integrity of the process by which offers were obtained?
- d) Was there unfairness in the working out of the process?

Royal Bank v Soundair, 1991 Carswell Ont (Ont CA) at para 20.

[57] Gascon, J. (as he then was) suggested in *Re AbitibiBowater, Inc*, 2010 QCCS 1742 (C.S. Que.) at paras 70-72 that a court should give due consideration to two further factors:

- a) the business judgment rule, in that a court will not lightly interfere with the exercise of the commercial and business judgment of the debtor company and the

- monitor in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient; and
- b) the weight to be given to the recommendation of the monitor.

[58] As noted by Gascon, J., it is not desirable for a bidder to wait to the last minute, even up to a court approval stage, to submit its best offer. However, a court can consider such an offer, if it is evidence that the debtor company did not properly carry out its duty to obtain the best price for creditors.

IV. Analysis

[59] The Trustee has raised a number of objections to the proposed sales, many of which relate to the factors and principles set out in section 36 of the CCAA, the Soundair principles and the AbitibiBowater factors:

- A. The Trustee submits that the CCAA can only be used to liquidate the assets of a debtor company and distribute the proceeds where such use is uncontested or where there is clear evidence that the CCAA provides scope for greater recoveries than would be available on a bankruptcy.

[60] Most of the cases relied upon by the Trustee with respect to this submission predate the 2009 enactment of section 36 of the CCAA. While prior to this change to the CCAA, there was some authority that questioned whether the CCAA should be used to carry out a liquidation of a debtors' assets, there was also authority that accepted this as a proper use of the statute.

[61] An analysis of the pre-section 36 state of the law on this issue, and support for the latter view, is well summarized in *Re Nortel Networks Corp.*, [2009] O.J. No. 3169. As noted by Morawetz, J. at para 28 of that decision, the CCAA is a flexible statute, particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and myriad interests. This is such a case.

[62] Section 36 now provides that a CCAA court may authorize the sale or disposition of assets outside the ordinary course of business if authorized to do so by court order. There is thus no jurisdictional impediment to the sale of assets where such sales meet the requisite tests, even in the absence of a plan of arrangement.

[63] Morawetz, J in *Re Target Canada Co.*, 2015 ONSC 303 at paras 32 and 33, describes the change brought about by section 36:

Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

See also *Re Brainhunter Inc.*, 2009 CarswellOnt 8207 at para 15.

[64] Whether before or after the enactment of section 36, Canadian courts have approved en bloc sales of a debtor company, recognizing that such sales are consistent with the broad remedial purpose and flexibility of the CCAA.

[65] What the provisions of the CCAA can provide in situations such as those facing the Sanjel Group is a court-supervised process of the execution of the sales, with provision for liquidity and the continuation of the business through the process provided by interim financing, a Key Employee Retention Plan that attempts to ensure that key employees are given an incentive to ensure a seamless transition, critical supplier relief that keeps operations functioning pending the closing of the sales and a process whereby a company with operations in Canada, the United States and internationally is able to invoke the aid of both Canadian and US courts during the process. It is true that the actual SISP process preceded the CCAA filing, and I will address that factor later in this decision.

[66] As counsel to the Sanjel Group notes, this type of insolvency proceeding is well-suited to the current catastrophic downturn of the economy in Alberta, with companies at the limit of their liquidity. It allows a business to be kept together and sold as a going concern to the extent possible. There have been a number of recent similar filings in this jurisdiction: the filing in Southern Pacific and Quicksilver are examples.

[67] The Monitor supports the sales, and is of the view, supported by investigation into the likely range of forced sale liquidation recoveries with financial advisors and others with industry knowledge, that a liquidation of assets would not generate a better result than the consideration contemplated by the proposed sales. The Monitor's investigations were hampered by the lack of recent sales of similar businesses, but I am satisfied by its thorough report that the Monitor's investigation of likely recoveries is the best estimate available. A CS estimate provided a different analysis, but I am satisfied by the evidence that it has little probative value.

[68] In summary, this is not an inappropriate use of the CCAA arising from the nature of the proposed sales.

B. The Trustee submits that the proposed sales are the product of a defective SISP conducted outside of the CCAA.

[69] It is true that the SISP, and the restructuring negotiations with the Ad Hoc Bondholders, took place prior to the filing under the CCAA, that this was a "pre-pack" filing.

[70] A pre-filing SISP is not of itself abusive of the CCAA. Nothing in the statute precludes it. Of course, a pre-filing SISP must meet the principles and requirements of section 36 of the CCAA and must be considered against the Soundair principles. The Trustee submits that such a SISP should be subject to heightened scrutiny. It may well be correct that a pre-filing SISP will be subject to greater challenges from stakeholders, and that it may be more difficult for the debtor company to establish that it was conducted in a fair and effective manner, given the lack of supervision by the Court and the Monitor, who as a court officer has statutory duties.

[71] Without prior court approval of the process, conducting a SISP outside of the CCAA means that both the procedure and the execution of the SISP are open to attack by aggrieved stakeholders and bitter bidders, as has been the case here. Any evidence or reasonable allegations of impropriety would have to be investigated carefully, whereas in a court-approved process, comfort can be obtained through the Monitor's review and the Court's approval of the process in

advance. However, in the end, it is the specific details of the SISP as conducted that will be scrutinized.

[72] Similar issues were considered in *Re Nelson Education Ltd.*, 2015 ONSC 5557 at paras 31-32, and in *Re Bloom Lake*, [p.1], 2015 QCCS 1920 at para 21.

[73] The Trustee submits that the SISP was defective in that its timelines were truncated and that it was destined not to generate offers that maximized value for all stakeholders. The Trustee filed an affidavit of a representative of Moelis indicating that it would be typical in a SISP to establish a deadline for non-binding offers one or two months following commencement of the process, while in this SISP, participants had only 12 to 25 days to evaluate the business and provide non-binding indications of interest. This opinion did not address the previous BAML process that identified likely purchasers and thus lengthened the review process for these parties who participated in the first process. The Trustee's advisor was also critical that the SISP provided only 16 days for final offers, suggesting that it is more typical to provide two months.

[74] While likely correct for normal-course SISP's, this analysis does not take into account the high cash burn situation of these debtors, nor the deteriorating market. The Moelis opinion suggests that potential purchaser would have a heightened diligence requirement in the current unfavourable market conditions, requiring extra time for due diligence. However, despite the speed of the SISP, it appears to have generated a range of bids significantly above liquidation value. The process was not limited to the SISP, but included the previous BAML process and the negotiations with the Ad Hoc Bondholders.

[75] The evidence discloses a thorough and comprehensive canvassing of the relevant markets for the debtors and their assets despite the aggressive timelines. The BAML process identified some interested parties and Sanjel's financial advisors built on that process by re-engaging with 28 private equity firms that had already expressed interest in these unique assets as well as identifying new potential purchasers, reaching out to 85 potential buyers.

[76] Of those 85 parties, 37 executed NDAs, 25 conducted due diligence and 17 met with the management team. Eight submitted non-binding indications of interest, five were invited to submit second-round bids and finally the top three were chosen for the continuation of negotiations to final agreements.

[77] While some interested parties may have found the time limits challenging, a reasonable number were able to meet them and submit bids. I am satisfied from the evidence that, despite a challenging economic environment, the process was competitive and robust.

[78] I also note the comments of the Monitor in its First Report dated April 12, 2016. While it was not directly involved in the SISP, the Monitor reports that the financial advisors advised the Monitor, that given the size and complexity of the Sanjel Group's operations and the time frames involved, all strategic and financial sponsors known to the advisors were contacted during the SISP and that it is unlikely that extending the SISP time frames in the current market would have resulted in materially better offers.

[79] Based on this advice and the Monitor's observations since its involvement in the SISP from mid-February 2016, the Monitor is of the opinion that it is highly improbable that another post-filing sales process would yield offers materially in excess of those received.

[80] Finally, I note that the Ad Hoc Bondholders' own March 20 proposal envisaged a pre-packaged CCAA proceedings. A sales process is only required to be reasonable, not perfect. I am

satisfied that this SISP was run appropriately and reasonably, and that it adequately canvassed the relevant market for the Sanjel Group and its assets.

C. The Ad Hoc Bondholders submit that negotiations among them, the Sanjel Group and the Syndicate were a sham conducted by Sanjel to delay the Ad Hoc Bondholders from taking action under Chapter 11 while it finalized the APAs. The Trustee alleges that the SISP has been conducted and the CCAA filing occurred in an atmosphere tainted by manoeuvring for advantage, bad faith, deception, secrecy, artificial haste and excessive deference by the Sanjel Group to the Syndicate.

[81] These are serious allegations, but they are not supported by the evidence.

[82] As the somewhat lengthy history of negotiations establishes, the Ad Hoc Bondholders had almost three months to present and negotiate restructuring proposals, with access to confidential information afforded to their advisors from January 9, 2016, weeks before the SISP participants. They presented four proposals, the last one after final bids had been received in the SISP. Although the final proposal breached the timelines of the SISP process, and could potentially raise an issue with respect to the integrity of the SISP process, Sanjel, the Syndicate and the prospective purchasers are not pressing that argument, as they take the position that the final offer is inferior at any rate.

[83] These proposals received responses from Sanjel and the Syndicate, and counter proposals were received. The evidence discloses that, in all proposals and counter proposals, the parties were far apart on a major issue: the extent to which the Syndicate's debt was to be paid down and how far it was willing to allow a portion to remain at risk.

[84] The Ad Hoc Bondholders were aware of the SISP from its commencement, and aware of the timing of the process. Throughout the SISP, the financial advisors had regular contact with Moelis and Fried Frank and directly with the Ad Hoc Bondholders. Michael Genereux, the lead partner at PJT with respect to the SISP, has sworn that he believes the Ad Hoc Bondholders were aware of the SISP and that it was progressing at a rapid pace. He says that he urged the Ad Hoc Bondholders to accelerate the pace at which they were advancing their restructuring negotiations.

[85] The Ad Hoc Bondholders were aware, or should have been aware, that the Sanjel Group intended a CCAA/Chapter 15 process from at the latest mid-March, 2016. Their representative from A&M was aware of the possibility of a CCAA filing from March 4, 2016. Reference to PWC as Monitor under the CCAA was available through the template APAs from March 4, 2016

[86] The Trustee and the Ad Hoc Bondholders submit that the Ad Hoc Bondholders' April 11, 2016 proposal provides superior recovery to the proposed sales generated by the SISP, that it "implies" a purchase price significantly in excess of the values generated by the APAs. The proposal, which was made directly to the Syndicate, was rejected by the Syndicate. It provides less immediate recovery to the Syndicate, and leaves a substantial portion of the Syndicate debt outstanding in a difficult and highly uncertain economic environment. It fails to address previously-expressed concerns about the need for capital going forward. The implied value of the proposal appears to rest on assumptions about improved economic recovery that the Syndicate does not accept or share.

[87] In addition, the proposal would require at least six months to execute and leaves a number of questions outstanding, not the least being whether a plan that raises some and not all

unsecured debt to secured status would pass muster. The proposal was rejected by the Syndicate for reasonable and defensible justifications.

[88] The Ad Hoc Bondholders describe their proposal as a “germ” of a viable plan. While a germ of a viable plan may be sufficient to justify the commencement of a CCAA proceeding, it is not comparable to the proposed sales generated by a reasonably-run and thorough SISP.

[89] The Trustee also submits that the Court should not be deterred by the Syndicate’s rejection of the proposal, insisting on its value and citing cases where a creditor’s stated intention not to accept a plan did not prevent a CCAA filing from proceeding. This is a different situation: the Ad Hoc Bondholder’s proposals are specific proposals with clear risks of timing and certainty. It is not up to this Court to second guess the Syndicate’s rejection of such a plan, even if inclined to do so.

[90] The Trustee submits that Sanjel did not act in good faith towards the Ad Hoc Bondholders in the period leading up to the filing. The Trustee notes that, contrary to the terms of the Bond Agreement, Sanjel failed to disclose to the bondholders that the Syndicate had issued a demand for payment acceleration and a notice of intention to enforce security pursuant to the terms of the Bankruptcy and Insolvency Act (the “Demand Acceleration and NOI”) on March 18, 2016. While this was a contractual breach, the Ad Hoc Bondholders were well aware that Sanjel was in breach of the Bank Credit Facility, and that the Syndicate was taking steps to enforce its rights in negotiations with Sanjel and the Ad Hoc Bondholders. The Syndicate, and the Ad Hoc Bondholders, were both careful to preserve their rights of enforcement in proposals and counter-proposals. In fact, the Syndicate did not exercise its right to set-off, and has allowed Sanjel to continue to have access to liquidity going into the CCAA process.

[91] This failure by Sanjel to advise the Trustee, (and other unsecured creditors that had similar provisions in their contracts), of this further step by the Syndicate does not constitute a reason to refuse to approve that APAs.

[92] The Trustee submits that Sanjel failed to make full and plain disclosure during the initial hearing because it failed to disclose that in 2015, 62 % of the Sanjel Group’s revenue was generated in the United States. Sanjel made extensive disclosure of its corporate structure and the integration of its business in its initial filing, including the fact that the Sanjel Group’s “nerve centre”, management team and treasury and financial functions are largely based in Calgary. The factors disclosed were more than sufficient to establish jurisdiction for a CCAA filing. The US Court in the Chapter 15 filing found the Sanjel Group’s COMI to be in Calgary. The single statistic of 2015 revenue would not have changed the outcome of the Initial Order.

[93] The Trustee’s most serious allegation, given its implications for the professional reputations of those involved, is that Sanjel and its counsel and the Syndicate and its counsel misled the Trustee and the Ad Hoc Bondholders in their requests for adjournment of the bondholders’ meeting, that the correspondence relating to the requests for adjournment created an obligation to negotiate in good faith, and that Sanjel and the Syndicate failed to do so. The Trustee and the Ad Hoc Bondholders allege that Sanjel and the Syndicate were negotiating with the Ad Hoc Bondholders only to gain time to finalize the APAs and file under the CCAA .

[94] Again, this serious allegation is not supported by the evidence. The correspondence relating to the adjournment requests discloses no promises to hold off proceedings. The letter of request for the first adjournment for counsel to the Syndicate, while it refers to engaging with the

Ad Hoc Bondholders with respect to the March 2, 2016 proposal, stipulates that in requesting the postponement of the meeting, counsel is not promising any course of action and reserves all rights.

[95] The request from counsel to Sanjel refers to the dual track of negotiating a financial restructuring and/or sale of assets. It speaks of focusing on negotiations for the balance of the month, instead of “prospective enforcement action as proposed for consideration at the scheduled bondholders meeting,” as was threatened by the notice of meeting. The Ad Hoc Bondholders were well-compensated financially for this adjournment.

[96] The second request to adjourn the meeting to April 14, 2016 was similarly without any promise to forbear and the acceptance of the request by the Trustee did not impose any conditions nor give any reasons for the acceptance. The representatives of the Ad Hoc Bondholders are knowledgeable and sophisticated with respect to financing and insolvency matters. They cannot be said to have been misled by the language used in the adjournment requests.

[97] The Trustee submits that the CCAA process to date has been engineered to effect a foreclosure in favour of the Syndicate “to the serious and material prejudice of the Bondholders” and other unsecured creditors.

[98] The SISP did not disclose any possibility that, in the current economic climate, the disposition of the assets would generate even enough to cover the debt owed to the secured creditors. The proposals made by the Ad Hoc Bondholders did not offer nearly enough to pay out that debt.

[99] The views of the Syndicate and its priority rights must be given due consideration: *Windsor Machine & Stamping Limited (Re)*, 2009 CarswellOnt 4471 (SCJ) at para 43.

[100] Section 6 of the CCAA requires that any compromise of creditors’ rights must be supported by a double majority of the affected creditors. The Syndicate (as the principal secured creditor group) and the Ad Hoc Bondholders (as unsecured creditors with other unsecured creditors) would form separate voting classes for the purposes of a vote on any plan of arrangement. Each class must have a double majority of creditors, representing both two-thirds in value and a majority of number, voting in support of the plan as a condition precedent to court approval. Thus, the Syndicate holds an effective “veto” over the approval of any plan proposed by the Ad Hoc Bondholders: *SemCanada Crude Co, Re*, 2009 ABQB 490 at para 22.

[101] As noted by the Syndicate, the Ad Hoc Bondholders proposals, including the April 11, 2016 proposal, pose substantial risk to the Syndicate, and it is under no obligation to support them. There is no evidence that the Syndicate is acting unreasonably or unfairly in asserting that it would exercise the statutory protection afforded to a secured creditor under the CCAA; in fact, the evidence is that the Syndicate was willing to consider a less than 100% payout in negotiations with the Ad Hoc Bondholders. There was however no agreement as to the extent of the payout and the extent to which the Syndicate would agree to remain at risk.

[102] The prejudice to the bondholders is that they were unable to persuade the secured creditors to compromise or put its financial interests at risk in order to provide the bondholders with some chance that an improved economic climate may save this enterprise. As noted, the Syndicate had doubts that the Ad Hoc Bondholder’s proposals would even provide sufficient

operating capital to keep the Sanjel Group operating for the months it would take to implement their proposals.

[103] The prejudice, if any, to the Ad Hoc Bondholders is that they were not able to pre-empt the CCAA filing with a filing under Chapter 11 of the *United States Bankruptcy Code*, with an automatic stay that, according to US bankruptcy law, has worldwide effect. A subsequent CCAA filing could be considered a breach of the stay, and provoke a jurisdictional issue that would delay proceedings and prove expensive to the Syndicate, improving the Ad Hoc Bondholders' bargaining position.

[104] While there is only hearsay opinion before me with respect to the advantages of a Chapter 11 filing, the Trustee suggests that under such a filing:

- (a) the Liberty and Step APAs would have been subject to market test and to higher and better offers;
- (b) Sanjel could confirm a plan without the consent of the Syndicate; and
- (c) parties in interest and estate fiduciaries could pursue claims and causes of action against Sanjel, the Syndicate, Sanjel's equity holders and MacBain.

[105] Sanjel cites academic commentary that the cram-down provisions of Chapter 11 require strict compliance so as not to override the protections and elections available to secured creditors in opposition to a plan that they do not support. Specifically, if a class of creditors is impaired, the plan must be fair and equitable with respect to that class.

[106] This is an issue for the US Courts. However, even if the Chapter 15 filing was replaced by a Chapter 11 filing, the current CCAA proceedings would not be terminated and any restructuring in the United States would necessarily have to be coordinated with these CCAA proceedings. Accordingly, the voting requirements for any plan of arrangement or the requirements for approval of a sale under the CCAA could not be avoided.

- D. The Ad Hoc Bondholders were prejudiced in that they were not provided with information regarding the process and the bids received.

[107] The Ad Hoc Bondholders had access to the same information afforded to bidders under the SISP and more. They were able to make proposals both before and after that process. Their financial advisors were afforded an opportunity for due diligence, and exercised it.

[108] What they did not receive was disclosure of the details of the bids. There was a dispute about whether or not the Ad Hoc Bondholders could be considered "bidders". While they were not part of the SISP, they certainly had interests in conflict with the SISP bidders. Had the bids been disclosed to them, there would indeed have been concern over the integrity of the process, as such disclosure would allow them to tailor their proposals in such a way as to undermine the bids.

[109] The Ad Hoc Bondholders were aware that they would not be given copies of the bids by mid-February, 2016 when the Bondholders Forbearance Agreement was settled, as it included a provision clarifying that they were not entitled to any pricing or bidder information from the SISP.

[110] The Bond Forbearance Agreement also recognized that, while Sanjel would negotiate in good faith with the Ad Hoc Bondholders, nothing restricted its ability to enter into or conduct

negotiations with respect to potential sales or other transactions. It was only on March 14, 2016 that the Ad Hoc Bondholders requested third party bid information.

[111] The Ad Hoc Bondholders were not improperly denied access to information, and would not have been entitled to know details of the third party bids.

V. Conclusion

[112] I am satisfied by the evidence before me that the factors set out in section 36(3) of the CCAA and Soundair favour the approval of the proposed sales. Specifically:

- (a) the process, while not conducted under the CCAA, was nevertheless reasonable in the circumstances, as established by the evidence. It was brief, but not unreasonably brief, given the previous BAML process, current economic climate and the deteriorating financial position of the Sanjel Group;
- (b) while the Monitor was not directly involved and did not actively participate in the SISP process prior to February 24, 2016, the Monitor has reviewed the process and is of the opinion that the SISP was a robust process run fairly and reasonably, and that sufficient efforts were made to obtain the best price possible for the Sanjel Group's assets in that process. I agree with the Monitor's assessment from my review of the evidence.

It is the Monitor's view, based on (i) the advice of CS and PJT, (ii) the nature of the Sanjel Group's operations and assets, (iii) the market conditions over the past year, (iv) the proposals received in the context of the SISP and from the Ad Hoc Bondholders, (v) the current ongoing depressed condition of the market and (vi) the underlying value of the Sanjel Group's assets, it is highly improbable that another post-filing sales process would yield offers for the Canadian and U.S. operations materially in excess of the values contained in the STEP and Liberty APAs.

I accept the Monitor's opinion in that regard, and nothing in my review of the evidence and the submissions of interested parties causes me to doubt that opinion.

- (c) The Monitor has provided an opinion that the proposed sales are more beneficial to creditors than a sale or disposition under bankruptcy.
- (d) Creditors, other than trade creditors, were consulted and involved in the process.
- (e) While the sales provide no return to any creditor other than the Syndicate, I am satisfied that all other viable or reasonable options were considered. While there is no guarantee of further employment arising from the sale, there is the prospect that since the business will continue to operate until the sale, there will be an opportunity for employment for Sanjel employees with the new enterprises, and an opportunity for suppliers to continue to supply them.
- (f) I am satisfied from the evidence that the consideration to be received for the assets is reasonable and fair.

I therefore approve the sale approval and vesting orders sought by the Sanjel Group.

VI. Postscript

[113] On May 9, 2016, before these reasons were released, I received a copy of a letter dated May 5, 2016 from Fried Frank on behalf of the Ad Hoc Bondholders addressed to Canadian and US counsel for the Sanjel Group, the Monitor, the Syndicate and the prospective purchasers. In extravagant language, the Ad Hoc Bondholders state that they have become aware of information that the addressees are “duty bound” to bring to the attention of the Courts as officers of the Courts. That information is that Shane Hooker has been designated to lead the Canadian cementing operations when the STEP sale closes, according to a STEP press release. Evidently, Mr. Hooker is married to the daughter of Dan MacDonald, the chairman of Sanjel’s board, and is the sister of Darin MacDonald, who was Chief Executive Officer of Sanjel and head of the restructuring committee.

[114] The letter asserts the following:

- a) There are “substantial and material” connections between STEP and the MacDonald family. It appears that the basis for this statement is that Mr. Hooker is married to Mr. MacDonald’s daughter and an employee and “executive in residence” of ARC Financial Corp., STEP’s financial sponsor in the sale;
- b) Mr. Hooker is “an intimate beneficiary of all that is and all that belongs to the MacDonald family.” In subsequent correspondence with the Monitor, it appears that the Ad Hoc Bondholders have no evidence to support this allegation;
- c) Mr. Hooker is “the loyal son-in-law and brother-in-law” of the MacDonald family. Again, the Ad Hoc Bondholders admit that they have no information to support this allegation;
- d) By reason of Mr. Hooker’s relationship with the “MacDonald family”, the proposed STEP transaction and the entirety of the SISP process “is tainted and worse”. “(O)ur clients have every reason to believe the substance, of self-dealing and deception of the highest order”;
- e) “Mr. Hooker’s personal and professional ties to the MacDonald family raise the spectre that all at hand is and has been a thinly-veiled scheme between the Company and the Syndicate and their advisors to deliver, on the one hand, an adequate recovery to the Syndicate and, on the other hand, Sanjel’s Canadian assets back into the hands of the MacDonald family thereby working a substantial forfeiture of value to the Bondholders and all other unsecured creditors of the Company”.

[115] The letter repeats previous allegations that the SISP was “driven by self-interest and self-dealing”, “riddled with conflicts of interest,” “inappropriate and flawed in every respect”, “chilled, inadequate” and “not conducted in good faith and efforts were undertaken to mislead and misdirect the company’s stakeholders”. It alleges:

- a) “That none of this has been brought to the attention of the Courts and all parties in interest is reprehensible at best and has all indicia of fraudulent intent and purpose.”
- b) “Be advised that with respect to each and all of you and each and all of your respective clients as well as with respect to STEP, Liberty and any and all funding sources and sponsors for each, our clients hereby reserve all of their rights and remedies with respect to any and all claims and causes of action of every kind and nature whatsoever whether such

claims and causes of action are grounded in contract, tort, equity, statute and otherwise including, but not limited to, any and all breach of fiduciary duties, civil conspiracy, tortious interference and lender liability.”

- c) “... the efforts to continue with malfeasance wrapped in the cloak of SISP and CCAA by each and all of you and your clients must stop now. As above, the Courts and others should and must be informed, the failure to do so is and will be a misrepresentation and fraud on the Courts.”

[116] The letter comments that “(w)hen Justice Romaine is in receipt of the information, she will have reason and basis and we believe that Her Ladyship will be constrained, to vacate the order.”

[117] The Monitor took immediate action to investigate these serious allegations of fraud, misrepresentation, conspiracy and collusion, requesting urgent responses from counsel for Sanjel, the Syndicate, Mr. MacDonald, PJT and CS. Relevant witnesses were contacted and follow-up questions directed. The Monitor was also in contact with Fried Frank to determine the source of the allegations, and what investigation had been undertaken by Fried Frank or the Ad Hoc Bondholders to verify or support their allegations.

[118] On Saturday, May 7, 2016, Fried Frank made the further allegation that potential bidders in the SISP were provided with forecasts that were far worse than actual results in order to facilitate the alleged fraud and conspiracy. The Monitor added this allegation to its investigation.

[119] The Monitor was satisfied by its rapid but thorough investigations that:

- a) Mr. Hooker and Mr. MacDonald have been estranged for the last two and a half-years, and have had no communication on any personal or business matters;
- b) Mr. Hooker left Sanjel in March, 2014 and began working for ARC Financial in the fall of 2015 to assist ARC in an unrelated transaction. ARC is a large private investor focussed on energy, which provides financing through a number of funds financed by from third party investors. ARC is the primary financial stakeholder in the STEP acquisition. No one from the MacDonald family has an ownership position in ARC, nor are any of them investors in any ARC funds. Mr. Hooker has no involvement in ARC’s fundraising efforts or fund deployment and he has no ownership interest in ARC;
- c) Mr. MacDonald had no involvement in the negotiation of the STEP APA, other than attendance as a Sanjel representative at three meetings between November 2015 and January 2016, before the SISP was commenced;
- d) Mr. Crilly as CFO of Sanjel (and later CRO) led the SISP process for Sanjel, while Mr. MacDonald concentrated on attempting to find a buyer for the whole company;
- e) The senior Mr. MacDonald has not had an active role in Sanjel’s management for years, was not involved in the SISP and does not own shares in STEP or ARC;
- f) Mr. Hooker’s involvement with the SISP and negotiations with STEP was limited to conducting on-site diligence on behalf of STEP;
- g) Sanjel has no direct or indirect ownership interest or other financial interest in ARC, STEP, the newly formed company that will be purchasing the cementing assets or any other entity owned or controlled by ARC;

- h) No consideration was provided to Mr. Hooker or either Mr. MacDonald in connection with the STEP APA;
- i) In the opinion of many of those who provided responses, the relationship between Mr. Hooker and Mr. MacDonald had an adverse effect, if anything, on the merits of the STEP bid. The advisors and the Syndicate repeat their previous position that the STEP offer, in combination with the Liberty offer, was materially superior to any en bloc bid or combination of bids, and was supported on the basis of its economic merits.

[120] This information was largely confirmed by a number of sources. The Monitor did not obtain sworn statements, nor conduct any kind of discovery process. It did not present the information in its Sixth Report to the Court as evidence, but as a report on its investigation to determine whether there was any probative value to the Ad Hoc Bondholders' allegations.

[121] When the Monitor was unable to find any real evidence to support the allegations, other than the bare fact that Mr. Hooker is an employee of ARC and is married to Mr. MacDonald's sister, it asked the Ad Hoc Bondholders if they had any supporting evidence. The substance of counsel to the Ad Hoc Bondholders' response is that there is an appearance of inappropriate dealing (arising from the relationship), and that it was up to the Monitor to investigate this.

[122] The Ad Hoc Bondholders instead provided the Monitor with a list of additional questions that they wish the Monitor to investigate through sworn statements subject to cross-examination. These questions appear designed to elicit some evidence that may support the Ad Hoc Bondholder's speculations.

[123] The Monitor cannot be faulted for failing to obtain sworn evidence from relevant parties. The allegations were made after approval of the APAs in the context of tight timelines to the closing of the transactions and the risk of losing the recommended sales transactions. If the Monitor had discovered anything that would give any legitimacy to the allegations, or raise any doubt about the integrity of the SISP, it may have been appropriate to direct further investigation, including sworn evidence. However, mere speculation resting on a family relationship is insufficient to require the Monitor to undertake further expensive investigation or to conduct a fishing expedition. This is particularly the case as there is no real evidence that Mr. Hooker's prospective employment will benefit either Mr. MacDonald or Sanjel in any way, or Mr. Hooker himself, other than the offer of employment.

[124] This is not a case where evidence that should be presented in affidavit form has been incorporated improperly into a Monitor's report. The Monitor decided, quite properly, that at this stage of the process, a quick investigation to determine whether there was any real basis for the Ad Hoc Bondholders' complaint was warranted. This investigation has satisfied the Monitor that, other than the fact that Mr. Hooker is indeed Mr. MacDonald's brother-in-law, there is no evidence of collusion between them, Mr. MacDonald was not involved in the STEP APA, Mr. Hooker was in no position to influence that STEP APA and no evidence that Mr. Hooker or the "MacDonald family" will profit in any way from the STEP APA, other than Mr. Hooker's offer of employment.

[125] Given the lack of any indicia that there is any basis for the Ad Hoc Bondholders' speculations of fraud or conspiracy, there is no reason for this Court to require the Monitor to take further steps to investigate the allegations, which appear to be thinly veiled and reckless attempts to delay and obfuscate the process.

[126] With respect to the allegations that potential bidders were provided with forecasts far worse than actual results in order to facilitate the alleged fraud and conspiracy, the Monitor has reviewed the forecasts and the variances from the forecasts provided during the SISP to actuals. The Monitor reports that these relate to collection of accounts receivable and payment of accounts payable. The actual collection of receivables was better than forecasted for the months of March and April. However, the Monitor understands that is a temporary timing variance based on earlier collection of receivables and does not represent a permanent improvement in Sanjel's actual cash position.

[127] Thus, the Monitor is of the view that the allegations by the Ad Hoc Bondholders with respect to forecasts being far worse than actual results lack merit.

[128] I accept the Monitor's advice on this issue.

[129] With respect to disclosure, the Monitor was not aware of the connection between STEP and the company alleged in the Fried Frank letter. The Monitor has reported that it did not become aware of anything that would support or substantiate the allegations since its involvement in the SISP process after February 24, 2016.

[130] The Ad Hoc Bondholders' allegations are in essence that the SISP was structured to achieve a preferential outcome for the MacDonald family through the familial connections between Mr. Hooker and the MacDonald family. If a sale of assets of a debtor company is to be made to a person related to the debtor, the Court may only approve the sale if it is satisfied that:

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the debtor company; and
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale: CCAA section 36(4).

[131] A related party pursuant to section 36(5) is defined to include certain categories of persons, and neither Mr. Hooker, his wife or either Mr. MacDonald fall into these categories.

[132] There is no evidence or indication that any member of the "MacDonald family" will benefit from the STEP APA, other than Mr. Hooker's offer of employment. I am therefore satisfied that section 36(3) is not applicable to the STEP or the Liberty transactions and that no disclosure of any relationship was necessary before the APAs were approved.

[133] Even if disclosure had been made, given the evidence before me with respect to the SISP process and the offers received, I would have been satisfied the requirements of section 36(3) were met.

[134] In conclusion, the allegations of the Ad Hoc Bondholders do not change my decision with respect to approval of the APAs. I see no reason why the Monitor should continue its investigation.

[135] The issue of who should bear the cost of the investigation into these allegations is reserved.

Heard on the 28th day of April, 2016.

Dated at the City of Calgary, Alberta this 16th day of May, 2016.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Chris Simard/Alexis Teasdale
for the Sanjel Group

Robert Anderson Q.C./Emily Paplawski
for the Trustee

Josef Kruger Q.C./Robyn Gurofsky/Jessie Cameron
for the Monitor

Kelly Bourassa/Kelly Peters
for the Syndicate

David Mann
for the Canadian Purchasers

Sean Collins/Walker Macleod
for the US Purchasers

Daniel Gilborn
for the TR Transport Inc.

Katherine Reiffenstein
for Aspen Air Corp. and Aspen Air US Corp.

Brian Davison/Ryan Algar/Karen Fellowes
for MacBain Properties Ltd. and MacBain Group

Melanie Gaston
for TAQA

Caireen Hanert
for Weir Group PLC

Heather Ferris
for GCC of America Inc.

Jennifer Davis
for CT Logics

Mary Buttery
for ARI Fuel Services

TAB 14

COURT FILE NO.: CV-08-7746-00-CL
DATE: 20081024

**SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)**

**RE: IN THE MATTER OF THE RECEIVERSHIP OF TOOL-PLAS
 SYSTEMS INC. (Applicant)**

**AND IN THE MATTER OF SECTION 101 OF THE *COURTS OF
 JUSTICE ACT*, AS AMENDED**

BEFORE: MORAWETZ J.

COUNSEL: D. Bish, for the Applicant, Tool-Plas

T. Reyes, for the Receiver, RSM Richter Inc.

R. van Kessel for EDC and Comerica

C. Staples for BDC

M. Weinczok for Roynat

HEARD
& RELEASED: SEPTEMBER 29, 2008

ENDORSEMENT

[1] This morning, RSM Richter Inc. (“Richter” or the “Receiver”) was appointed receiver of Tool-Plas, (the “Company”). In the application hearing, Mr. Bish in his submissions on behalf of the Company made it clear that the purpose of the receivership was to implement a 'quick flip' transaction, which if granted would result in the sale of assets to a new corporate entity in which the existing shareholders of the Company would be participating. The endorsement appointing the Receiver should be read in conjunction with this endorsement.

[2] The Receiver moves for approval of the sale transaction. The Receiver has filed a comprehensive report in support of its position – which recommends approval of the sale.

[3] The transaction has the support of four Secured Lenders – EDC, Comerica, Roynat and BDC.

[4] Prior to the receivership appointment, Richter assessed the viability of the Company. Richter concluded that any restructuring had to focus on the mould business and had to be concluded expeditiously given the highly competitive and challenging nature of the auto parts business. Further, steps had to be taken to minimize the risk of losing either or both key customers – namely Ford and Johnson Controls. Together these two customer account for 60% of the Company's sales.

[5] Richter was also involved in assisting the Company in negotiating with its existing Secured Lenders. As a result, these Lenders have agreed to continue to finance the Company's short term needs, but only on the basis that a sale transaction occurs.

[6] Under the terms of the proposed offer the Purchaser will acquire substantially all of the assets of the Company. The purchase price will consist of the assumption or notional repayment of all of the outstanding obligations to each of the Secured Lenders, subject to certain amendments and adjustments.

[7] The proposed purchaser would be entitled to use the name Tool-Plas. The purchaser would hire all current employees and would assume termination and vacation liabilities of the current employees; the obligations of the Company to trade creditors related to the mould business, subject to working out terms with those creditors; as well as the majority of the Company's equipment leases, subject to working out terms with the lessors.

[8] The only substantial condition to the transaction is the requirement for an approval and vesting order.

[9] The Receiver is of the view that the transaction would enable the purchaser to carry on the Company's mould business and that this would be a successful outcome for customers, suppliers, employees and other stakeholders, including the Secured Lenders.

[10] The Receiver recommends the 'quick flip' transaction. The Receiver is of the view that there is substantial risk associated with a marketing process, since any process other than an expedited process could result in a risk that the key customers would resource their business elsewhere. Reference was made to other recent insolvencies of auto parts suppliers which resulted in receivership and owners of tooling equipment repossessing their equipment with the result that there was no ongoing business. (Polywheels and Progressive Moulded Tooling).

[11] The Receiver is also of the view that the proposed purchase price exceeds both a going concern and a liquidation value of the assets. The Receiver has also obtained favourable security opinions with respect to the security held by the Secured Lenders. Not all secured creditors are being paid. There are subordinate secured creditors consisting of private arms-length investors who have agreed to forego payment.

[12] Counsel to the Receiver pointed out that the transaction only involved the mould business. The die division has already been shut down. The die division employees were provided with working notice. They will not have ongoing jobs. Suppliers to the die division will not have their outstanding obligations assumed by the purchaser. There is no doubt that

employees and suppliers to the die division will receive different treatment than employees and suppliers to the mould business. However, as the Receiver points out, these decisions are, in fact, business decisions which are made by the purchaser and not by the Receiver. The Receiver also stresses the fact that the die business employees and suppliers are unsecured creditors and under no scenario would they be receiving any reward from the sales process.

[13] This motion proceeded with limited service. Employees and unsecured creditors (with the exception of certain litigants) were not served. The materials were served on Mr. Brian Szucs, who was formerly employed as an Account Manager. Mr. Szucs has issued a Statement of Claim against the Company claiming damages as a result of wrongful dismissal. His employment contract provides for a severance package in the amount of his base salary (\$120,000) plus bonuses.

[14] Mr. Szucs appeared on the motion arguing that his Claim should be exempted from the approval and vesting order – specifically that his claim should not be vested out, rather it should be treated as unaffected. Regrettably for Mr. Szucs, he is an unsecured creditor. There is nothing in his material to suggest otherwise. His position is subordinate to the secured creditors and the purchaser has made a business decision not to assume the Company's obligations to Mr. Szucs. If the sale is approved, the relief requested by Mr. Szucs cannot be granted.

[15] A 'quick flip' transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a 'quick flip' transaction, the Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the 'quick flip' transaction would realistically be any different if an extended sales process were followed.

[16] In this case certain parties will benefit if this transaction proceeds. These parties include the Secured Lenders, equipment and vehicle lessors, unsecured creditors of the mould division, the landlord, employees of the mould division, suppliers to the mould division, and finally – the customers of the mould division who stand to benefit from continued supply.

[17] On the other hand, certain parties involved in litigation, former employees of the die division and suppliers to the die division will, in all likelihood, have no possibility of recovery. This outcome is regrettable, but in the circumstances of this case, would appear to be inevitable. I am satisfied that there is no realistic scenario under which these parties would have any prospect of recovery.

[18] I am satisfied that, having considered the positions of the above-mentioned parties, the proposed sale is reasonable. I accept the view of the Receiver that there is a risk if there is a delay in the process. I am also satisfied that the sale price exceeds the going concern and the liquidation value of the assets and that, on balance, the proposed transaction is in the best interests of the stakeholders. I am also satisfied that the prior involvement of Richter has resulted in a process where alternative courses of action have been considered.

[19] I am also mindful that the Secured Lenders have supported the proposed transaction and that the subordinated secured lenders are not objecting.

[20] In these circumstances the process can be said to be fair and in the circumstances of this case I am satisfied that the principles set out in *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.) have been followed.

[21] In the result, the motion of the Receiver is granted and an Approval and Vesting Order shall issue in the requested form.

[22] The confidential customer and product information contained in the Offer is such that it is appropriate for a redacted copy to be placed in the record with an unredacted copy to be filed separately, under seal, subject to further order.

MORAWETZ J.

DATE: October 24, 2008

TAB 15

Proposition de SRTX inc.

2026 QCCS 570

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No.: 500-11-066823-267
500-11-066824-265
500-11-066826-260
500-11-066825-262

DATE: February 25, 2026

BY THE HONOURABLE LUC MORIN, S.C.J.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF:**SRTX INC.**

-and-

SHEERTEX INC.

-and-

SHEERTEX SOFTWARE HOLDINGS ULC.

-and-

OCTAGON PERFORMANCE MATERIALS INC.

Debtors/Applicants

-and-

PRICEWATERHOUSECOOPERS INC.

Trustee

-and-

9561-3261 QUÉBEC INC.

-and-

A.Y.K. INTERNATIONAL INC.

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-and-

THE REGISTRAR OF THE REGISTER OF PERSONAL AND MOVABLE REAL RIGHTS (QUÉBEC)

-and-

THE REGISTRAR OF ALBERTA'S PERSONAL PROPERTY REGISTRY

-and-

THE REGISTRAR OF THE BRITISH COLUMBIA PERSONAL PROPERTY REGISTRY

-and-

THE REGISTRAR OF THE ONTARIO PERSONAL PROPERTY REGISTRY

Impleaded Parties

JUDGMENT¹

I- OVERVIEW

[1] The Debtors, a group of companies operating in the textile and apparel industry, widely known for their rip-resistant tights marketed under the *Sheertex* brand, seek approval of a transaction that would transfer a substantial portion of their business to *A.Y.K. International Inc.* ("**AYK**").

[2] The proposed transaction is structured through a Reverse Vesting Order ("**RVO**"), a mechanism that would preserve the business within the existing corporate entity while effectively extinguishing the current equity. Under this structure, excluded or otherwise undesirable assets, primarily those whose realizable value is uncertain at this stage, will be segregated and dealt with separately (the "**AYK Transaction**").

[3] What is presented to the Court is commonly referred to as a "prepack."

¹ *Les juges de la Cour supérieure doivent soumettre leurs projets de jugement au Service de traduction, mais en raison de contraintes techniques et opérationnelles, une traduction du présent jugement ne peut être jointe immédiatement et sans délai conformément à l'article 10 de la Charte de la langue française. Après vérification auprès du Service de traduction, la traduction du présent jugement devrait être disponible sous peu, mais considérant que ce délai est de nature à mettre en péril la clôture d'une transaction visant une entité insolvable le Tribunal émettra le présent jugement en langue anglaise, la traduction sera produite au dossier de la Cour dans les meilleurs délais. Ce jugement ne met par ailleurs pas fin à l'instance. En optant pour cette solution, le Tribunal tient à souligner que dans la présente affaire, toutes les procédures étaient rédigées en anglais et toutes les pièces étaient en langue anglaise.*

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[4] Corporate restructuring has evolved significantly over the last few years. Proceedings under the *Bankruptcy and Insolvency Act*² or the *Companies' Creditors Arrangement Act*³, once the central arena of negotiations, are now frequently the final act in a longer, carefully orchestrated strategy designed to minimize the time a business remains under statutory court supervision.

[5] In a traditional restructuring, the Court's involvement is ongoing and incremental. In a prepack, however, the Court is asked to intervene in the final chapter and asked to endorse a process it has not supervised, often *nunc pro tunc*, on the strength of summaries prepared by experienced professionals.

[6] In the Court's view, prepacks should be encouraged and celebrated, not ostracized. When done correctly, they serve an important purpose. They can shield a business from the stigma of formal insolvency proceedings, reduce operational disruption, preserve going-concern value, and minimize professional costs associated with prolonged court oversight. In theory, they represent the most efficient form of corporate restructuring, its best version.

[7] But prepacks are akin to unicorns. The occurrences of this mythical creature are scarce and only few live to tell the tale. Put differently, true examples are rare.

[8] A successful prepack requires alignment among stakeholders whose competing interests typically diverge in insolvency: secured and unsecured creditors, employees, customers, clients, tax authorities, and shareholders, all seeking to rightfully preserve their respective positions. That tension is both inevitable and legitimate.

[9] For that reason, prepacks are difficult to achieve. Their streamlined and expedited nature demands near unanimity, or at least a broad stakeholder alignment. If a key stakeholder raises a serious opposition, the Court must exercise caution, even in the face of liquidity constraints or asserted urgency.

[10] A shareholder of the Debtors wrote directly to the Court expressing profound surprise at the insolvency filing and, more particularly, at the strategic review process and the contemplated transaction with AYK. The shareholder indicated that, had the opportunity been afforded, an equity investment would have been considered.

[11] However, when provided with the opportunity to substantiate that contestation, including through direct communications with the Court, the shareholder elected not to pursue or formalize any challenge to the AYK Transaction. In these circumstances, that

² *Bankruptcy and Insolvency Act*, R.S.C. ch. B-3 ("BIA").

³ *Companies' Creditors Arrangement Act*, R.S.C. ch. C-36 ("CCAA").

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initial expression of concern cannot be permitted to overshadow the otherwise broad support demonstrated for the proposed transaction.

[12] For the reasons set out below, the Court is satisfied that the statutory and practical conditions for approving a prepack transaction are met in the present case. Accordingly, the Court concludes that the AYT Transaction may be authorized and implemented pursuant to an RVO structure.

II- ANALYSIS

[13] The Debtors are, in essence, a start-up enterprise that has historically operated through successive cycles of liquidity constraints, each bridged by the expectation of a forthcoming round of investment, when, and if, such financing ultimately materializes.

[14] Between 2019 and 2025, the Debtors raised approximately \$255M in equity and debt to fund their operations and expansion projects. That said, they were never able to achieve profitability.

[15] Since 2023, the Debtors have incurred significant losses, in excess of \$128M.

[16] In 2025, tariff changes imposed by the US Government led to uncertainty and the temporarily lay off of approximately 40% of the Debtors' workforce of approximately 350 employees. There are roughly 30 employees currently employed, only seven of whom will see their employment continued if the AYK Transaction is approved by the Court.

[17] The Debtors were nevertheless able to get additional financing from *Export Development Corporation* ("**EDC**"), its main secured creditor, and investors during 2025, but the liquidity crisis persisted and on October 28, 2025, they retained the services of *PwC Corporate Finance* ("**PwC CF**") to conduct a strategic review process.

[18] These were tumultuous times for the Debtors, their CEO who had been recently brought in decided not to pursue the adventure considering the challenges faced by the Debtors, which were not exactly what she had signed up for.

[19] On October 29, 2025, the Debtors issued a press release explaining the strategic review, the role of PwC CF and the resignation of their CEO. This press release⁴ was widely distributed, even catching the attention of the *Globe & Mail*⁵ and *Bloomberg*⁶.

⁴ Exhibit P-8.

⁵ Exhibit P-9.

⁶ Exhibit P-10.

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[20] Throughout November, December, and January, the Debtors implemented a sales and investment solicitation process (“**SISP**”), canvassing the market for potential buyers and investors. The SISP was conducted with the assistance of PwC CF and under the oversight of the Trustee. The Board of Directors remained actively involved at each stage, as did EDC.

[21] The Debtors’ financial distress culminated in the filing of a Notice of Intention under the BIA on February 17, 2026, merely one week prior to this hearing. The application materials were served the following day and submitted to the Court on February 20, 2026. A press release was issued on February 17, 2026, announcing that the Debtors would be seeking leave to have the AYK Transaction approved⁷.

[22] The Court is left to deal with the following questions:

22.1. Is the prepack approach warranted under the circumstances?

22.2. Should the AYK Transaction be approved?

22.3. Is the RVO structured appropriate to implement the AYK transaction?

[23] The Court is satisfied that each of these questions must be answered in the affirmative. Here’s why.

A- The Use of a Prepack is Appropriate

[24] Prepacks require a carefully orchestrated symphony that allows for the SISP to be conducted outside formal insolvency proceedings.

[25] Unlike a traditional insolvency process, a prepack does not unfold in the open, with the benefit of public announcements and the procedural timelines that ordinarily allow stakeholders to absorb developments and organize a response. Instead, stakeholders are effectively presented with a transaction that is substantially complete, leaving them with significantly curtailed reaction time.

[26] Unlike in a traditional insolvency process, the Court has limited opportunity to develop a confidence-based relationship with its Court-appointed officer, the trustee. This reality underscores the heightened need for comprehensive and candid advance disclosure, an obligation that extends beyond routine procedural requirements. A full and frank disclosure type of obligation. Above and beyond.

⁷ Exhibit P-8.

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[27] Case law specifically addressing prepack transactions remains limited. In the absence of a well-developed body of guiding authority, the Court considers it appropriate to articulate certain criteria that should inform the assessment of whether a prepack constitutes a proper course of action in a given case:

27.1. Good Faith and Absence of Improper Purpose

A prepack must not be deployed for an ulterior or improper purpose. Nor should timing be artificially engineered or weaponized by one stakeholder to the detriment of the broader constituency.

The parties seeking approval of a prepack bear the burden of demonstrating, on a balance of probabilities, that they have acted in good faith, that the transaction pursues a valid commercial objective, and that it serves the best interests of the debtor's stakeholders as a whole.

27.2. Heightened Level of Advance Disclosure

Prepacks impose a heightened obligation of full and frank disclosure on those seeking approval. The debtor, the trustee, and the purchaser must accept a broader disclosure obligation than in a conventional restructuring process. The usual strategic reticence that characterizes commercial negotiations must yield to transparency.

This broader level of disclosure is the price to pay for a streamlined and expedited process, one that offers enhanced closing certainty and reduced litigation risk. It is a price definitely worth paying.

The Court has said it before: if democracy dies in darkness, insolvency surely dies in opacity. Confidentiality concerns, while legitimate, must be managed in advance by the sophisticated professionals engaged in these proceedings.

Numerous stakeholders stand to be affected by this restructuring, only a fraction of whom are present before the Court today. The Court must remain mindful of their interests. So too must its officer, the trustee.

27.3. A Robust Assessment by the Trustee

For many stakeholders, the trustee's report constitutes their only window into the process. Most will neither attend hearings nor benefit from oral explanations.

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This informational asymmetry must be addressed proactively and requires a more detailed report from the trustee in a prepack context.

The Court's supervisory role does not end with those physically present in the courtroom; it extends to all stakeholders whose rights and interests may be affected.

Correspondingly, the Trustee's mandate is not limited to reporting procedural developments. As an officer of the Court, the Trustee must provide meaningful oversight by explaining how the interests of affected stakeholders have been considered or, where appropriate, why they have not been engaged or accommodated in the circumstances.

In a prepack approval application, the Trustee should provide a detailed report that clearly addresses these fundamental questions in accessible language:

Who is buying?

Stakeholders should be provided with an overview of the purchaser's background and capacity, whether as a strategic buyer, investor, or otherwise. Sufficient information should be provided to assess the purchaser's ability to close and to operate the business post-transaction, as the case may be.

What is being purchased?

The approval hearing is the stress test of the SISP. A detailed timeline of key milestones should form part of the Trustee's summary. The trustee, as an officer of the Court, bears responsibility for distilling what is material and bringing it to the Court's attention.

Where insider interest exists, an explanation of safeguards measures that were put in place is required to ensure process integrity.

Where the trustee and the SISP agent operate under the same professional umbrella, perceived conflicts must be addressed proactively. Measures implemented to separate roles, the analytical process for bids, and the fee structure applicable to each function should be disclosed.

Why Must the Transaction be Approved within a Prepack?

The report must contain a clear and unequivocal recommendation, not only

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in support of the contemplated transaction, but also with respect to the appropriateness of proceeding on an accelerated prepack timeline.

It must further address the relevant statutory considerations under the applicable insolvency regime, including, where applicable, the factors set out in section 65.13(4) of the BIA or section 36(3) of the CCAA.

When will Closing of the Transaction Occur?

The Trustee's report should include a clear closing timeline, identify risk factors affecting closing certainty, and outline plans for remaining assets.

All of this information must be made available to the Court and to stakeholders within a timeframe that is reasonable to permit proper review and meaningful analysis in advance of the hearing.

In a prepack context, what constitutes a reasonable delay will depend on a range of factors: cash flow constraints, the nature of the business, operational realities, and the risk to enterprise value. That said, absent truly exceptional circumstances, such a delay should not be less than one week.

27.4. Broad Level of Support from a Variety of Stakeholders

In a prepack context, the company is effectively insulated from the more transparent phases of a formal insolvency process.

The parties seeking approval of a prepack bear the burden of demonstrating, on a balance of probabilities, that no stone was left unturned in the exploration of viable alternatives, and that meaningful consultation was undertaken with the various stakeholders whose rights and interests stand to be affected.

Although the Court is mindful of the equity subordination principle enshrined in the BIA and CCAA, in a prepack there is generally no compelling reason not to consult shareholders regarding potential rescue financing. Failure to do so may run counter to legitimate expectations and risk allegations akin to an oppression remedy.

Opacity in a process that demands transparency risks fueling cynicism, particularly where some stakeholders allege that the restructuring was orchestrated to sidestep their interests, a *fait accompli* of some sort.

That cannot be the perception left standing. The legitimacy of the process

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is too important to be compromised by what could be perceived as a steamrolling approach.

Commercial insolvency proceedings carry profound consequences: unpaid suppliers, displaced employees, impaired creditors, and extinguished equity. Insolvency legislation seeks to mitigate such harm by preserving viable businesses and avoiding value destruction through liquidation. It bridges distressed capital and distressed opportunity. But this remedy functions only in an environment of transparency.

The extraordinary powers conferred under Canadian insolvency law are not to be exercised in the shadows. The pace of restructuring may require swift decisions made on imperfect information. That reality heightens - not diminishes - the need for openness and stakeholder confidence. Strategic advantages typical of ordinary litigation must yield to the broader objectives of fairness and collective recovery. This is even more true in a prepack context.

27.5. Absence of Objective Reason to Delay the Approval of the Transaction

The parties seeking approval of a prepack bear the burden of demonstrating, on a balance of probabilities, that there is no sound basis to defer the hearing and that genuine urgency justifies proceeding on an expedited basis.

Insolvency proceedings often give rise to compelling commercial considerations that favour swift action; erosion of enterprise value, loss of employees, supplier uncertainty, customer attrition, or the withdrawal of financing, to name but a few. However, something more than mere convenience or procedural efficiency must be shown.

A prepack should remain the exception, not a matter of preference or expediency. It is not a “nice to have” option, but a course of action that must be justified by demonstrable necessity.

[28] This list of criteria is not intended to be exhaustive. Rather, it reflects basic requirements that insolvency professionals should bear in mind when presenting a prepack transaction for judicial approval.

[29] Having regard to these criteria, in this case, the Court is satisfied that the use of a prepack structure to implement the AYK Transaction is appropriate under the circumstances.

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[30] The Court has reviewed the Trustee's initial and supplemental reports (collectively, the "**Reports**"). It heard the testimony of Mr. Philippe Jordan, a seasoned commercial restructuring professional who has been personally involved in this matter since September 2025.

[31] Mr. Jordan testified that he was engaged at every stage of the process, from the initial strategic review, through the implementation of the SISP, and ultimately in connection with the contemplated AYK Transaction. He confirmed that the Debtors' Board of Directors was actively and proactively involved at all key milestones. He further indicated that he participated directly in discussions with prospective investors and purchasers, including certain existing shareholders of the Debtors.

[32] The Court also heard from Mr. Alexandre Aubrey, a member of the Debtors' Board of Directors. Mr. Aubrey testified that institutional shareholders - namely EDC, Investissement Québec, BDC and H&M - collectively held approximately 50% of the outstanding equity and were each represented on the Board.

[33] He corroborated Mr. Jordan's testimony, confirming that the Board had proactively engaged with significant shareholders to assess their interest in providing additional investment. He further confirmed that both the prepack approach and the AYK Transaction were duly considered and approved by the Board.

[34] In addition, the Court benefited from comprehensive and helpful submissions from counsel representing a range of stakeholders.

[35] In short, the Court was provided with the necessary context and a detailed explanation of how matters have unfolded. More importantly, the evidence established why prompt action is required if the Debtors' once-thriving business is to have any realistic prospect of a tomorrow, albeit in a much different and reduced form.

[36] The Court is of the view that the Debtors have discharged their burden of demonstrating that

36.1. Good Faith: The Court is satisfied that the prepack approach is not motivated by any improper purpose.

The AYK Transaction, implemented via a prepack, is designed to mitigate the already substantial anticipated losses of EDC, whose funding has provided the Debtors with the necessary leeway to explore other viable alternatives through the strategic review and SISP. The Trustee testified that EDC's anticipated loss is expected to be in the eight-figure range.

36.2. Advance Disclosure: The strategic review, the Debtors' financial difficulties,

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the SISP, and the need for urgent financing were all matters of public record, as evidenced by the press release issued in October 2025⁸ and coverage in the *Globe & Mail*⁹ and *Bloomberg*¹⁰.

While the Application and the Trustee's Report were made public only a week before the hearing, it can hardly have come as a surprise to any stakeholder that a transaction was forthcoming. The Court is satisfied that there has been a heightened level of advance disclosure.

- 36.3. Robust Assessment of the Trustee: The Court is satisfied that the Trustee's Reports, read as a whole, provide a sufficiently detailed overview of the situation, such that a reasonable person familiar with the industry in which the Debtors operate, and with their historical financing challenges, would be in a position to understand the rationale and contours of the proposed AYK Transaction and the need to proceed with a prepack approach.
- 36.4. Broad Level of Support from a Variety of Stakeholders: On the evening of February 20, 2026, the Court received approximately 800 pages of application materials. It also received correspondence from a shareholder indicating that he had only become aware of the insolvency proceedings, the SISP, and the proposed transaction the previous day.

In an unusual exchange, the Court expressly advised the shareholder that, should he wish to seek an adjournment of the hearing or formally contest the AYK Transaction, he would need to do so through proper procedural channels and with competent legal counsel¹¹. That communication went unanswered. Debtors' counsel, as well as the Trustee, confirmed that the shareholder did not further engage with them.

The Court is satisfied that, at this stage, all affected stakeholders have been duly consulted and that the AYK Transaction, along with the prepack approach, enjoys broad support.

- 36.5. Absence of Objective Reason to Delay the Approval of the Transaction: The prepack approach is designed to mitigate the already substantial losses anticipated by EDC. EDC was well within its rights to withdraw financial support. The Debtors had remained unprofitable for an extended period, with no credible path to profitability in sight. From the standpoint of

⁸ Exhibit P-8.

⁹ Exhibit P-9.

¹⁰ Exhibit P-10.

¹¹ Exhibit P-11.

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legitimate expectations, it would be unreasonable to require EDC to continue funding what had become a persistently loss-making enterprise.

This constitutes a valid commercial rationale for proceeding with a prepack, beyond mere convenience or procedural efficiency. Considering the broad support and consultation undertaken with the stakeholders affected by the AYK Transaction and given the Trustee's assessment that a short delay would not alter the ultimate outcome, the Court is satisfied that there exists no valid commercial reason to defer the prepack. The AYK Transaction should therefore proceed without further delay.

[37] Having determined that the prepack approach is warranted, the Court must now turn to the AYK Transaction and assess whether it meets the standards for approval.

B- The AYK Transaction Must be Approved

[38] Pursuant to section 65.13(4) of the BIA, the Court must approve a sale outside of the ordinary course of business. The factors enumerated in subsection 65.13(4) of the BIA mirror those enumerated in subsection 36(3) of the CCAA such that it is possible to consider case law under the CCAA when deciding whether to approve a transaction under the BIA.

[39] These statutory criteria have been held not to be cumulative or exhaustive. Rather, the Court must look at the proposed transaction as a whole and decide whether it is appropriate, fair and reasonable¹². The criteria largely overlap with the factors enumerated in *Soundair*¹³, which have historically guided Canadian courts in approving transactions in an insolvency context.

[40] The *Soundair* factors thus remain relevant and continue to the cornerstone referenced by Courts when applying the statutory test to determine whether to approve a transaction¹⁴. The *Soundair* factors are as follows:

- 40.1. Whether sufficient effort has been made to get the best price and the debtor has not acted improvidently.
- 40.2. Whether the interests of all parties have been considered.
- 40.3. The efficacy and integrity of the process by which offers have been obtained.

¹² *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 1920, par. 26.

¹³ *Royal Bank of Canada v Soundair Corp.*, 1991 CanLII 2727 (ON CA) ("*Soundair*").

¹⁴ *Royal Bank of Canada v Canwest Aerospace Inc.*, 2024 BCSC 585, par. 24.

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40.4. Whether there has been unfairness in the working out of the process.

[41] The Court is satisfied that the statutory criteria are met in respect to the AYK Transaction:

41.1. The process leading to the AYK Transaction, from the strategic review through the SISP, was conducted in a fair and reasonable manner.

Over the course of approximately three months, 138 potential buyers and investors were invited to participate, 23 of whom executed a standard non-disclosure agreement to access the virtual data room.

This process yielded eight non-binding letters of interest and four binding offers. A robust process that properly canvassed the market.

41.2. The Trustee filed detailed Reports supporting his view that the SISP was fair and reasonable.

41.3. The Trustee believes that the AYT Transaction is more beneficial to creditors than a sale or disposition under a bankruptcy.

41.4. There was a broad consultation of a variety of stakeholders, including main creditors, at all pertinent milestones of the process.

[42] Having heard the Trustee, reviewed his Reports, and considered the representations of counsel for a range of stakeholders, the Court is satisfied that the AYK Transaction represents the best possible outcome under the circumstances and is the product of a fair and reasonable process designed to maximize the value of the Debtors' business. Accordingly, approval of the AYK Transaction is warranted.

[43] This leaves the Court with one final question: whether the proposed RVO structure constitutes an appropriate mechanism to implement the AYK Transaction.

C- The RVO Structure of the AYK Transaction Is Appropriate

[44] The AYT Transaction is structured as a share purchase transaction pursuant to which AYT will acquire 100% of the issued and outstanding shares of the Debtors, such that the Debtors will, upon closing, be wholly owned by AYT, with all excluded or otherwise unwanted assets and liabilities having been carved out and transferred to ResidualCo in accordance with the transaction structure.

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[45] RVOs are aimed at facilitating the sale of a debtor company's shares to a purchaser while transferring unwanted assets and liabilities to a newly incorporated entity as part of a pre-closing reorganization. As Dr. Janis Sarra explains¹⁵:

The result of an RVO is to expunge the existing corporate structure of the debtor company of anything the purchaser does not want. The newco is added to the insolvency proceeding and continues in that process while the debtor company exits the insolvency proceeding with broad liability releases; then the newco is liquidated or placed in bankruptcy to be liquidated. The transaction takes place outside of a negotiated and court-approved plan of arrangement or compromise.

[46] In *Harte Gold*¹⁶ the Ontario Superior Court of Justice sets out the applicable criteria for determining whether it is appropriate to issue an RVO by framing the analysis around the following key questions:

- 46.1. Why is the RVO necessary in this case?
- 46.2. Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
- 46.3. Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative?
- 46.4. Does the consideration paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[47] More recently, in the BIA proceedings of *Brunswick Health*¹⁷, the Honourable Justice Christian Immer concluded that, similar to the CCAA, the BIA empowers the Court to issue RVOs. After an extensive review of the relevant case law, Justice Immer outlined several guiding principles for RVO applications:

- 47.1. The use of an RVO should be unusual and extraordinary, warranting close judicial scrutiny.
- 47.2. The debtor must seek this extraordinary relief in good faith and with due diligence, with a view to achieving the best outcome for all stakeholders.

¹⁵ Janis P Sarra, *Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions*, Canadian Legal Information Institute, 2022 CanLIIDocs 431.

¹⁶ *Harte Gold Corp. (Re)*, 2022 ONSC 653 ("**Harte Gold**").

¹⁷ *Proposition de Brunswick Health Group Inc.*, 2023 QCCS 4643, par. 39.

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47.3. RVOs should not be pursued merely to expedite a desired result, without regard to the remedial objectives of the applicable insolvency regime.

[48] Having considered these criteria, the Court is of the view that the RVO structure of the AYK Transaction is appropriate under the circumstances.

[49] While the Court is mindful of the structural complexity inherent to any RVO, often fully appreciated only by a handful experienced insolvency practitioners and tax advisors, “extraordinary” must not be conflated with “exceptional.”

[50] Since this Court’s decision in *Stornoway*¹⁸, a significant number of corporate restructurings have been implemented through the RVO mechanism. In practice, plans of arrangement and traditional Approval and Vesting Orders (“AVOs”) have, in many instances, receded in favour of the RVO structure as a means of effecting formal insolvency restructurings.

[51] Put simply, although an RVO remains an extraordinary remedy in nature and demands careful judicial scrutiny, it is certainly no longer uncommon¹⁹.

[52] Behind the complexity of the RVO structure, the AYK Transaction is, in substance, a purchase of the Debtors’ intellectual property (“IP”) and finished goods inventory. The excluded assets consist primarily of the plant equipment and various agreements to which the Debtors are party, most notably the lease agreements relating to their manufacturing facilities.

[53] The Debtors and AYK submit that the transaction will not close absent the implementation of an RVO. They characterize it as an essential condition of the deal. Three principal reasons are advanced: (i) the preservation of the Debtors’ Transfer Preference Level (“TPL”); (ii) the avoidance of disruption in the chain of title relating to the Debtors’ IP and patents; and (iii) the preservation of the Debtors’ tax attributes.

[54] The Court turns first to the TPL.

[55] The Debtors currently benefit from a TPL certificate of eligibility issued by *Global Affairs Canada*, pursuant to which export quotas are allocated to qualifying exporters. Under this regime, the Debtors were granted a specified quota permitting exports free of duty.

¹⁸ *Stornoway Diamond Corporation* (October 7, 2019) Montreal C.S.M. 500-11-057094-191 (Justice Louis Gouin).

¹⁹ Victor Olusegun, *The Journey of Reverse Vesting Orders from “Extraordinary” to Ordinary: Is it Time for Parliamentary Intervention?*, 2024 22 *Annual Review of Insolvency Law*, 2024 CanLIIDocs 3053.

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[56] The evidence establishes that securing a TPL allocation can take approximately seven to eight months. The Trustee confirmed this during his testimony. Its preservation through the RVO structure is therefore of critical importance to AYK. The TPL cannot be assigned to a purchaser under a traditional vesting order. AYK cannot reasonably absorb a seven-to eight-month interruption in U.S. exports, nor the imposition of additional tariffs pending requalification.

[57] The RVO structure allows the Debtors to retain the TPL, thereby mitigating the material risk associated with its potential loss, risk which AYK is unwilling to assume.

[58] The Court turns next to the IP and patent rights.

[59] The Debtors hold significant intellectual property and patent rights, the majority of which form part of the retained assets. The RVO structure enables AYK to preserve these rights without additional transfer steps or regulatory approvals, processes that may be both costly and time-consuming. This facilitates and accelerates closing, a consideration of particular importance given the Debtors' ongoing liquidity constraints and pressing going-concern obligations.

[60] Finally, the tax attributes.

[61] The Debtors' tax attributes constitute a material component of the value underpinning the AYK Transaction. The evidence indicates that the RVO structure is the only viable mechanism by which these attributes may be preserved, thereby materially enhancing the consideration payable under the AYK Transaction.

[62] Applying the criteria articulated in *Harte Gold* and *Brunswick Health*, the Court concludes as follows:

- 62.1. The RVO is necessary to implement the AYK Transaction. The evidence is clear that, absent the RVO structure, AYK would not proceed with the AYK Transaction.
- 62.2. The RVO structure forms an integral component of the AYK Transaction, which the Court has already found to represent the best available outcome following a robust SISP. There is not a scintilla of evidence suggesting that a superior, or even equivalent, result could be achieved through an alternative structure that does not involve an RVO.
- 62.3. No evidence was adduced to suggest that any stakeholder would be worse off under the RVO structure than under any other viable alternative. On the contrary, the Trustee's Report indicates that a transaction implemented through a traditional Approval and Vesting Order would yield a materially

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inferior recovery.

- 62.4. The consideration payable under the AYK Transaction reflects the material value attributable to the preservation of the Debtors' intellectual property, the TPL, and the tax attributes, each of which is maintained through the RVO structure.
- 62.5. The RVO structure is sought in good faith, with due diligence, and with a view to achieving the best possible outcome for the stakeholders as a whole.
- 62.6. The RVO is not being pursued merely to expedite a desired outcome without regard to the remedial objectives of the BIA. Rather, it is an essential and value-preserving condition of the AYK Transaction.

III- CONCLUSION

[63] The Debtors' story is, regrettably, an unfortunate one. The record suggests that, absent the imposition of U.S. tariffs, an external development that materially disrupted their operating landscape and liquidity, their trajectory may have been markedly different.

[64] The Court was provided with extensive application materials in advance of the hearing. The evidentiary record was comprehensive, carefully organized, and directed to the determinative issues. The Trustee's testimony provided a detailed, chronological account of the events and restructuring efforts culminating in the present application. Attorney's submissions were measured and well supported, situating the relief sought within the applicable statutory and jurisprudential framework.

[65] These proceedings have advanced on an expedited timetable. The compressed schedule necessitated extensive engagement from the Court and resulted in numerous questions, as well as, at times, vigorous exchanges with the Trustee and counsel for the various parties.

[66] The Court considers it appropriate to acknowledge that the professionalism, preparation, and candour of counsel, the Trustee, and the other professionals involved materially assisted the Court in understanding the factual matrix and legal issues, and in arriving at its determination.

[67] The Court will therefore grant the Application and execute the draft orders submitted.

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FOR THESE REASONS, THE COURT:

[68] **GRANTS** the *Application for the issuance of an Approval and Reverse Vesting Order, and for Ancillary Relief*.

[69] **EXECUTES** the draft “*Approval and Reverse Vesting Order*” annexed to the present judgment and forming part hereof as **Schedule A**.

[70] **EXECUTES** the draft “*Ordonnance d’annulation et de radiation*” annexed to the present judgment and forming part hereof as **Schedule B**.

[71] **THE WHOLE**, without costs.

LUC MORIN. S.C.J.

Mtre Ilia Kravtsov
Mtre Jack M. Little
Mtre Catherine Saya
OLSER, HOSKIN & HARCOURT LLP
Attorneys for the Debtors

Mtre Nathalie Nouvet
Mtre Melis Celikaksoy
STIKEMAN ELLIOTT LLP
Attorneys for the Trustee

Mtre Bertrand Giroux
MILLER THOMSON LLP
Attorney for A.Y.K. International INC.

Hearing date: February 24, 2026

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SCHEDULE A

Approval and Reverse Vesting Order

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SCHEDULE B

Ordonnance d'annulation et de radiation

TAB 16

AbitibiBowater inc. (Arrangement relatif à)

2009 QCCS 6461

SUPERIOR COURT

CANADA
 PROVINCE OF QUEBEC
 DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **NOVEMBER 23, 2009**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:**ABITIBIBOWATER INC.**

And

ABITIBI-CONSOLIDATED INC.

And

BOWATER CANADIAN HOLDINGS INC.

And

The other Petitioners listed on Schedules "A", "B" and "C"

Petitioners

And

ERNST & YOUNG INC.

Monitor

**CORRECTED JUDGMENT
 ON RE-AMENDED MOTION FOR THE APPROVAL OF A SECOND DIP FINANCING
 AND FOR DISTRIBUTION OF CERTAIN PROCEEDS
 OF THE MPCo SALE TRANSACTION TO THE TRUSTEE
 FOR THE SENIOR SECURED NOTES (#312)**

[1] **WHEREAS** the Abitibi Petitioners and the Term Lenders have requested the Court to issue this Corrected Judgment so as to clarify that it does not apply to Abitibi-Consolidated (U.K.) Inc., a Petitioner that was added to the schedule of Abitibi Petitioners by Order of this Court rendered on November 10, 2009, namely after the

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ULC DIP Motion was argued but before the related Judgment of the Court was rendered on November 16, 2009;

[2] **WHEREAS** the request is justified to avoid any misunderstanding as to the exact scope of this Court's Judgment;

[3] **WHEREAS** a small correction to paragraph [17] of the conclusions and the addition of a new paragraph [21.1] are necessary to that end;

FOR THESE REASONS, THE COURT:

ULC DIP Financing

[1] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to enter into, obtain and borrow under a credit facility provided pursuant to a loan agreement (the "**ULC DIP Agreement**") among ACI, as borrower, and 3239432 Nova Scotia Company, an unlimited liability company ("**ULC**"), as lender (the "**ULC DIP Lender**"), to be approved by Alcoa acting reasonably, which terms will be consistent with the ULC DIP Term Sheet communicated as **Exhibit R-1** in support of the ULC DIP Motion, subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor and to modifications required by Alcoa, acting reasonably, which credit facility shall be in an aggregate principal amount outstanding at any time not exceeding **\$230** million.

[2] **ORDERS** that the credit facility provided pursuant to the ULC DIP Agreement (the "**ULC DIP**") will be subject to the following draw conditions:

- a) a first draw of \$130 million to be advanced at closing;
- b) subsequent draws for a maximum total amount of \$50 million in increments of up to \$25 million to be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order which shall apply mutatis mutandis to advances under the ULC DIP; and
- c) the balance of \$50 million shall become available upon further order of the Court.

At the request of the Borrower, all undrawn amounts under the ULC DIP shall either (i) be transferred to the Monitor to be held in an interest bearing account for the benefit of the Borrower providing that any requests for advances thereafter shall continue to be made and processed in accordance herewith as if the transfer had not occurred, or (ii) be invested by ULC in an interest bearing account with all interest earned thereon being for the benefit of and remitted to the Borrower forthwith following receipt thereof.

[3] **ORDERS** the Petitioners to communicate a draft of the substantially final ULC DIP Agreement (the "**Draft ULC DIP Agreement**") to the Monitor and to any party listed on the Service List which requests a copy of same (an "**Interested Party**") no later than five (5) days prior to the anticipated closing of the MPCo Transaction, as said term is defined in the ULC DIP Motion.

[4] **ORDERS** that any Interested Party who objects to any provisions of the Draft ULC DIP Agreement as not being substantially in accordance with the terms of the ULC DIP Term Sheet, Exhibit R-1, or objectionable for any other reason, shall, before the close of business of the day following delivery of the Draft ULC DIP Agreement, make a request for a hearing before this Court stating the grounds upon which such objection is based, failing which the Draft ULC DIP Agreement shall be considered to conform to the ULC DIP Term Sheet and shall be deemed to constitute the ULC DIP Agreement for the purposes of this Order.

[5] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to execute and deliver the ULC DIP Agreement, subject to the terms of this Order and the approval of Alcoa, acting reasonably, as well as such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, mandate and other definitive documents (collectively with the ULC DIP Agreement, the "**ULC DIP Documents**"), as are contemplated by the ULC DIP Agreement or as may be reasonably required by the ULC DIP Lender pursuant to the terms thereof, and the Abitibi Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the ULC DIP Lender under and pursuant to the ULC DIP Documents as and when same become due and are to be performed, notwithstanding any other provision of this Order.

[6] **ORDERS** that the Abitibi Petitioners shall substantially comply with the terms and conditions set forth in the ULC DIP Documents and the 13-week cash flow forecast (the "Budget") provided to the financial advisors of the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party.

[7] **ORDERS** that, in accordance with the terms and conditions of the ULC DIP Documents, the Abitibi Petitioners shall use the proceeds of the ULC DIP substantially in compliance with the Budget, that the Monitor shall monitor the ongoing disbursements of the Abitibi Petitioners under the Budget, and that the Monitor shall forthwith advise the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party of the Monitor's understanding of any pending or anticipated substantial non-compliance with the Budget and/or any other pending or anticipated event of default or termination event under any of the ULC DIP Documents.

[8] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a business plan to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on November 27, 2009.

[9] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a restructuring and recapitalization term sheet (the "Recapitalization Term Sheet") to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on December 15, 2009.

[10] **ORDERS** that, notwithstanding any other provision of this Order, the Abitibi Petitioners shall pay to the ULC DIP Lender when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the ULC DIP Lender on a full indemnity basis (the "**ULC DIP Expenses**") under the ULC DIP Documents and shall perform all of their other obligations to the ULC DIP Lender pursuant to the ULC DIP Documents and this Order.

[11] **ORDERS** that the claims of the ULC DIP Lender pursuant to the ULC DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the ULC DIP Lender, in such capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan or any proposal filed by any Abitibi Petitioner under the *BIA*.

[12] **ORDERS** that the ULC DIP Lender may, notwithstanding any other provision of this Order or the Initial Order:

- a) take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the ACI DIP Charge and the ULC DIP Documents in all jurisdictions where it deems it to be appropriate; and
- b) upon the occurrence of a Termination Event (as each such term is defined in the ULC DIP Documents), refuse to make any advance to the Abitibi Petitioners and terminate, reduce or restrict any further commitment to the Abitibi Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the ULC DIP Lender to the Abitibi Petitioners against any obligation of the Abitibi Petitioners to the ULC DIP Lender, make demand, accelerate payment or give other similar notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Abitibi Petitioners and for the appointment of a trustee in bankruptcy of the Abitibi Petitioners, and upon the occurrence of an event of default under the terms of the ULC DIP Documents, the ULC DIP Lender shall be entitled to apply to the Court to seize and retain proceeds from the sale of any of the Property of the Abitibi Petitioners and the cash flow of the Abitibi Petitioners to repay amounts owing to the ULC DIP Lender in accordance with the ULC DIP Documents and the ACI DIP Charge.

[13] **ORDERS** that the foregoing rights and remedies of the ULC DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and

manager of the Abitibi Petitioners or the Property of the Abitibi Petitioners, the whole in accordance with and to the extent provided in the ULC DIP Documents.

[14] **ORDERS** that the ULC DIP Lender shall not take any enforcement steps under the ULC DIP Documents or the ACI DIP Charge without providing five (5) business day (the "**Notice Period**") written enforcement notice of a default thereunder to the Abitibi Petitioners, the Monitor, the Senior Secured Noteholders, Alcoa, the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the ULC DIP Lender shall be entitled to take any and all steps and exercise all rights and remedies provided for under the ULC DIP Documents and the ACI DIP Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the *BIA*. For greater certainty, the ULC DIP Lender may issue a prior notice pursuant to Article 2757 CCQ concurrently with the written enforcement notice of a default mentioned above.

[15] **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 61.1 to 61.9 of the Initial Order, the approval of the ULC DIP Documents or the ACI DIP Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, Alcoa, the Senior Secured Noteholders and the ULC DIP Lender by the moving party and returnable within seven (7) days after the party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) each of the ULC DIP Lender and Alcoa applies for or consents to such order.

[16] **ORDERS** that 3239432 Nova Scotia Company is authorized to assign its interest in the ULC DIP to Alcoa pursuant to the security agreements and guarantees to be granted pursuant to the Implementation Agreement and this Court's Order dated September 29, 2009.

[17] **AMENDS** the Initial Order issued by this Court on April 17, 2009 (as amended and restated) by adding the following at the end of paragraph 61.3:

"**ORDERS** further, that from and after the date of closing of the MPCo Transaction (as said term is defined in the Petitioners' ULC DIP Motion dated November 9, 2009) and provided the principal, interest and costs under the ACI DIP Agreement (as defined in the Order of this Court dated May 6, 2009), are concurrently paid in full, the ACI DIP Charge shall be increased by the aggregate amount of **\$230** million (subject to the same limitations provided in the first sentence hereof in relation to the Replacement Securitization Facility) and shall be extended by a movable and immovable hypothec, mortgage, lien and security interest on all property of the Abitibi Petitioners (other than the property of Abitibi Consolidated (U.K.) Inc.) in favour of the ULC DIP Lender for all amounts owing, including principal, interest and ULC DIP Expenses and all obligations required to be performed under or in connection with the ULC

DIP Documents. The ACI DIP Charge as so increased shall continue to have the priority established by paragraphs 89 and 91 hereof provided such increased ACI DIP Charge (being the portion of the ACI DIP Charge in favour of the ULC DIP Lender) shall in all respects be subordinate (i) to the subrogation rights in favour of the Senior Secured Noteholders arising from the repayment of the ACI DIP Lender from the proceeds of the sale of the MPCo transaction as approved by this Court in its Order of September 29, 2009 and as confirmed by paragraph 11 of that Order, notwithstanding the amendment of paragraph 61.10 of this Order by the subsequent Order dated November 16, 2009, as well as the further subrogation rights, if any, in favour of the Term Lenders; and (ii) rights in favour of the Term Lenders arising from the use of cash for the payment of interest fees and accessories as determined by the Monitor. No order shall have the effect of varying or amending the priority of the ACI DIP Charge and the interest of the ULC DIP Lender therein without the consent of the Senior Secured Noteholders and Alcoa. The terms "ULC DIP Lender", "ULC DIP Documents", "ULC DIP Expenses", "Senior Secured Noteholders" and "Alcoa" shall be as defined in the Order of this Court dated November 16, 2009. Notwithstanding the subrogation rights created or confirmed herein, in no event shall the ULC DIP Lender be subordinated to more than approximately \$40 million, being the aggregate of the proceeds of the MPCo Transaction paid to the ACI DIP Lender plus the interest, fees and expenses paid to the ACI DIP Lender as determined by the Monitor."

ACI DIP Agreement

[18] **ORDERS** that the Abitibi Petitioners are hereby authorized to make, execute and deliver one or more amendment agreements in connection with the ACI DIP Agreement providing for (i) an extension of the period during which any undrawn portion of the credit facility provided pursuant to the ACI DIP Agreement shall be available and (ii) the modification of the date upon which such credit facility must be repaid from November 1, 2009 to the earlier of the closing of the MPCo Transaction and December 15, 2009, subject to the terms and conditions set forth in the ACI DIP Agreement, save and except for non-material amendments.

Senior Secured Notes Distribution

[19] **ORDERS** that the Abitibi Petitioners are authorized and directed to make a distribution to the Trustee of the Senior Secured Notes in the amount of \$200 million upon completion of the MPCo Transaction (as said term is defined in the ULC DIP Motion) from the proceeds of such sale and of the ULC DIP Facility, providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction.

[20] **ORDERS** that, subject to completion of the ULC DIP (including the initial draw of \$130 million thereunder) and providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction, the distribution referred to in the preceding paragraph and the flow of funds upon completion of the MPCo Transaction and the ULC DIP shall be arranged in accordance with the following principles: (a) MPCo Proceeds shall be used, first, to fund the distribution to the Senior Secured Notes referenced in the previous paragraph and, secondly, to fund the repayment of the ACI DIP; (b) the initial draw of \$130 million made under the ULC DIP shall fund any remaining balance due to repay in full the ACI DIP and this, upon completion of the MPCo Transaction. The Monitor shall be authorized to review the completion of the MPCo Transaction, the ULC DIP and the repayment of the ACI DIP and shall report to the Court regarding compliance with this provision as it deems necessary.

Amendment to the Subrogation Provision

[21] **ORDERS** that Subsection 61.10 of the Initial Order, as amended and restated, is replaced by the following:

Subrogation to ACI DIP Charge

[61.10] **ORDERS** that the holders of Secured Notes, the Lenders under the Term Loan Facility (collectively, the "**Secured Creditors**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (collectively, the "**Lien Holder**") that hold security over assets that are subject to the ACI DIP Charge and that, as of the Effective Time, was opposable to third parties (including a trustee in bankruptcy) in accordance with the law applicable to such security (an "**Impaired Secured Creditor**" and "**Existing Security**", respectively) shall be subrogated to the ACI DIP Charge to the extent of the lesser of (i) any net proceeds from the Existing Security including from the sale or other disposition of assets, resulting from the collection of accounts receivable or other claims (other than Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) and/or cash that is subject to the Existing Security of such Impaired Secured Creditor that is used directly to pay (a) the ACI DIP Lender or (b) another Impaired Secured Creditor (including by any means of realization) on account of principal, interest or costs, in whole or in part, as determined by the Monitor (subject to adjudication by the Court in the event of any dispute) and (ii) the unpaid amounts due and/or becoming due and/or owing to such Impaired Secured Creditor that are secured by its Existing Security. For this

purpose "**ACI DIP Lender**" shall be read to include Bank of Montreal, IQ, the ULC DIP Lender and their successors and assigns, including any lender or lenders providing replacement DIP financing should same be approved by subsequent order of this Court. No Impaired Secured Creditor shall be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the ACI DIP Lender have been paid in full and providing that all rights of subrogation hereunder shall be postponed to the right of subrogation of IQ under the IQ Guarantee Offer, and, for greater certainty, no subrogee shall have any rights over or in respect of the IQ Guarantee Offer. In the event that, following the repayment in full of the ACI DIP Lender in circumstances where that payment is made, wholly or in part, from net proceeds of the Existing Security of an Impaired Secured Creditor (the "**First Impaired Secured Creditor**"), such Impaired Secured Creditor enforces its right of subrogation to the ACI DIP Charge and realizes net proceeds from the Existing Security of another Impaired Secured Creditor (the "**Second Impaired Secured Creditor**"), the Second Impaired Secured Creditor shall not be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the First Impaired Secured Creditor have been paid in full. In the event that more than one Impaired Secured Creditor is subrogated to the ACI DIP Charge as a result of a payment to the ACI DIP Lender, such Impaired Secured Creditors shall rank *pari passu* as subrogees, rateably in accordance with the extent to which each of them is subrogated to the ACI DIP Charge. The allocation of the burden of the ACI DIP Charge amongst the assets and creditors shall be determined by subsequent application to the Court if necessary."

[21.1] **DECLARES** that for the purposes of paragraphs 1, 5, 10, 12, 13, 17 and 18 of the present Order, the term "Abitibi Petitioners" shall not include Abitibi-Consolidated (U.K.) Inc. added to the schedule of Abitibi Petitioners by Order of this Court on November 10, 2009;

[22] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

[23] **WITHOUT COSTS.**

CLÉMENT GASCON, J.S.C.

Me Sean Dunphy and Me Joseph Reynaud
STIKEMAN, ELLIOTT
Attorneys for Petitioners

Me Robert Thornton

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THORNTON GROUT FINNIGAN
Attorneys for the Monitor

Me Jason Dolman
FLANZ FISHMAN MELAND PAQUIN
Attorneys for the Monitor

Me Alain Riendeau
FASKEN MARTINEAU DuMOULIN
Attorneys for Wells Fargo Bank, N.A., Administrative Agent under the Credit and
Guarantee Agreement Dated April 1, 2008

Me Marc Duchesne
BORDEN, LADNER, GERVAIS
Attorneys for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank
National Association, Indenture Trustee for the Senior Secured Noteholders

Me Frederick L. Myers
GOODMANS LLP
Co-Counsel for the Ad Hoc Committee of Unsecured Noteholders of AbitibiBowater Inc.
and certain of its Affiliates

Me Jean-Yves Simard
LAVERY, DE BILLY
Co-Counsel for the Ad Hoc Committee of Unsecured Noteholders of AbitibiBowater Inc.
and certain of its Affiliates

Me Patrice Benoît
GOWLING LAFLEUR HENDERSON LLP
Attorneys for Investissement Québec

Me S. Richard Orzy
BENNETT JONES
Attorneys for the Official Committee of Unsecured Creditors of AbitibiBowater Inc. & Al.

Me Frédéric Desmarais
McMILLAN LLP
Attorneys for Bank of Montreal

Me Anastasia Flouris
KUGLER, KANDESTIN, LLP
Attorneys for Alcoa

Date of hearing: November 23, 2009

SCHEDULE "A"
ABITIBI PETITIONERS

1. ABITIBI-CONSOLIDATED INC.
2. ABITIBI-CONSOLIDATED COMPANY OF CANADA
3. 3224112 NOVA SCOTIA LIMITED
4. MARKETING DONOHUE INC.
5. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
6. 3834328 CANADA INC.
7. 6169678 CANADA INC.
8. 4042140 CANADA INC.
9. DONOHUE RECYCLING INC.
10. 1508756 ONTARIO INC.
11. 3217925 NOVA SCOTIA COMPANY
12. LA TUQUE FOREST PRODUCTS INC.
13. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
14. SAGUENAY FOREST PRODUCTS INC.
15. TERRA NOVA EXPLORATIONS LTD.
16. THE JONQUIERE PULP COMPANY
17. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY
18. SCRAMBLE MINING LTD.
19. 9150-3383 QUÉBEC INC.
20. ABITIBI-CONSOLIDATED (U.K.) INC.

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SCHEDULE "B"
BOWATER PETITIONERS

1. BOWATER CANADIAN HOLDINGS INC.
2. BOWATER CANADA FINANCE CORPORATION
3. BOWATER CANADIAN LIMITED
4. 3231378 NOVA SCOTIA COMPANY
5. ABITIBIBOWATER CANADA INC.
6. BOWATER CANADA TREASURY CORPORATION
7. BOWATER CANADIAN FOREST PRODUCTS INC.
8. BOWATER SHELBURNE CORPORATION
9. BOWATER LAHAVE CORPORATION
10. ST-MAURICE RIVER DRIVE COMPANY LIMITED
11. BOWATER TREATED WOOD INC.
12. CANEXEL HARDBOARD INC.
13. 9068-9050 QUÉBEC INC.
14. ALLIANCE FOREST PRODUCTS (2001) INC.
15. BOWATER BELLEDUNE SAWMILL INC.
16. BOWATER MARITIMES INC.
17. BOWATER MITIS INC.
18. BOWATER GUÉRETTE INC.
19. BOWATER COUTURIER INC.

SCHEDULE "C"**18.6 CCAA PETITIONERS**

1. ABITIBIBOWATER INC.
2. ABITIBIBOWATER US HOLDING 1 CORP.
3. BOWATER VENTURES INC.
4. BOWATER INCORPORATED
5. BOWATER NUWAY INC.
6. BOWATER NUWAY MID-STATES INC.
7. CATAWBA PROPERTY HOLDINGS LLC
8. BOWATER FINANCE COMPANY INC.
9. BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED
10. BOWATER AMERICA INC.
11. LAKE SUPERIOR FOREST PRODUCTS INC.
12. BOWATER NEWSPRINT SOUTH LLC
13. BOWATER NEWSPRINT SOUTH OPERATIONS LLC
14. BOWATER FINANCE II, LLC
15. BOWATER ALABAMA LLC
16. COOSA PINES GOLF CLUB HOLDINGS LLC

AbitibiBowater inc. (Arrangement relatif à)

2009 QCCS 6461

SUPERIOR COURT

CANADA
 PROVINCE OF QUEBEC
 DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **NOVEMBER 16, 2009**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.

And

ABITIBI-CONSOLIDATED INC.

And

BOWATER CANADIAN HOLDINGS INC.

And

The other Petitioners listed on Schedules "A", "B" and "C"

Petitioners

And

ERNST & YOUNG INC.

Monitor

JUDGMENT

**ON RE-AMENDED MOTION FOR THE APPROVAL OF A SECOND DIP FINANCING
 AND FOR DISTRIBUTION OF CERTAIN PROCEEDS
 OF THE MPCo SALE TRANSACTION TO THE TRUSTEE
 FOR THE SENIOR SECURED NOTES (#312)**

INTRODUCTION

[1] In the context of their CCAA¹ restructuring, the Abitibi Petitioners² present a Motion³ for 1) the approval of a second DIP financing and 2) the distribution of certain proceeds of the Manicouagan Power Company ("**MPCo**") sale transaction to the Senior Secured Noteholders ("**SSNs**").

[2] More particularly, the Abitibi Petitioners seek:

- 1) Orders authorizing Abitibi Consolidated Inc. ("**ACI**") and Abitibi Consolidated Company of Canada Inc. ("**ACCC**") to enter into a Loan Agreement (the "**ULC DIP Agreement**") with 3239432 Nova Scotia Company ("**ULC**"), as lender, providing for a CDN\$230 million super-priority secured debtor in possession credit facility (the "**ULC DIP Facility**").

The ULC DIP Facility is to be funded from the ULC reserve of approximately CDN\$282.3 million (the "**ULC Reserve**"), with terms that will be substantially in the form of the term sheet (the "**ULC DIP Term Sheet**") attached to the ULC DIP Motion;

- 2) Orders authorizing the distribution to the SSNs of up to CDN\$200 million upon completion of the sale of ACCC's 60% interest in MPCo and Court approval of the ULC DIP Agreement.

The distribution is to be paid from the net proceeds of the MPCo sale transaction after the payments, holdbacks, reserves and deductions provided for in the Implementation Agreement agreed upon in regard to that transaction; and

- 3) Orders amending the Second Amended Initial Order to increase the super priority charge set out in paragraph 61.3 (the "**ACI DIP Charge**") in respect of the ACI DIP Facility by an amount of CDN\$230 million in favour of ULC for all amounts owing in connection with the ULC DIP Facility.

¹ *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**").

² In this Judgment, all capitalized terms not otherwise defined have the meaning ascribed thereto in either: 1) the *Second Amended Initial Order* issued by the Court on May 6, 2009; 2) the *Motion for the Distribution by the Monitor of Certain Proceeds of the MPCo Sale Transaction to U.S. Bank National Association, Indenture and Collateral Trustee for the Senior Secured Noteholders* (the "**Distribution Motion**") of the Ad Hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Notes (respectively, the "**Committee**" and "**Trustee**", collectively the "**SSNs**") dated October 6, 2009; or 3) the Abitibi Petitioners' *Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes* (the "**ULC DIP Motion**") dated November 9, 2009.

³ *Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes* dated November 9, 2009 (the "**ULC DIP Motion**").

This increase in the ACI DIP Charge is to still be subordinated to any and all subrogated rights in favour of the SSNs, the lenders under the ACCC Term Loan (the "**Term Lenders**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (the "**Lien Holders**") arising under paragraph 61.10 of the Second Amended Initial Order.

[3] The SSNs and the Term Lenders, the only two secured creditor groups of the Abitibi Petitioners, do not, in the end, contest the ULC DIP Motion. Pursuant to intense negotiations and following concessions made by everyone, an acceptable wording to the orders sought was finally agreed upon on the eve of the hearing. The efforts of all parties and Counsel involved are worth mentioning; the help and guidance of the Monitor and its Counsel as well.

[4] Of the unsecured creditors and other stakeholders, only the Ad Hoc Unsecured Noteholders Committee (the "**Bondholders**") opposes the ULC DIP Motion, and even there, just in part. At hearing, Counsel for the Official Committee of Unsecured Creditors set up in the corresponding U.S. proceedings pending in the State of Delaware also voiced that his client shared some of the Bondholders' concerns.

[5] In short, while not contesting the request for approval of the second DIP financing, the Bondholders contend that the CDN\$200 million immediate proposed distribution to the SSNs is inappropriate and uncalled for at this time.

[6] Before analyzing the various orders sought, an overview of the MPCo sale transaction and of the ULC DIP Facility that are the subject of the debate is necessary.

THE MPCo SALE TRANSACTION

[7] The MPCo sale transaction is central to the orders sought in the ULC DIP Motion.

[8] Under the terms of an Implementation Agreement signed in that regard, Hydro-Québec ("**HQ**") agreed to pay ACCC CDN\$615 million (the "**Purchase Price**") for ACCC's 60% interest in MPCo.

[9] Of this amount, it is expected that (i) CDN\$25 million will be paid at closing to Alcoa, the owner of the other 40% interest in MPCo, for tax liabilities; (ii) approximately CDN\$31 million will be held by HQ for two years to secure various indemnifications (the "**HQ Holdback**"); (iii) certain inter-party accounts will be settled; (iv) the CDN\$282.3 million ULC Reserve, set up primarily to guarantee potential contingent pension liabilities and taxes resulting from the Proposed Transactions, will be held by the Monitor in trust for the ULC pending further Order of the Court; and (v) the ACI DIP Facility will be repaid.

[10] That said, until the sale, ACCC's 60% interest in MPCo remains subject to the SSN's first ranking security. This first ranking security interest has never been

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contested by any party. In fact, after their review of same, the Monitor's Counsel concluded that it is valid and enforceable⁴.

[11] Accordingly, the proceeds of the sale less adjustments, holdbacks and reserve would normally be paid to the SSNs as holders of valid first ranking security over this asset.

[12] To that end, the SSNs' claim of US\$477,545,769.53 (US\$413 million in principal and US\$64,545,769.53 in interest as at October 1st, 2009) is not really contested except for a 0.5% to 2% additional default interest over the 13.75% original loan rate.

[13] In that context, on September 29, 2009, the Court issued an Order approving the sale of ACCC's 60% interest in MPCo on certain conditions. Amongst others, the Court:

- a) Approved the terms and conditions of the Implementation Agreement;
- b) Authorized and directed ACI and ACCC to implement and complete the Proposed Transactions with such non-material alterations or amendments as the parties may agree to with the consent of the Monitor;
- c) Declared that (i) the proceeds from the Proposed Transactions, net of certain payments, holdbacks, reserves and deductions, and (ii) the shares of the ULC, shall constitute and be treated as proceeds of the disposition of ACCC's MPCo shares (collectively, the **"MPCo Share Proceeds"**);
- d) Declared that the MPCo Share Proceeds extend to and include (a) ACCC's interest in the HQ Holdback and (b) ACCC's interest in claims arising from the satisfaction of related-party claims;
- e) Declared that the MPCo Share Proceeds will be subject to a replacement charge (the **"MPCo Noteholder Charge"**) in favour of the SSNs with the same rank and priority as the security held in respect of the ACCC's MPCo shares;
- f) Declared that the ULC Reserve is subject to a charge in favour of the SSNs which is subordinate to a charge in favour of Alcoa (the **"ULC Reserve Charge"**); and
- g) Ordered that the cash component of the MPCo Share Proceeds and the ULC Reserve be paid to and held by the Monitor in an interest bearing account or investment grade marketable securities pending further Order of the Court.

[14] The Proposed Transactions are not expected to close until the latter part of November or early December 2009. ACI has requested and obtained an extension

⁴ See Monitor's 19th Report dated October 27, 2009.

from Investissement Quebec (“**IQ**”) to December 15, 2009 for the repayment of the ACI DIP Facility that matured on November 1st, 2009.

[15] Based on the amounts of the significant payments, holdbacks, reserves and deductions from the Purchase Price, and considering that the amount drawn under the ACI DIP Facility presently stands at CDN\$54.8 million, the Net Available Proceeds after payment of the ACI DIP Facility would be approximately CDN\$173.9 million.

THE ULC DIP FACILITY

[16] Pursuant to the Implementation Agreement, ULC is required to maintain the ULC Reserve. On the closing of the Proposed Transactions, ULC will hold the ULC Reserve in the amount of approximately CDN\$282.3 million.

[17] This amount may be used for a limited number of purposes (the “**Permitted Investments**”) that are described in the Implementation Agreement. Such Permitted Investments include making a DIP loan to either ACI or ACCC.

[18] Based on that, the ULC DIP Term Sheet provides that the ACI Group will borrow CDN\$230 million from the ULC Reserve as a Permitted Investment.

[19] According to the Monitor⁵, the significant terms of the ULC DIP Term Sheet are as follows:

- i) **Manner of Borrowing** – Initially, the ULC DIP Facility was to be available by way of an immediate draw of CDN\$230 million. After negotiations with the Term Lenders, it was rather agreed that (i) a first draw of CDN\$130 million will be advanced at closing, (ii) subsequent draws for a maximum total amount of CDN\$50 million in increments of up to CDN\$25 million will be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order, and (iii) the balance of CDN\$50 million shall become available upon further order of the Court.
- ii) **Interest Payments** – No interest will be payable on the ULC DIP Facility;
- iii) **Fees** – No fees are payable in respect of the ULC DIP Facility;
- iv) **Expenses** – The borrowers will pay all reasonable expenses incurred by ULC and Alcoa in connection with the ULC DIP Facility;
- v) **Reporting** – Reporting will be similar to that provided under the ACI DIP Facility and copies of all financial information will be placed in the data room. Reporting will include notice of events of default or maturing events of default;

⁵ See Monitor's 19th Report dated October 27, 2009.

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- vi) **Use of Proceeds** – The ULC DIP Facility will be used for general corporate purposes in material compliance with the 13-week cash flow forecasts to be provided no less frequently than the first Friday of each month (the “**Budget**”);
- vii) **Events of Default** – The events of default include the following:
 - (a) Substantial non-compliance with the Budget;
 - (b) Termination of the CCAA Stay of Proceedings;
 - (c) Failure to file a CCAA Plan with the Court by September 30, 2010; and
 - (d) Withdrawal of the existing Securitization Program unless replaced with a reasonably similar facility;
- viii) **Rights of Alcoa** – Alcoa will receive all reporting noted above and notices of events of default. Alcoa’s consent is required for any amendments or waivers;
- ix) **Rights of Senior Secured Noteholders** – The Senior Secured Noteholders’ rights consist of:
 - (a) Receiving all reporting noted above and any notice of an Event of Default;
 - (b) Consent of Senior Secured Noteholders holding a majority of the principal amount of the Senior Secured Notes is required for any amendments to the maximum amount of the ULC DIP Facility or any change to the Outside Maturity Date or the interest rate;
 - (c) Upon an Event of Default, there is no right to accelerate payment or maturity, subject to the right to apply to Court for the termination of the ULC DIP Facility, which right is without prejudice to the right of ACI, ACCC, the ULC or Alcoa to oppose such application;
 - (d) Entitlement to review draft of documents, but final approval of such documents is in Alcoa’s sole discretion; and
 - (e) Entitlement to request the approval of the Court to amend any monthly cash flow budget which has been filed;
- x) **Security** – Security is similar to the existing ACI DIP Facility and ranking immediately after the existing ACI DIP Charge. There are no charges on the assets of the Chapter 11 Debtors (as defined in the existing ACI DIP Facility).

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[20] The Monitor notes that the ULC DIP Facility will provide the ACI Group with additional net liquidity (after the retirement of the ACI DIP Facility and after the payment of the proposed distribution to the SSNs) in the amount of some CDN\$167 million.

THE QUESTIONS AT ISSUE

[21] In light of this background, the Court must answer the following questions:

- 1) Should the ULC DIP Facility of CDN\$230 million be approved?
- 2) Should the proposed distribution of CDN\$200 million to the SSNs be authorized?
- 3) Is the wording of the orders sought appropriate, notably with regard to the additions proposed by the Bondholders in terms of the future steps to be taken by the Abitibi Petitioners?

ANALYSIS AND DISCUSSION

1) THE APPROVAL OF THE DIP FINANCING

[22] In the Court's opinion, the second DIP financing, that is, the ULC DIP Facility of CDN\$230 million, should be approved on the amended terms agreed upon by the numerous parties involved.

[23] In this restructuring, the Court has already approved DIP financing in respect of both the Abitibi Petitioners and the Bowater Petitioners.

[24] On April 22, 2009, it issued a Recognition Order (U.S. Interim DIP Order) recognizing an Interim Order of the U.S. Bankruptcy Court for a DIP loan of up to US\$206 million to the Bowater Petitioners. On May 6, 2009, it approved the ACI DIP Facility, a US\$100 million loan to the Abitibi Petitioners by Bank of Montreal ("**BMO**"), guaranteed by IQ.

[25] The jurisdiction of the Court to approve DIP financing and the requirement of the Abitibi Petitioners for such were canvassed at length in the May 6 Judgment. The requirements of the Abitibi Petitioners for liquidity and the authority of the Court to approve agreements to satisfy those requirements have already been reviewed and ruled upon.

[26] There have been no circumstances intervening since the approval of the ACI DIP Facility that can fairly be characterized as negating the requirement of the Abitibi Petitioners for DIP financing.

[27] The only issue here is whether this particular ULC DIP Facility proposal, replacing as it does the prior ACI DIP Facility, is one that the Court ought to approve. As indicated earlier, the answer is yes.

[28] At this stage in the proceedings where the phase of business stabilization is largely complete, the Court is not required to approach the subject of DIP financing from the perspective of excessive caution or parsimony.

[29] On the one hand, as highlighted notably by the Monitor⁶, the Abitibi Petitioners have presented substantial reasons to support their need for liquidity by way of a DIP loan. Suffice it to note to that end that:

- a) Without an adequate cushion, in view of potential adverse exchange rate fluctuations and further adverse price declines in the market, the Abitibi Petitioners' liquidity could easily be insufficient to meet the requirements of its Securitization Program (Monitor's 19th Report at paragraphs 49, 50 and chart at paragraph 61);
- b) Absent a DIP loan, there is, in fact, a "high risk of default" under the Securitization Program (Monitor's 19th Report at paragraph 32);
- c) Despite Abitibi Petitioners' best efforts at forecasting, weekly cash flow forecasts have varied by as much as US\$26 million. Weekly disbursements have varied by 100%. Each 1¢ variation in the foreign exchange rate as against the US dollar could produce a US\$17 million negative cash flow variation. The ultimate cash flow requirements will be highly dependent on variables that the Abitibi Petitioners' cannot control (Monitor's 19th Report at paragraphs 54, 60 and 61);
- d) The market decline has eroded the Abitibi Petitioners' liquidity, while foreign exchange fluctuations are placing further strain on this liquidity. Even if prices increase, the resulting need for additional working capital to increase production will paradoxically put yet further strain on this liquidity;
- e) Without the ULC DIP Facility, the Abitibi Petitioners would lack access to sufficient operating credit to maintain normal operations. They would be significantly impaired in their ability to operate in the ordinary course and they would face an increase in the risk of unexpected interruptions; and
- f) The Abitibi Petitioners have yet to complete their business plan and it is premature to predict the length of the proceedings (Monitor's 19th Report at paragraphs 47 and 48).

[30] In fact, based upon its sensitivity analysis, the inter-month variability of the cash flows, the minimum liquidity requirements under the Securitization Program, and the requirement to repay the ACI DIP Facility, the Monitor is of the view that the Abitibi Petitioners need the new ULC DIP Facility to ensure that ACI has sufficient liquidity to complete its restructuring.

⁶ See Monitor's 19th Report dated October 27, 2009.

[31] On the other hand, the reasonableness of the amount of the ULC DIP Facility is supported by the following facts:

- a) Only about CDN\$168 million of incremental liquidity is being provided and post-transaction, the Abitibi Petitioners will have, at best, about CDN\$335 million of liquidity (Monitor's 19th Report at paragraph 68);
- b) The Bowater Petitioners, a group of the same approximate size as the Abitibi Petitioners, enjoy liquidity of approximately US\$400 million (Monitor's 19th Report at paragraph 69) and a DIP facility of approximately US\$200 million;
- c) Even with the ULC DIP Facility, the Abitibi Petitioners will be at the low end of average relative to their peers in terms of available liquidity relative to their size;
- d) The cash flow of the Abitibi Petitioners is subject to significant intra-month variations and has risks associated with pricing and currency fluctuations which are larger the longer the period examined; and
- e) The Abitibi Petitioners are required by the Securitization Facility to maintain liquidity on a rolling basis above US\$100 million.

[32] In addition, the Court and the stakeholders have all the means necessary at their disposal to monitor the use of liquidity without, at the same time, having to ration its access at a level far below that enjoyed by the peers with whom the Abitibi Petitioners compete.

[33] In this regard, it is important to emphasize that the ULC DIP Facility includes, after all, particularly interesting conditions in terms of interest payments and associated fees. Because ULC is the lender, none are payable.

[34] Finally, the provisions of section 11.2 of the amended CCAA, and in particular the factors for review listed in subsection 11.2(4), are instructive guidelines to the exercise of the Court's discretion to approve the ULC DIP Facility.

[35] Pursuant to subsection 11.2(4) of the amended CCAA, for restructurings undertaken after September 18, 2009, the judge is now directed to consider the following factors in determining whether to exercise his or her discretion to make an order such as this one:

- a) The period during which the company is expected to be subject to CCAA proceedings;
- b) How the company's business and financial affairs are to be managed during the proceedings;

- c) Whether the company's management has the confidence of its major creditors;
- d) Whether the loan would enhance the prospects of a viable compromise or arrangement being made;
- 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.

[36] Applying these criteria to this case, it is, first, premature to speculate how long the Abitibi Petitioners will remain subject to proceedings under the CCAA.

[37] The Monitor's 19th Report has considered cash flow forecasts until December 2010. The Abitibi Petitioners are hopeful of progressing to a plan outline by year-end with a view to emergence in the first or second quarter of 2010.

[38] In considering a DIP financing proposal, the Court can take note of the fact that the time and energies ought, at this stage in the proceedings, to be more usefully and profitably devoted to completing the business restructuring, raising the necessary exit financing and negotiating an appropriate restructuring plan with the stakeholders.

[39] Second, even if the ULC DIP Facility of CDN\$230 million is a high, albeit reasonable, figure under the circumstances, access to the funds and use of the funds remain closely monitored.

[40] Based on the compromise reached with the Term Lenders, access to the funds will be progressive and subject to control. The initial draw is limited to CDN\$130 million. Subsequent additional draws up to CDN\$50 million will be in maximum increments of CDN\$25 million and subject to prior notice. The final CDN\$50 million will only be available with the Court's approval.

[41] As well, the use of the funds is subject to considerable safeguards as to the interests of all stakeholders. These include the following:

- a) The Monitor is on site monitoring and reviewing cash flow sources and uses in real time with full access to senior management, stakeholders and the Court;
- b) Stakeholders have very close to real time access to financial information regarding sources and use of cash flow by reason of the weekly cash flow forecasts provided to their financial advisors and the weekly calls with such financial advisors, participated in by senior management;

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- c) The Monitor provides regular reporting to the Court including as to the tracking of variances in cash use relative to forecast and as to evolution of the business environment in which the Abitibi Petitioners are operating; and
- d) All stakeholders have full access to this Court to bring such motions as they see fit should a material adverse change in the business or affairs intervene.

[42] Third, there has been no suggestion that the management of the Abitibi Petitioners has lost the confidence of its major creditors. To the contrary:

- a) Management has successfully negotiated a settlement of very complex and thorny issues with both the Term Lenders and the SSNs, which has enabled this ULC DIP Motion to be brought forward with their support;
- b) While management does not agree with all positions taken by the Bondholders at all times, it has by and large enjoyed the support of that group throughout these proceedings;
- c) Management has been attentive to the suggestions and guidance of the Monitor with the result that there have been few if any instances where the Monitor has been publicly obliged to oppose or take issue with steps taken;
- d) Management has been proactive in hiring a Chief Restructuring Officer who has provided management with additional depth and strength in navigating through difficult circumstances; and
- e) The Abitibi Petitioners' management conducts regular meetings with the financial advisors of their major stakeholders, in addition to having an "open door" policy.

[43] The Court is satisfied that, in requesting the approval of the ULC DIP Facility, management is doing so with a broad measure of support and the confidence of its major creditor constituencies.

[44] Fourth, with an adequate level of liquidity, the Abitibi Petitioners will be able to run their business as a going concern on as normal a basis as possible, with a view to enhancing and preserving its value while the restructuring process proceeds.

[45] By facilitating a level of financial support that is reasonable and adequate and of sufficient duration to enable them to complete the restructuring on most reasonable assumptions, the Abitibi Petitioners will have the benefit of an umbrella of stability around their core business operations.

[46] In the Court's opinion, this can only facilitate the prospects of a viable compromise or arrangement being found.

[47] Fifth, there are only two secured creditor groups of the Abitibi Petitioners: the SSNs and the Term Lenders. After long and difficult negotiations, they finally agreed to an acceptable wording to the orders sought. No one argues any longer that it is prejudiced in any way by the proposed security or charge.

[48] Lastly, sixth, the Monitor has carefully considered the positions of all of the stakeholders as well as the reasonableness of the Abitibi Petitioners' requirements for the proposed ULC DIP Facility. Having reviewed both the impact of the proposed ULC DIP Facility on stakeholders and its beneficial impact upon the Abitibi Petitioners, the Monitor recommends approval of the ULC DIP Facility.

[49] On the whole, in approving this ULC DIP Facility, the Court supports the very large consensus reached and the fine balance achieved between the interests of all stakeholders involved.

2) THE DISTRIBUTION TO THE SSNs

[50] The approval of the terms of the ULC DIP Facility by the SSNs is intertwined with the Abitibi Petitioners' agreement to support a distribution in their favor in the amount of CDN\$200 million.

[51] The Abitibi Petitioners and the SSNs consider that since the MPCo proceeds were and are subject to the security of the SSNs, this arrangement or compromise is a reasonable one under the circumstances.

[52] They submit that the proposed distribution will be of substantial benefit to the Abitibi Petitioners. Savings of at least CDN\$27.4 million per year in accruing interest costs on the CDN\$200 million to be distributed will be realized based on the 13.75% interest rate payable to the SSNs.

[53] Needless to say, they maintain that the costs saved will add to the potential surplus value of SSNs' collateral that could be utilized to compensate any creditor whose security may be impaired in the future in repaying the ULC DIP Facility.

[54] The Bondholders oppose the CDN\$200 million distribution to the SSNs.

[55] In their view, given the Abitibi Petitioners' need for liquidity, the proposed payment of substantial proceeds to one group of creditors raises important issues of both propriety and timing. It also brings into focus the need for the CCAA process to move forward efficiently and effectively towards the goal of the timely negotiation and implementation of a plan of arrangement.

[56] The Bondholders claim that the proposed distribution violates the CCAA. From their perspective, nothing in the statute authorizes a distribution of cash to a creditor

group prior to approval of a plan of arrangement by the requisite majorities of creditors and the Court. They maintain that the SSNs are subject to the stay of proceedings like all other creditors.

[57] By proposing a distribution to one class of creditors, the Bondholders contend that the other classes of creditors are denied the ability to negotiate a compromise with the SSNs. Instead of bringing forward their proposed plan and creating options for the creditors for negotiation and voting purposes, the Abitibi Petitioners are thus eliminating bargaining options and confiscating the other creditors' leverage and voting rights.

[58] Accordingly, the Bondholders conclude that the proposed distribution should not be considered until after the creditors have had an opportunity to negotiate a plan of arrangement or a compromise with the SSNs.

[59] In the interim, they suggest that the Abitibi Petitioners should provide a business plan to their legal and financial advisors by no later than 5:00 p.m. on November 27, 2009. They submit that a restructuring and recapitalization term sheet on terms acceptable to them and their legal and financial advisors should also be provided by no later than 5:00 p.m. on December 11, 2009.

[60] With all due respect for the views expressed by the Bondholders, the Court considers that, similarly to the ULC DIP Facility, the proposed distribution should be authorized.

[61] To begin with, the position of the Bondholders is, under the circumstances, untenable. While they support the CDN\$230 million ULC DIP Facility, they still contest the CDN\$200 million proposed distribution that is directly linked to the latter.

[62] The Court does not have the luxury of picking and choosing here. What is being submitted for approval is a global solution. The compromise reached must be considered as a whole. The access to additional liquidity is possible because of the corresponding distribution to the SSNs. The amounts available for both the ULC DIP Facility and the proposed distribution come from the same MPCo sale transaction.

[63] The compromise negotiated in this respect, albeit imperfect, remains the best available and viable solution to deal with the liquidity requirements of the Abitibi Petitioners. It follows a process and negotiations where the views and interests of most interested parties have been canvassed and considered.

[64] To get such diverse interest groups as the Abitibi Petitioners, the SSNs, the Term Lenders, BMO and IQ, and ULC and Alcoa to agree on an acceptable outcome is certainly not an easy task to achieve. Without surprise, it comes with certain concessions.

[65] It would be very dangerous, if not reckless, for the Court to put in jeopardy the ULC DIP Facility agreed upon by most stakeholders on the basis that, perhaps, a better

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arrangement could eventually be reached in terms of distribution of proceeds that, on their face, appear to belong to the SSNs.

[66] The Court is satisfied that both aspects of the ULC DIP Motion are closely connected and should be approved together. To conclude otherwise would potentially put everything at risk, at a time where stability is most required.

[67] Secondly, it remains that ACCC's interest in MPCo is subject to the SSNs' security. As such, all proceeds of the sale less adjustments, holdbacks and reserves should normally be paid to the SSNs. Despite this, provided they receive the CDN\$200 million proposed distribution, the SSNs have consented to the sale proceeds being used by the Abitibi Petitioners to pay the existing ACI DIP Facility and to the ULC Reserve being used up to CDN\$230M for the ULC DIP Facility funding.

[68] It is thus fair to say that the SSNs are not depriving the Abitibi Petitioners of liquidity; they are funding part of the restructuring with their collateral and, in the end, enhancing this liquidity.

[69] The net proceeds of the MPCo transaction after payment of the ACI DIP Facility are expected to be CDN\$173.9 million. Accordingly, out of a CDN\$200 million distribution to the SSNs, only CDN\$26.1 million could technically be said to come from the ULC DIP Facility. Contrary to what the Bondholders alluded to, if minor aspects of the claims of the SSNs are disputed by the Abitibi Petitioners, they do not concern the CDN\$200 million at issue.

[70] Thirdly, the ULC DIP Facility bears no interest and is not subject to drawdown fees, while a distribution of CDN\$200 million to the SSNs will create at the same time interest savings of approximately CDN\$27 million per year for the ACI Group. There is, as a result, a definite economic benefit to the contemplated distribution for the global restructuring process.

[71] Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a CCAA reorganization. Nothing in the CCAA prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada⁷.

[72] While the SSNs are certainly subject to a stay of proceedings much like the other creditors involved in the present CCAA reorganization, an interim distribution of net proceeds from the sale of an asset subject to the Court's approval has never been considered a breach of the stay.

⁷ See *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Ont. Sup. Ct.); *Re Rol-Land Farms Limited* (October 5, 2009), Toronto 08-CL-7889 (Ont. Sup. Ct.); and *Re Pangeo Pharma Inc.*, (August 14, 2003), Montreal 500-11-021037-037 (Que. Sup. Ct.).

[73] In this regard, the Bondholders have no economic interest in the MPCo assets and resulting proceeds of sale that are subject to a first ranking security interest in favor of the SSNs. Therefore, they are not directly affected by the proposed distribution of CDN\$200 million.

[74] In *Windsor Machine & Stamping Ltd. (Re)*⁸, Morawetz J. dealt with the opposition of unsecured creditors to an Approval and Distribution Order as follows:

13 Although the outcome of this process does not result in any distribution to unsecured creditors, this does not give rise to a valid reason to withhold Court approval of these transactions. I am satisfied that the unsecured creditors have no economic interest in the assets.

[75] Finally, even though the Monitor makes no recommendation in respect of the proposed distribution to the SSNs, this can hardly be viewed as an objection on its part. In the first place, this is not an issue upon which the Monitor is expected to opine. Besides, in its 19th report, the Monitor notes the following in that regard:

- a) According to its Counsel, the SSNs security on the ACCC's 60% interest in MPCo is valid and enforceable;
- b) The amounts owed to the SSNs far exceed the contemplated distribution while the SSNs' collateral is sufficient for the SSNs' claim to be most likely paid in full;
- c) The proposed distribution entails an economy of CDN\$27 million per year in interest savings; and
- d) Even taking into consideration the CDN\$200 million proposed distribution, the ULC DIP Facility provides the Abitibi Petitioners with the liquidity they require for most of the coming year.

[76] All things considered, the Court disagrees with the Bondholders' assertion that the proposed distribution is against the goals and objectives of the CCAA. For some, it may only be a small step. However, it is a definite step in the right direction.

[77] Securing the most needed liquidity at issue here and reducing substantially the extent of the liabilities towards a key secured creditor group no doubt enhances the chances of a successful restructuring while bringing stability to the on-going business.

[78] This benefits a large community of interests that goes beyond the sole SSNs.

[79] From that standpoint, the Court is satisfied that the restructuring is moving forward properly, with reasonable diligence and in accordance with the CCAA ultimate goals.

⁸ *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Ont. Sup. Ct.).

[80] Abitibi Petitioners' firm intention, reiterated at the hearing, to shortly provide their stakeholders with a business plan and a restructuring and recapitalization term sheet confirms it as well.

3) THE ORDERS SOUGHT

[81] In closing, the precise wording of the orders sought has been negotiated at length between Counsel. It is the result of a difficult compromise reached between many different parties, each trying to protect distinct interests.

[82] Nonetheless, despite their best efforts, this wording certainly appears quite convoluted in some cases, to say the least. The proposed amendment to the subrogation provision of the Second Amended Initial Order is a vivid example. Still, the mechanism agreed upon, however complicated it might appear to some, remains acceptable to all affected creditors.

[83] The delicate consensus reached in this respect must not be discarded lightly. In view of the role of the Court in CCAA proceedings, that is, one of judicial oversight, the orders sought will thus be granted as amended, save for limited exceptions. To avoid potential misunderstandings, the Court felt necessary to slightly correct the specific wording of some conclusions. The orders granted reflect this.

[84] Turning to the conclusions proposed by the Bondholders at paragraphs 8 to 11 of the draft amended order (now paragraphs 6 to 9 of this Order), the Court considers them useful and appropriate. They assist somehow in bringing into focus the need for this CCAA process to continue to move forward efficiently.

[85] Minor adjustments to some of the wording are, however, required in order to give the Abitibi Petitioners some flexibility in terms of compliance with the ULC DIP documents and cash flow forecast.

[86] For the expected upcoming filing by the Abitibi Petitioners of their business plan and restructuring and recapitalization term sheet, the Court concludes that simply giving act to their stated intention is sufficient at this stage. The deadlines indicated correspond to the date agreed upon by the parties for the business plan and to the expected renewal date of the Initial Order for the restructuring and recapitalization term sheet.

FOR THESE REASONS, THE COURT:

ULC DIP Financing

[87] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to enter into, obtain and borrow under a credit facility provided pursuant to a loan agreement (the "**ULC DIP Agreement**") among ACI, as borrower, and 3239432 Nova

Scotia Company, an unlimited liability company ("**ULC**"), as lender (the "**ULC DIP Lender**"), to be approved by Alcoa acting reasonably, which terms will be consistent with the ULC DIP Term Sheet communicated as **Exhibit R-1** in support of the ULC DIP Motion, subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor and to modifications required by Alcoa, acting reasonably, which credit facility shall be in an aggregate principal amount outstanding at any time not exceeding **\$230** million.

[88] **ORDERS** that the credit facility provided pursuant to the ULC DIP Agreement (the "**ULC DIP**") will be subject to the following draw conditions:

- d) a first draw of \$130 million to be advanced at closing;
- e) subsequent draws for a maximum total amount of \$50 million in increments of up to \$25 million to be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order which shall apply mutatis mutandis to advances under the ULC DIP; and
- f) the balance of \$50 million shall become available upon further order of the Court.

At the request of the Borrower, all undrawn amounts under the ULC DIP shall either (i) be transferred to the Monitor to be held in an interest bearing account for the benefit of the Borrower providing that any requests for advances thereafter shall continue to be made and processed in accordance herewith as if the transfer had not occurred, or (ii) be invested by ULC in an interest bearing account with all interest earned thereon being for the benefit of and remitted to the Borrower forthwith following receipt thereof.

[89] **ORDERS** the Petitioners to communicate a draft of the substantially final ULC DIP Agreement (the "**Draft ULC DIP Agreement**") to the Monitor and to any party listed on the Service List which requests a copy of same (an "**Interested Party**") no later than five (5) days prior to the anticipated closing of the MPCo Transaction, as said term is defined in the ULC DIP Motion.

[90] **ORDERS** that any Interested Party who objects to any provisions of the Draft ULC DIP Agreement as not being substantially in accordance with the terms of the ULC DIP Term Sheet, Exhibit R-1, or objectionable for any other reason, shall, before the close of business of the day following delivery of the Draft ULC DIP Agreement, make a request for a hearing before this Court stating the grounds upon which such objection is based, failing which the Draft ULC DIP Agreement shall be considered to conform to the ULC DIP Term Sheet and shall be deemed to constitute the ULC DIP Agreement for the purposes of this Order.

[91] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to execute and deliver the ULC DIP Agreement, subject to the terms of this Order and the

approval of Alcoa, acting reasonably, as well as such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, mandate and other definitive documents (collectively with the ULC DIP Agreement, the "**ULC DIP Documents**"), as are contemplated by the ULC DIP Agreement or as may be reasonably required by the ULC DIP Lender pursuant to the terms thereof, and the Abitibi Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the ULC DIP Lender under and pursuant to the ULC DIP Documents as and when same become due and are to be performed, notwithstanding any other provision of this Order.

[92] **ORDERS** that the Abitibi Petitioners shall substantially comply with the terms and conditions set forth in the ULC DIP Documents and the 13-week cash flow forecast (the "Budget") provided to the financial advisors of the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party.

[93] **ORDERS** that, in accordance with the terms and conditions of the ULC DIP Documents, the Abitibi Petitioners shall use the proceeds of the ULC DIP substantially in compliance with the Budget, that the Monitor shall monitor the ongoing disbursements of the Abitibi Petitioners under the Budget, and that the Monitor shall forthwith advise the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party of the Monitor's understanding of any pending or anticipated substantial non-compliance with the Budget and/or any other pending or anticipated event of default or termination event under any of the ULC DIP Documents.

[94] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a business plan to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on November 27, 2009.

[95] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a restructuring and recapitalization term sheet (the "Recapitalization Term Sheet") to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on December 15, 2009.

[96] **ORDERS** that, notwithstanding any other provision of this Order, the Abitibi Petitioners shall pay to the ULC DIP Lender when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the ULC DIP Lender on a full indemnity basis (the "**ULC DIP Expenses**") under the ULC DIP Documents and shall perform all of their other obligations to the ULC DIP Lender pursuant to the ULC DIP Documents and this Order.

[97] **ORDERS** that the claims of the ULC DIP Lender pursuant to the ULC DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the ULC DIP Lender, in such capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan or any proposal filed by any Abitibi Petitioner under the *BIA*.

[98] **ORDERS** that the ULC DIP Lender may, notwithstanding any other provision of this Order or the Initial Order:

- c) take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the ACI DIP Charge and the ULC DIP Documents in all jurisdictions where it deems it to be appropriate; and
- d) upon the occurrence of a Termination Event (as each such term is defined in the ULC DIP Documents), refuse to make any advance to the Abitibi Petitioners and terminate, reduce or restrict any further commitment to the Abitibi Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the ULC DIP Lender to the Abitibi Petitioners against any obligation of the Abitibi Petitioners to the ULC DIP Lender, make demand, accelerate payment or give other similar notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Abitibi Petitioners and for the appointment of a trustee in bankruptcy of the Abitibi Petitioners, and upon the occurrence of an event of default under the terms of the ULC DIP Documents, the ULC DIP Lender shall be entitled to apply to the Court to seize and retain proceeds from the sale of any of the Property of the Abitibi Petitioners and the cash flow of the Abitibi Petitioners to repay amounts owing to the ULC DIP Lender in accordance with the ULC DIP Documents and the ACI DIP Charge.

[99] **ORDERS** that the foregoing rights and remedies of the ULC DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Abitibi Petitioners or the Property of the Abitibi Petitioners, the whole in accordance with and to the extent provided in the ULC DIP Documents.

[100] **ORDERS** that the ULC DIP Lender shall not take any enforcement steps under the ULC DIP Documents or the ACI DIP Charge without providing five (5) business day (the "**Notice Period**") written enforcement notice of a default thereunder to the Abitibi Petitioners, the Monitor, the Senior Secured Noteholders, Alcoa, the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the ULC DIP Lender shall be entitled to take any and all steps and exercise all rights and remedies provided for under the ULC DIP Documents and the ACI DIP Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the *BIA*. For greater certainty, the ULC DIP Lender may issue a prior notice pursuant to Article 2757 CCQ concurrently with the written enforcement notice of a default mentioned above.

[101] **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 61.1 to 61.9 of the Initial Order, the approval of the ULC DIP Documents or the ACI DIP Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, Alcoa, the Senior

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Secured Noteholders and the ULC DIP Lender by the moving party and returnable within seven (7) days after the party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) each of the ULC DIP Lender and Alcoa applies for or consents to such order.

[102] **ORDERS** that 3239432 Nova Scotia Company is authorized to assign its interest in the ULC DIP to Alcoa pursuant to the security agreements and guarantees to be granted pursuant to the Implementation Agreement and this Court's Order dated September 29, 2009.

[103] **AMENDS** the Initial Order issued by this Court on April 17, 2009 (as amended and restated) by adding the following at the end of paragraph 61.3:

"**ORDERS** further, that from and after the date of closing of the MPCo Transaction (as said term is defined in the Petitioners' ULC DIP Motion dated November 9, 2009) and provided the principal, interest and costs under the ACI DIP Agreement (as defined in the Order of this Court dated May 6, 2009), are concurrently paid in full, the ACI DIP Charge shall be increased by the aggregate amount of **\$230** million (subject to the same limitations provided in the first sentence hereof in relation to the Replacement Securitization Facility) and shall be extended by a movable and immovable hypothec, mortgage, lien and security interest on all property of the Abitibi Petitioners in favour of the ULC DIP Lender for all amounts owing, including principal, interest and ULC DIP Expenses and all obligations required to be performed under or in connection with the ULC DIP Documents. The ACI DIP Charge as so increased shall continue to have the priority established by paragraphs 89 and 91 hereof provided such increased ACI DIP Charge (being the portion of the ACI DIP Charge in favour of the ULC DIP Lender) shall in all respects be subordinate (i) to the subrogation rights in favour of the Senior Secured Noteholders arising from the repayment of the ACI DIP Lender from the proceeds of the sale of the MPCo transaction as approved by this Court in its Order of September 29, 2009 and as confirmed by paragraph 11 of that Order, notwithstanding the amendment of paragraph 61.10 of this Order by the subsequent Order dated November 16, 2009, as well as the further subrogation rights, if any, in favour of the Term Lenders; and (ii) rights in favour of the Term Lenders arising from the use of cash for the payment of interest fees and accessories as determined by the Monitor. No order shall have the effect of varying or amending the priority of the ACI DIP Charge and the interest of the ULC DIP Lender therein without the consent of the Senior Secured Noteholders and Alcoa. The terms "ULC DIP Lender", "ULC DIP Documents", "ULC DIP Expenses", "Senior Secured Noteholders" and "Alcoa" shall be as defined in the Order of this Court dated November 16, 2009. Notwithstanding the subrogation rights created or confirmed herein, in no event shall the ULC DIP Lender be subordinated to more than approximately \$40 million, being the aggregate

of the proceeds of the MPCo Transaction paid to the ACI DIP Lender plus the interest, fees and expenses paid to the ACI DIP Lender as determined by the Monitor."

ACI DIP Agreement

[104] **ORDERS** that the Abitibi Petitioners are hereby authorized to make, execute and deliver one or more amendment agreements in connection with the ACI DIP Agreement providing for (i) an extension of the period during which any undrawn portion of the credit facility provided pursuant to the ACI DIP Agreement shall be available and (ii) the modification of the date upon which such credit facility must be repaid from November 1, 2009 to the earlier of the closing of the MPCo Transaction and December 15, 2009, subject to the terms and conditions set forth in the ACI DIP Agreement, save and except for non-material amendments.

Senior Secured Notes Distribution

[105] **ORDERS** that the Abitibi Petitioners are authorized and directed to make a distribution to the Trustee of the Senior Secured Notes in the amount of \$200 million upon completion of the MPCo Transaction (as said term is defined in the ULC DIP Motion) from the proceeds of such sale and of the ULC DIP Facility, providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction.

[106] **ORDERS** that, subject to completion of the ULC DIP (including the initial draw of \$130 million thereunder) and providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction, the distribution referred to in the preceding paragraph and the flow of funds upon completion of the MPCo Transaction and the ULC DIP shall be arranged in accordance with the following principles: (a) MPCo Proceeds shall be used, first, to fund the distribution to the Senior Secured Notes referenced in the previous paragraph and, secondly, to fund the repayment of the ACI DIP; (b) the initial draw of \$130 million made under the ULC DIP shall fund any remaining balance due to repay in full the ACI DIP and this, upon completion of the MPCo Transaction. The Monitor shall be authorized to review the completion of the MPCo Transaction, the ULC DIP and the repayment of the ACI DIP and shall report to the Court regarding compliance with this provision as it deems necessary.

Amendment to the Subrogation Provision

[107] **ORDERS** that Subsection 61.10 of the Initial Order, as amended and restated, is replaced by the following:

Subrogation to ACI DIP Charge

[61.10] **ORDERS** that the holders of Secured Notes, the Lenders under the Term Loan Facility (collectively, the "**Secured Creditors**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (collectively, the "**Lien Holder**") that hold security over assets that are subject to the ACI DIP Charge and that, as of the Effective Time, was opposable to third parties (including a trustee in bankruptcy) in accordance with the law applicable to such security (an "**Impaired Secured Creditor**" and "**Existing Security**", respectively) shall be subrogated to the ACI DIP Charge to the extent of the lesser of (i) any net proceeds from the Existing Security including from the sale or other disposition of assets, resulting from the collection of accounts receivable or other claims (other than Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) and/or cash that is subject to the Existing Security of such Impaired Secured Creditor that is used directly to pay (a) the ACI DIP Lender or (b) another Impaired Secured Creditor (including by any means of realization) on account of principal, interest or costs, in whole or in part, as determined by the Monitor (subject to adjudication by the Court in the event of any dispute) and (ii) the unpaid amounts due and/or becoming due and/or owing to such Impaired Secured Creditor that are secured by its Existing Security. For this purpose "**ACI DIP Lender**" shall be read to include Bank of Montreal, IQ, the ULC DIP Lender and their successors and assigns, including any lender or lenders providing replacement DIP financing should same be approved by subsequent order of this Court. No Impaired Secured Creditor shall be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the ACI DIP Lender have been paid in full and providing that all rights of subrogation hereunder shall be postponed to the right of subrogation of IQ under the IQ Guarantee Offer, and, for greater certainty, no subrogee shall have any rights over or in respect of the IQ Guarantee Offer. In the event that, following the repayment in full of the ACI DIP Lender in circumstances where that payment is made, wholly or in part, from net proceeds of the Existing Security of an Impaired Secured Creditor (the "**First Impaired Secured Creditor**"), such Impaired Secured Creditor enforces its right of subrogation to the ACI DIP Charge and realizes net proceeds from the Existing Security of another Impaired Secured Creditor (the "**Second Impaired Secured Creditor**"), the Second Impaired Secured Creditor shall not be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the First

Impaired Secured Creditor have been paid in full. In the event that more than one Impaired Secured Creditor is subrogated to the ACI DIP Charge as a result of a payment to the ACI DIP Lender, such Impaired Secured Creditors shall rank pari passu as subrogees, rateably in accordance with the extent to which each of them is subrogated to the ACI DIP Charge. The allocation of the burden of the ACI DIP Charge amongst the assets and creditors shall be determined by subsequent application to the Court if necessary."

[108] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

[109] **WITHOUT COSTS.**

CLÉMENT GASCON, J.S.C.

Me Sean Dunphy and Me Joseph Reynaud
STIKEMAN, ELLIOTT
Attorneys for Petitioners

Me Robert Thornton
THORNTON GROUT FINNIGAN
Attorneys for the Monitor

Me Jason Dolman
FLANZ FISHMAN MELAND PAQUIN
Attorneys for the Monitor

Me Alain Riendeau
FASKEN MARTINEAU DuMOULIN
Attorneys for Wells Fargo Bank, N.A., Administrative Agent under the Credit and Guarantee Agreement Dated April 1, 2008

Me Marc Duchesne
BORDEN, LADNER, GERVAIS
Attorneys for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders

Me Frederick L. Myers
GOODMANS LLP
Co-Counsel for the Ad Hoc Committee of Unsecured Noteholders of AbitibiBowater Inc. and certain of its Affiliates

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Me Jean-Yves Simard
LAVERY, DE BILLY
Co-Counsel for the Ad Hoc Committee of Unsecured Noteholders of AbitibiBowater Inc.
and certain of its Affiliates

Me Patrice Benoît
GOWLING LAFLEUR HENDERSON LLP
Attorneys for Investissement Québec

Me S. Richard Orzy
BENNETT JONES
Attorneys for the Official Committee of Unsecured Creditors of AbitibiBowater Inc. & Al.

Me Frédéric Desmarais
McMILLAN LLP
Attorneys for Bank of Montreal

Me Anastasia Flouris
KUGLER, KANDESTIN, LLP
Attorneys for Alcoa

Date of hearing: November 9, 2009

SCHEDULE "A"
ABITIBI PETITIONERS

21. ABITIBI-CONSOLIDATED INC.
22. ABITIBI-CONSOLIDATED COMPANY OF CANADA
23. 3224112 NOVA SCOTIA LIMITED
24. MARKETING DONOHUE INC.
25. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
26. 3834328 CANADA INC.
27. 6169678 CANADA INC.
28. 4042140 CANADA INC.
29. DONOHUE RECYCLING INC.
30. 1508756 ONTARIO INC.
31. 3217925 NOVA SCOTIA COMPANY
32. LA TUQUE FOREST PRODUCTS INC.
33. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
34. SAGUENAY FOREST PRODUCTS INC.
35. TERRA NOVA EXPLORATIONS LTD.
36. THE JONQUIERE PULP COMPANY
37. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY
38. SCRAMBLE MINING LTD.
39. 9150-3383 QUÉBEC INC.
40. ABITIBI-CONSOLIDATED (U.K.) INC.

SCHEDULE "B"
BOWATER PETITIONERS

20. BOWATER CANADIAN HOLDINGS INC.
21. BOWATER CANADA FINANCE CORPORATION
22. BOWATER CANADIAN LIMITED
23. 3231378 NOVA SCOTIA COMPANY
24. ABITIBIBOWATER CANADA INC.
25. BOWATER CANADA TREASURY CORPORATION
26. BOWATER CANADIAN FOREST PRODUCTS INC.
27. BOWATER SHELBURNE CORPORATION
28. BOWATER LAHAVE CORPORATION
29. ST-MAURICE RIVER DRIVE COMPANY LIMITED
30. BOWATER TREATED WOOD INC.
31. CANEXEL HARDBOARD INC.
32. 9068-9050 QUÉBEC INC.
33. ALLIANCE FOREST PRODUCTS (2001) INC.
34. BOWATER BELLEDUNE SAWMILL INC.
35. BOWATER MARITIMES INC.
36. BOWATER MITIS INC.
37. BOWATER GUÉRETTE INC.
38. BOWATER COUTURIER INC.

SCHEDULE "C"**18.6 CCAA PETITIONERS**

17. ABITIBIBOWATER INC.
18. ABITIBIBOWATER US HOLDING 1 CORP.
19. BOWATER VENTURES INC.
20. BOWATER INCORPORATED
21. BOWATER NUWAY INC.
22. BOWATER NUWAY MID-STATES INC.
23. CATAWBA PROPERTY HOLDINGS LLC
24. BOWATER FINANCE COMPANY INC.
25. BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED
26. BOWATER AMERICA INC.
27. LAKE SUPERIOR FOREST PRODUCTS INC.
28. BOWATER NEWSPRINT SOUTH LLC
29. BOWATER NEWSPRINT SOUTH OPERATIONS LLC
30. BOWATER FINANCE II, LLC
31. BOWATER ALABAMA LLC
32. COOSA PINES GOLF CLUB HOLDINGS LLC

TAB 17

CITATION: : Ontario Securities Commission v. Bridging Income Fund L.P., 2022 ONSC 4472

COURT FILE NO.: CV-21-00661458-00CL

DATE: 2022-08-03

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ONTARIO SECURITIES COMMISSION

Applicant

AND:

BRIDGING INCOME FUND LP, BRIDGING MID-MARKET DEBT FUND LP, SB FUND GP INC., BRIDGING FINANCE GP INC., BRIDGING INCOME RSP FUND, BRIDGING MID-MARKET DEBT RSP FUND, BRIDGING PRIVATE DEBT INSTITUTIONAL LP, BRIDGING REAL ESTATE LENDING FUND LP, BRIDGING SMA 1 LP, BRIDGING INFRASTRUCTURE FUND LP, BRIDGING MJ GP INC., BRIDGING INDIGENOUS IMPACT FUND, BRIDGING FERN ALTERNATIVE CREDIT FUND, BRIDGING SMA 2 LP, BRIDGING SMA 2 GP INC., and BRIDGING PRIVATE DEBT INSTITUTIONAL RSP FUND

Respondents

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *John L. Finnigan, Grant B. Moffat and Adam Driedger*, for the Receiver

Robert Staley and Mike Shakra, for the Bridging Unitholders

Steve Graff and Miranda Spence, for the SMA 2 Unitholders

Monica Faheim, Representative Counsel for the Misrepresentation Claimants for the Unitholder Priority Motion

Eric Bédard and Émile St-Pierre, Quebec Representative Counsel for the Unitholder Priority Motion

Steven Weisz, for University of Minnesota Foundation

David Bish, for The Coco Group, 2693600 Ontario Inc., Rocky Coco and Jenny Coco

Robb English, for the Redemption Claimants for the Unitholder Priority Motion

Ryan Taylor, for David Sharpe

David T. Ullmann, for Thomas Canning (Maidstone) Limited, William Thomas, Robert Thomas and 2190330 Ontario Ltd.

Lawrence Thacker, for Natasha Sharpe

Martino Calvaruso, for Blackrock Financial Management Inc.

HEARD: July 19, 2022

DETERMINED: July 29, 2022

REASONS RELEASED: August 3, 2022

ENDORSEMENT

[1] On July 29, 2022, a SMA 2 Interim Distribution of \$46 million, allocated to Blue Cross (86.84%) and Canassurance (13.16%) was approved with reasons to follow. These are the reasons.

[2] PricewaterhouseCoopers Inc. (“PwC”), in its capacity as Receiver and Manager of the assets and properties (collectively, the “Property”) of each of the Respondents, brings this motion for an order (the “SMA 2 Interim Distribution Order”), approving an interim cash distribution to Blue Cross Life Insurance Company (“BCLIC”) and Canassurance Hospital Service Association (“CHSA” and together with BCLIC, the “SMA 2 Unitholders”), the two institutional unitholders in Bridging SMA 2 LP (“SMA 2”), subject to the terms and conditions of a proposed reimbursement agreement between the Receiver and each of BCLIC and CHSA.

[3] The Receiver is of the view that, given the unique circumstances of the SMA 2 Unitholders, it is appropriate to carry out an interim cash distribution to the SMA 2 Unitholders at this time, subject to the terms of the SMA 2 Reimbursement Agreement. Although the quantum of proceeds of Property available for distribution to the SMA 2 Unitholders will not be finally known until the Distribution Issues are resolved, the Receiver estimates that the Other Claims for which SMA 2 may be liable in accordance with the Distribution Methodology, ultimately approved by the court, will likely be less than the amount of the SMA 2 Cash Reserve (the “SMA 2 Cash Reserve”). In the event that the SMA 2 Cash Reserve is not sufficient to address Other Claims or Distribution Issues, the proposed SMA 2 Reimbursement Agreement requires the SMA 2 Unitholders to repay any amounts distributed to them within 30 days of demand from the Receiver. The Receiver is of the view that no stakeholders will be prejudiced by the proposed SMA 2 Interim Distribution.

[4] All of the units in SMA 2 are held by BCLIC and CHSA. BCLIC holds approximately 86.84% of the SMA 2 units and CHSA holds approximately 13.16% of the SMA 2 units.

[5] The Receiver reports that SMA 2 was established in December 2020, less than five months before the appointment of the Receiver. The SMA 2 Unitholders invested capital in SMA 2 totaling \$188 million. Based on the Receiver’s review of Bridging’s books and records, these cash amounts were held in a separate bank account in the name of SMA 2 at all times since December 2020.

[6] The Receiver is of the view that it is appropriate at this time to issue a partial distribution to the SMA 2 Unitholders in the aggregate amount of \$78 million (the “Proposed SMA 2 Interim Distribution”) on a *pro rata* basis to BCLIC and CHSA, based on their proportionate investments.

[7] The Receiver has consulted with Representative Counsel on the SMA 2 Reimbursement Agreement and the Proposed Interim SMA 2 Distribution.

[8] The Receiver submits that orders granting interim distributions have been granted by courts in insolvency proceedings. Reference was made to the *Abitibiwater Inc.*, 2009 QCCS 6461 at para. 71 and *SemCanada Crude Co., Re*, 2009 ABQB 90 at para. 27 in support of this proposition.

[9] The Receiver is satisfied that the amount of Other Claims for which SMA 2 may be liable will likely be less than the SMA 2 Cash Reserve.

[10] The Receiver submits that the Proposed SMA 2 Interim Distribution strikes an appropriate balance in the circumstances between the need to distribute the proceeds of the Property as quickly and efficiently as possible and the protection of the interest of all stakeholders.

[11] During the hearing, I raised questions regarding the potential impact that substantively consolidating the various Bridging Funds for the purpose of distribution to Unitholders and other stakeholders of the proceeds of the Property (a “Distribution”) would have on the amount of the Proposed Interim SMA 2 Distribution. I requested that the Receiver prepare a supplement to the 12th Report (the “Supplement to the 12th Report”) to provide additional information that could result from a substantive consolidation of the Bridging Funds. The Supplement to the 12th Report is attached as Schedule 1 to this endorsement.

[12] I am satisfied that it is appropriate for the Receiver to make an interim distribution to SMA 2 Unitholders. However, it seems to me that, until such time as a determination has been made as to whether substantive consolidation should be applied to the various Bridging Funds, it is appropriate to reduce the amount of the Proposed Distribution such that SMA 2 Unitholders do not receive an interim distribution that could exceed the amount of the final Distribution.

[13] Accordingly, taking into account the analysis in the Supplement to the 12th Report, I have determined that the Proposed Interim SMA 2 Distribution set out in the 12th Report of \$78 million should be reduced to \$46 million. This reduced amount takes into account that the issue of substantive consolidation has yet to be determined.

[14] I do not question in any way the financial position of either of the SMA 2 Unitholders nor their commitment to enter into the SMA 2 Reimbursement Agreement. Rather, I have not been persuaded that it is appropriate, at this time, to approve the Proposed Interim SMA 2 Distribution, prior to the determination of the substantive consolidation issue.

[15] I take this opportunity to thank the Receiver and all parties for their prompt response to the questions that I posed during the hearing and for the preparation of the Supplement to the 12th Report.

[16] The form of order attached at Tab 4 of the Motion Record has been revised in accordance with these reasons and has been signed by me.

Chief Justice G.B. Morawetz

Date: August 3, 2022

TAB 18

Court of Queen's Bench of Alberta

Citation: Re SemCanada Crude Company (Companies' Creditors Arrangement Act), 2009 ABQB 90

Date: 20080211
Docket: 0801 08510
Registry: Calgary

**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 SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 3191278 Nova Scotia Company and 1380331 Alberta ULC

Applicants

**Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine**

Introduction

[1] Three of this group of CCAA debtors have applied for an order authorizing an interim distribution of funds to a banking syndicate, their major secured creditor under a guarantee of the indebtedness of the entire corporate group, including debtors engaged in Chapter 11 proceedings in the United States.

Background to Application

[2] SemCanada Energy Company ("SemCanada Energy") and its subsidiaries A.E. Sharp Ltd. ("AES") and CEG Energy Options, Inc. ("CEG") are three of a group of seven companies referred to as the SemCanada Group that obtained protection from their creditors pursuant to an Order granted under the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended, on July 30, 2008. Prior to the initial order, SemCanada Energy, AES and CEG had

commenced proceedings under the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3, on July 24, 2008 and those proceedings were then converted to proceedings under the CCAA.

[3] On July 22, 2008, SemGroup L.P. and its direct and indirect subsidiaries in the United States (the “U.S. Debtors”) filed voluntary petitions to restructure under Chapter 11 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware.

[4] According to the second report of the Monitor, the financial problems of the SemGroup arose from a failed trading strategy and the volatility of petroleum products prices, leading to material margin calls related to large futures and options positions on the NYMEX and OTC markets, resulting in a severe liquidity crisis. SemGroup’s credit facilities were insufficient to accommodate its capital needs, and the corporate group sought protection under Chapter 11 and the CCAA.

[5] The SemCanada Group are indirect wholly-owned subsidiaries of SemGroup LP. The SemCanada Group is comprised of three separate businesses:

- (a) SemCanada Crude Company (“SemCanada Crude”), a crude oil marketing and blending operation;
- (b) SemEnergy Group, whose business is gas marketing, including the purchase and sale of gas to certain of its four subsidiaries as well as to SemCAMS ULC; (“SemCAMS”); and
- (c) SemCAMS, whose business consists of ownership interests in large gas processing facilities located in Alberta, as well as agreements to operate these facilities.

[6] SemCrude, L.P. as U.S. borrower and a predecessor company of SemCAMS as Canadian borrower, certain U.S. SemGroup corporations and Bank of America as administrative agent for a syndicate of lenders (the “Lenders”) entered into a credit agreement in 2005 (the “Credit Agreement”). The Credit Agreement provides four different credit facilities. There are no advances outstanding with respect to the Canadian term loan facility, but in excess of U.S. \$2.5 billion is owing under the U.S. term loan facility, the working capital loan facility and the revolver loan.

[7] Five of the SemCanada Group of companies, including SemCanada, have provided a guarantee of all obligations under the Credit Agreement to the Lenders, who rank as senior secured lenders, and to a US \$600 million bond indenture issued by SemGroup. The amount owing under these instruments is in excess of US \$3.3 billion. The guarantee is secured by a security and pledge agreement (the “Security Agreement”) signed by five members of the SemCanada Group.

[8] While it is intended to present a plan of arrangement or compromise with respect to at least one of the other two businesses, the SemEnergy Group is in self liquidation and has no significant ongoing operations. As a result of liquidation proceedings and the collection of

outstanding accounts receivable, SemCanada Energy, AES and CEG now hold \$113 million in cash.

[9] The SemEnergy Group proposes to make an interim distribution payment to the Lenders of \$90 million. The remainder of the \$113 million would be held back to satisfy claims that may rank in priority to that of the Lenders, costs and fees related to the CCAA proceedings and the employee retention plan, potential claims under the Directors' Charge and a general contingency reserve. Since the time of the first application, the Lenders have requested that the outstanding and continuing fees of their Canadian advisors be paid by the SemEnergy Group. The current outstanding fees amount to approximately \$1.8 million. It is common ground that if such interim payment is allowed, there will be nothing left from the \$113 million to be distributed to unsecured creditors, subject to certain recovery measures in the United States proceedings that will be referred to later in this decision.

[10] A number of unsecured creditors objected to the application, and it was adjourned to allow the unsecured creditors access to the security opinion of the Monitor's counsel, cross-examination on affidavits and the preparation of a report from the Monitor on the status of the restructuring efforts of the U.S. Debtors to date.

[11] The unsecured creditors of the SemCanada Group that object to the application have raised a number of issues. They can be summarized as follows:

- (a) the obligations of the SemCanada Group under the guarantee to the Lenders may be voidable as fraudulent preferences or fraudulent conveyances. The Court has insufficient evidence on that issue to grant the order sought, and the SemCanada Group should be compelled to provide further financial information and to answer specific questions on the issue during cross-examination on the affidavits;
- (b) the amounts that the SemCanada Group are obligated to pay under the guarantee are expressly limited by the terms of the guarantee itself;
- (c) the interim distribution may unfairly prejudice Canadian unsecured creditors and bestow an unwarranted benefit on unsecured creditors in the United States proceedings; and
- (d) there is no urgency and a delay may provide more clarity with respect to the situation in the U.S. Chapter 11 proceedings.

Analysis

(a) *The Fraudulent Preferences Issue*

[12] The opinion obtained by the Monitor from counsel on the validity of the Lenders' security does not address any issue of fraudulent preference. It would not be normal practice in this kind of proceeding for the Monitor's counsel to address the possibility of fraudulent preference unless the Monitor is alerted to some evidence that this may be an issue. The Monitor has not identified any such concern in this case. Thus, in the normal course, it would be up to

creditors, if they believe circumstances exist, to bring appropriate proceedings to attack the guarantee and Security Agreement. The SemCanada Group points out that the unsecured creditors have not brought any action (which might leave them open to sanctions of costs if unsuccessful) and submit that they are attempting to use the proceeding as a fishing expedition to delay and obfuscate the application. The applicants and the Lenders submit that the analysis of the possibility of fraudulent preference submitted by the unsecured creditors is flawed at any rate and lacking in merit.

[13] There is, however, a complication in the argument as to who has the onus to address the possibility of fraudulent preferences. The unsecured creditors point out that the draft order proposed by the applicants for the interim distribution seeks a declaration that the Lenders' security (as embodied in the guarantee and the Security Agreement, which was executed by all five major companies in the SemCanada Group) constitutes a valid and enforceable obligation of the SemEnergy Group and that the payment of the interim distribution will not be void or voidable at the instance of creditors and does not constitute an unjust preference, fraudulent conveyance or reviewable transaction. Pursuant to the proposed order, this declaration would be binding on any trustee in bankruptcy or receiver that may be appointed in respect of the debtors. Thus, the unsecured creditors argue, the issue of fraudulent preferences is relevant and the SemCanada Group should be obligated to file more complete affidavits providing financial statements at relevant periods at and around the time the loan documents and guarantee were entered into and to answer cross-examination questions on the value of the assets of the SemEnergy Group at such times.

[14] The declaratory language at issue is common to this type of order, and the SemEnergy Group and the Lenders submit that it applies only to the interim distribution, not the underlying guarantee and Security Agreement that precedes it. They also submit that, at any rate, language can be crafted to ensure that the declaration is not given effect beyond a limited purpose. While it could be argued that declaratory relief relating to the interim distribution could be construed as extending to the underlying guarantee obligations, I accept that the language of the proposed order was not intended to protect the guarantee and the Security Agreement from the possibility of attack as a fraudulent preference, conveyance or reviewable transaction.

[15] It is not inappropriate for the applicants to ask for a declaration that the interim distribution is not a fraudulent preference or conveyance and such a declaration would arise from the Court's review of the relief sought as a part of CCAA process. Given the limited nature of what is being sought and the purpose of the proceedings, the creditors are not entitled to a full review of the possibility of historical fraudulent preferences or fulsome financial information from the CCAA debtors arising from this application standing alone. This does not preclude the unsecured creditors from applying to lift the stay to bring an independent action if they believe that it is justified by evidence.

[16] The applicants and the Lenders raised a number of arguments about the weakness of any allegations of fraudulent preference, the passing of limitation periods and the absence of any

intent that could form the basis for such an action. It is not necessary to address these submissions at this point in time.

[17] I therefore decline to require the CCAA debtors to file further financial information on this application or to answer the questions or provide the undertakings previously refused.

(b) The Guarantee is Limited - Section 2(f) of the Guarantee

[18] The guarantee signed by SemEnergy and the other guarantors includes the following provision:

2(f) The liability of each Guarantor hereunder shall be limited to the maximum amount of liability that can be incurred without rendering this Guaranty, as it relates to such Guarantor, voidable under applicable Law relating to fraudulent conveyance or fraudulent transfer, and not for any greater amount.

[19] It appears from academic commentary that this clause was designed to address an issue that exists under United States corporate law relating to the inability of a corporation to grant a guarantee if it causes the guarantor to become insolvent: *Corporate Guarantees As a Form of Financial Assistance: The Banker's View*, S.D.N. Belcher and Peter J. Lewarne, (1990) 5 B.F.L.R. at 1. While certain insolvency tests under corporate legislation historically limited Canadian corporations in granting guarantees, they have now been repealed, and the same issue does not exist under Canadian law.

[20] Thus, while this clause may have effect when construed under U.S. law to limit the guarantee to an amount that would not render the guarantors insolvent at relevant periods of time, there are no corresponding obligations under the laws of Alberta (the governing law of the guarantee) or the corporate statutes of Nova Scotia, Alberta and Saskatchewan that govern SemEnergy, AES and CEG, respectively, that would limit the amount of the guarantee arising from the potential of insolvency when the guarantee was granted, or to the asset value of the guarantor, net of unsecured indebtedness, as suggested by the unsecured creditors. The “next asset value” limitation argued by the unsecured creditors appears to arise from either the wording of Section 6(c) of the guarantee (set out later in these reasons) or a representation as to solvency given by the SemGroup companies to the banking syndicate in the Credit Agreement for the indebtedness that underlies the guarantee.

[21] The wording of Section 6(c) relating to the concept of “net worth” is restricted to the subsection and plainly refers only to the calculation of a limited right of subrogation.

[22] While the breach of the representation in the Credit Agreement may form the basis for an action by the banking syndicate under the Credit Agreement if it is established to be incorrect, there is no evidence incorporating this representation into Section 2(f) of the guarantee, or that would warrant it being read into the section or otherwise modifying the section's plain meaning.

[23] While Section 2(f) may take effect in addition to the standard statutory remedies if the guarantee is determined to be a fraudulent conveyance or fraudulent transfer under applicable Canadian insolvency law, that argument refers back to the issue of fraudulent preferences in the more generally understood “all or nothing” sense, and the current lack of any persuasive evidence that would indicate a fraudulent preference. Thus, Section 2(f) of the guarantee does not, as submitted by the unsecured creditors, limit the liability of each individual guarantor to its net asset value on certain relevant dates, either by its plain language, the operation of any ambiguity or cross-reference to another agreement or a reference to applicable Canadian law, and there is no reason arising from this provision of the guarantee to require further financial information from the applicants.

(c) Potential Prejudice to Canadian Unsecured Creditors

[24] The unsecured creditors submit that the payment of the interim distribution may give rise to the development of inequities among the unsecured creditors of the SemCanada Group and the U.S. Debtors. They note that, according to material filed with the application for the initial order, all the CCAA applicants were solvent but for their secured guarantee obligations. The declaration filed at the commencement of Chapter 11 proceeding in the United States disclosed that the consolidated assets of the SemGroup as of May 31, 2008 totalled approximately \$6.14 billion. It appears that subsequent events have reduced the value of the SemGroup’s assets by approximately \$2 billion and it must be noted that the value declared is book value. However, given that secured and senior debt totals approximately \$3.3 billion, it does not appear that there are insufficient assets in the U.S. estate to fully pay the Lenders.

[25] There have been no distributions made to the Lenders in the United States since the commencement of the U.S. proceedings. The unsecured creditors submit that, if the interim distribution is authorized, an inequitable situation arises whereby the SemEnergy Group of debtor companies will have applied all of their assets to the secured debt, leaving their unsecured creditors without the possibility of recovery, while other debtor companies, including in the U.S. proceedings, will have their burdens reduced, making it possible that U.S. unsecured debtors will benefit disproportionately.

[26] The applicants and the Lenders point out, firstly, that the guarantee is an unconditional guarantee and that the Lenders are not required to exhaust their remedies against any other party before invoking its provisions against the applicants. That is clear from the language of the guarantee and the law. However, the contractual rights of the Lenders, in common with the contractual rights of many stakeholders, have been stayed by the CCAA proceedings. The rights of a secured creditor are not awarded a unique status under the CCAA: *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.) at page 92. It is not uncommon for contractual rights to be affected by CCAA proceedings and it is important to note that what is being proposed by the applicants is a deviation from the normal course of such proceedings, which are designed to prevent manoeuvring for position among creditors while a reorganization is attempted.

[27] While orders allowing interim distributions to creditors for one reason or another are not without precedent, at the least, an application for an interim distribution to one creditor must be carefully scrutinized and found to be justifiable for good and sustainable reasons, recognizing that it may create a preference. The court is required to consider the advantages, disadvantages and potential prejudice of such an interim distribution to all the stakeholders of the debtor entity.

[28] The applicants and the Lenders point out that the Lenders have established the indebtedness of the SemEnergy Group and that their security is valid and ranks first in priority. While the Lenders have not made a formal demand of payment or filed a notice of intention, they are only precluded from doing so by the stay provisions of the initial order. The SemEnergy Group has been liquidated, and, they submit, these companies were only included in the CCAA proceedings for administrative convenience. The unsecured creditors counter that the SemEnergy Group sought the protection of the CCAA in July of 2008 purportedly to “reorganize and/or liquidate”, that the CCAA applicants argued that adding the SemEnergy Group to the CCAA proceedings made sense given the inter-relationship of the SemCanada Group’s businesses, and that, having chosen to use the CCAA process, the SemEnergy Group should be compelled to live with its choice.

[29] I agree that I cannot ignore the fact that this is a CCAA proceeding and not a receivership merely because it is more convenient for the applicants and the Lenders at this point to characterize the proceedings in those terms. While the SemEnergy Group standing alone may have liquidated with no current intention of formulating a reorganization plan, the whole of the SemGroup is under the protection of the CCAA in Canada and Chapter 11 in the United States. This is not only for the convenience of the debtors and the Lenders, but to allow the corporate group time to accomplish the goals of such legislation in terms of attempting to reorganize its business, maximizing the value of its estate for the benefit of all stakeholders, and ensuring fairness of treatment. I am not only permitted but required in my supervisory role under the CCAA to consider the implications of the corporate group’s cross-border reorganization efforts as a whole.

[30] The applicants argue that if the application does not succeed, the Lenders will apply to appoint a receiver. The Lenders in fact invite the Court to convert the proceedings to a receivership on its own motion. That application is not before me and not likely to be unopposed in any event.

[31] The applicants and the Lenders submit that the interim distribution would not prejudice the SemEnergy’s Group’s other creditors because SemCanada Energy has rights of indemnification and subrogation from the other members of the corporate group.

[32] Sections 6(a) and 6(c) of the guarantee, however, read as follows:

Section 6. Limited Subrogation

- (a) Until all of the Obligations have been paid and performed in full, no Guarantor shall have any right to exercise any right of subrogation, reimbursement, indemnity, exoneration, contribution or any other claim which it may now or hereafter have against or to any Obligor or any Security in connection with this Guaranty (including any right of subrogation under any law, as amended), and each Guarantor hereby waives any rights to enforce any remedy which such Guarantor may have against either Borrower or any other Obligor and any right to participate in any Security until such time. ...
- (c) Upon full and final payment of the Obligations, each guarantor of the Obligations which has made payments upon the Obligations shall be entitled to contribution from each other guarantor of the Obligations, to the end that all such payments upon the Obligations shall be shared among all such guarantors in proportion to their respective net worth, provided that the contribution obligations of each Guarantor shall be limited to the maximum amount that it can pay at such time without rendering its contribution obligations voidable under applicable Law relating to fraudulent conveyances or fraudulent transfers. As used in this subsection, the “Net Worth” of each guarantor means, at any time, the remainder of (i) the fair value of such guarantor’s assets (other than such right of contribution), minus (ii) the fair value of such guarantor’s liabilities (other than its liabilities under its guaranty of the Obligations).

[33] It appears, therefore, that the SemEnergy Group’s right of subrogation and indemnity may not be enforceable against other borrowers or guarantors unless and until all the indebtedness to the Lenders is paid in full. It also appears that the right to contribution from other members of the SemGroup may be limited under U.S. law to amounts that would not result in the insolvency of such an entity in proportion to such entity’s net worth. At this stage of proceedings, both in Canada and in the United States, it is not possible to say with certainty that the reorganization of the corporate group will result in the payment of indebtedness to the Lenders in full or in such a fashion that the limitation upon subrogation is not triggered. It is possible, for example, that a reorganization may compromise the claims of the Lenders or may have them continue the loans on revised terms to a reorganized corporate group. The SemEnergy Group’s right of subrogation and indemnity could prove to be a hollow or inadequate remedy.

[34] The unsecured creditors submit that the language of the guarantee prevents the SemEnergy Group from filing a claim for subrogation in the U.S. proceedings. The applicants submit that, if payment under the guarantee is authorized, they would file a claim and the Lenders agree that, in their view, such a filing would not be a breach of Section 6 of the guarantee. What is not clear is whether the U.S. debtors would also agree. Even if they did, the filing of a claim does not eliminate the contractual limits on subrogation.

[35] The Lenders submit that making the payment and subsequently filing a claim in the U.S. proceedings may ultimately be beneficial to the SemEnergy Group’s other creditors, as it allows the timely filing of a claim. The unsecured creditors do not appear to agree.

[36] The Lenders submit that there is no good reason to delay the rights of the Lenders to collect on the guarantee, and that to refuse the application would be to improve the position of the unsecured creditors to the detriment of the secured creditor. I am satisfied that an interim distribution to the Lenders gives rise to the possibility that unsecured creditors may be prejudiced and that such potential for prejudice outweighs the benefits of an early payment on the guarantee to the Lenders. To suggest, as the Lenders do, that if the right to subrogation is contractually barred or is compromised by a plan of arrangement in the United States, the unsecured creditors are where they would be if the Lenders had exercised their contractual rights in any event is to treat the Canadian CCAA proceedings as a mere administrative convenience.

[37] The unsecured creditors made certain representations regarding a claim by NGX Financial Inc. Given the decision I have reached, it is not necessary that I address this issue at this time.

(d) *The Lack of Urgency and Benefit of Delay*

[38] The unsecured creditors submit that the applicants have shown no urgency to this application, and the only evidence before this court to justify the application is the statement of the Chief Executive Officer of the SemEnergy Group that, given the status of the group and the significant proceeds in their bank accounts, an interim distribution is appropriate. The Monitor, in commenting that the interim distribution is appropriate, repeats these reasons and notes that the claims bar date has passed and that it has received its security opinion from counsel. While the Monitor's recommendations are entitled to great deference, the Monitor has not delved into or addressed the issues of potential prejudice raised by the unsecured creditors in its analysis of the issue.

[39] The unsecured creditors submit that even a short delay in the distribution of funds may provide more clarity with respect to the situation in the U.S. Chapter 11 proceedings. They refer to media reports that indicate that a third party may be purposing a plan of arrangement or reorganization to the U.S. Debtors in the near future, and the Monitor reports that it understands that business plans and confidential information memorandums have been prepared for some of the significant U.S. Debtors and the SemGroup's intention is to either seek a sale of certain operating units or companies or restructure under the ownership of Semgroup. The Monitor advises, however, that it is premature and unrealistic to estimate the timing for the conclusion of the U.S. proceedings.

[40] It is not necessarily the case that a distribution of funds from the Canadian estate must await the resolution of Chapter 11 proceedings in the United States. The Canadian CCAA proceedings may advance at a different pace if the Court is satisfied by evidence before it that it is appropriate to do so. In the case of this application, however, it is prudent to delay an interim distribution until there is sufficient information to better evaluate the potential of prejudice to Canadian creditors.

Conclusion

[41] I find the application to be premature, and adjourn it sine die with leave to the applicants and the Lenders to reapply with more current information if it becomes apparent that the potential prejudice identified to the unsecured creditors is unlikely to materialize, can be avoided by other measures or that the balance of prejudice and benefit has shifted.

Heard on the 19th day of January, 2009.

Dated at the City of Calgary, Alberta this 11th day of February, 2009.

B.E. Romaine
J.C.Q.B.A.

Appearances:

A. Robert Anderson, Q.C., Cynthia L. Spry and Douglas Schweitzer
Osler, Hoskin & Harcourt LLP
for the Applicants

David R. Byers, Ashley J. Taylor and Maya Poliak
Stikeman Elliott LLP
for The Bank of America

Patrick T. McCarthy and Josef A. Kruger
Borden Ladner Gervais LLP
for the Monitor

Chris Simard
Bennet Jones LLP
for Iteration Energy Ltd. Plains Canada Marketing, L.P. Plains Midstream Canada ULC,
Sabre Energy Partnership (by its Managing Partner Sabre Energy Ltd.), 1316751 Alberta
Ltd., Northern Sun Exploration Inc., ATCO Midstream Ltd. And Devon Canada
Corporation

Craig McMahon
Gowling Lafleur Henderson LLP
for Barnwell of Canada, Limited and Celtic Exploration Ltd.

Douglas S. Nishimura and Brian O'Leary
Burnet Duckworth & Palmer LLP
for ARC Resources Ltd., City of Medicine Hat, PennWest Petroleum, Avenir Operating
Corp., NuVista Energy Ltd., Black Rider Resources Inc., Wolf Coulee Resources Inc.,
Profound Energy Inc., Orleans Energy Ltd., Baytex Energy Ltd., Daylight Energy Ltd.,
Crew Energy Inc., Trilogy Energy LP

Brendan O'Neill
Goodmans LLP
for Fortis Capital Corp.

Travis Lysak
Fraser Milner Gasgrain LLP
for Nexen Marketing and Keyera Energy Partnership

William E.J. Skelly
Heenan Blaikie LLP
for Fractal Systems Inc. Bellamont Exploration Ltd., Enersul Limited Partnership and
Dynamysk Automation Ltd.

TAB 19

CITATION: First Source Financial Management v. Chacon Strawberry Fields Inc., 2024
ONSC 7229

COURT FILE NO.: CV-24-00717742-00CL

DATE: 20241223

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: FIRST SOURCE FINANCIAL MANAGEMENT INC.

Applicant

AND:

CHACON STRAWBERRY FIELDS INC. and SURINDER KAUR CHAHAL

Respondents

BEFORE: Justice Jana Steele

COUNSEL: *Steven L. Graff and Adrienne Ho*, for the Receiver, The Fuller Landau Group Inc.

Wolfgang Kaufmann and Tajinder Kaur Sivia, for the Respondents

Ryan Shah, for the Applicant, First Source Financial Management Inc.

Jitseh Bhalla, for the Second Lender, 1794523 Ontario Inc.

Arnab Bose, for the third-party, Ramesh Ahluwalia

HEARD: December 20, 2024

ENDORSEMENT

Overview

[1] This is a motion brought by The Fuller Landau Group Inc., the Receiver, for the approval of a sale process and transaction, an approval and vesting order, and an ancillary order approving the Receiver's report, fees and disbursements, and a distribution to the first secured lender, among other things.

[2] The contentious issues before the court relate to whether last ditch attempts to alter the sale process by an unsuccessful bidder, Ramesh Ahluwalia, and by the respondents should be permitted.

[3] The respondents seek access to certain sealed confidential documents and an adjournment of three weeks. The respondents say they want the time to secure financing.

[4] Mr. Ahluwalia asks that his late offer be considered when the court determines whether to approve the agreement of purchase and sale with the Purchaser.

[5] For the reasons set out below the Receiver's motion is granted.

Background

[6] The application to appoint the Receiver was filed by First Source Financial Management Inc. ("First Source") on or about April 3, 2024. However, due to a forbearance agreement that was reached, the Receiver was not appointed until on or about July 19, 2024. At that time, the Receiver was appointed as receiver and manager of the lands and premises municipally known as 12550, 12560 and 12570 Kennedy Road, Caledon Ontario, (the "Real Property") owned by Chacon Strawberry Fields Inc. (the "Debtor").

[7] The Debtor is a company incorporated pursuant to the laws of Ontario.

[8] The Debtor owns and operates a mixed-use retail plaza called "Strawberry Fields Plaza," which is situated on the Real Property, a 2.32-acre piece of land. The plaza is fully leased to 15 tenants.

[9] Upon being appointed and determining the nature of the property and other preliminary steps, the Receiver undertook a process to engage a real estate broker to market and sell the Real Property. The Receiver met with five real estate brokerages, each of which were asked to provide a marketing proposal for the Real Property. All five brokerages submitted marketing proposals. The Receiver selected Lennard Commercial Realty, Brokerage ("Lennard") based on its specific expertise with properties similar to the Real Property and prior successful experience with sales in receiverships.

[10] The Receiver entered into the listing agreement with Lennard on or about September 17, 2024.

[11] Lennard listed the property on September 23, 2024. Lennard took numerous other marketing steps, resulting in 127 parties executing non-disclosure agreements to access the data room.

[12] The initial bid deadline was set at November 6, 2024, at 3 p.m. Eleven offers were submitted by the deadline and three other offers were submitted after the deadline, including Mr. Ahluwalia's bid. The top six bidders (all of which had submitted their bids by the deadline) were invited to submit another bid – Mr. Ahluwalia was not asked to re-submit because he was not among the top six bidders.

[13] The successful bidder (the "Purchaser") submitted its bid by the initial bid deadline and was among the top six asked to re-submit a bid.

[14] The second bid deadline was set at November 12, 2024, at 3 pm. Five of the six bidders who were invited to re-submit, including the Purchaser, did so in accordance with the deadline. Two other bidders who were not invited to re-submit, including Mr. Ahluwalia, made another bid.

[15] The Purchaser's bid was accepted by the Receiver on November 13, 2024. The Purchaser's bid was the highest bid delivered by the second bid deadline. The Purchaser paid the required deposit to the Receiver.

[16] On November 14, 2024, two days after the second bid deadline, and after the Receiver had accepted the Purchaser's bid, Mr. Ahluwalia made another bid.

[17] Among other things, the Receiver is asking the court to approve the transaction with the Purchaser (the "Sale Transaction"). The Sale Transaction is targeted to close on January 13, 2025.

[18] The applicant, First Source, is the first ranking secured creditor on the Real Property.

Analysis

Should the Court adjourn the proceedings to January 9, 2025, as requested by the respondents?

[19] The respondents ask the court to adjourn the Receiver's motion to January 9, 2025 to give the respondents the opportunity to redeem. Tied in with this request, is the respondents' request that the Receiver be required to provide the respondents with access to certain sealed documents, including the sale price the Purchaser is paying pursuant to the Sale Transaction, the adjustments to the sale price, and a draft payout statement to show what each creditor is expected to receive (the "Transaction Information").

[20] The Court of Appeal in *Rose-Isli Corp. v. Smith*, 2023 ONCA 548, at para. 9, affirmed that the motions judge had not erred in applying the following principles to guide her consideration of whether the debtor should be granted leave to redeem:

- a. In considering a request by an encumbrancer to redeem a mortgage on property in receivership, a court should consider the impact that allowing the encumbrancer to exercise its right of redemption would have on the integrity of a court-approved sales process;
- b. Usually, if a court-approved sales process has been carried out in a manner consistent with the principles set out in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.), a court should not permit a latter attempt to redeem to interfere with the completion of the sales process. In our view, the reason the *Soundair* principles apply to circumstances where an encumbrancer seeks to redeem a mortgage is that once the court's process has been invoked to supervise the sale of assets under receivership, the process must take into consideration all affected economic interests in the properties in question, not just those of one creditor; and
- c. In dealing with the matter, a court should engage in a balancing analysis of the right to redeem against the impact on the integrity of the court-approved receivership process.

[21] Unlike *Rose-Isli*, in the instant case the sales process was not pre-approved by the court. The Receiver asks the court on this motion to approve the sales process that it undertook. As set out below, I am satisfied that the *Soundair* principles have been satisfied and the sales process should be approved.

[22] The respondents' evidence is that they have obtained a financing offer from Gurpreet Kainth of K.P. Financial Group for \$23.5 million (the "Financing Offer"). Further, the respondents state that their redemption plan, assuming the financing is approved, is to pay the following:

- a. First Source will be paid in full,
- b. The second mortgagee will receive 90% of the amount owing,
- c. All HST, realty taxes, Receiver's costs and real estate break fees will be satisfied, and
- d. Subsequent mortgagees will be compensated, with specific amounts allocated to obtain necessary postponements.

[23] Essentially the respondents are asking the court for more time to put together a proposal that they say will be better than the Sale Transaction. The respondents are not saying that they have "cash in hand" and can redeem the outstanding mortgages on the property. The respondents seek the confidential Transaction Information so they can ensure that their proposal is better than the deal reached pursuant to the Sale Transaction.

[24] The Receiver objects to any adjournment. As the Receiver points out an adjournment will result in a delay and will not change the outcome. Setting aside whether the Financing Offer may come to fruition, the proposed \$23.5 million in financing is not enough for the Debtor to redeem the outstanding mortgages on the property. The Receiver states that the Debtor would need more than \$32.8 million in financing to pay out the mortgagees in full.

[25] The jurisprudence provides for a balancing act that the court must engage in when faced with a debtor who wants to redeem. After a receiver has gone through an exhaustive bidding process, including the costs associated therewith, to find a purchaser, the court may still permit a last-minute redemption where the debtor comes with a cheque in hand: *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, 2024 ONSC 4000 at para. 7-9. Further, in the exceptional circumstances where the court may permit a last-minute redemption, the cheque in hand must be sufficient to cover all the outstanding obligations: *Vector Financial Services v. 33 Hawarden Crescent*, 2024 ONSC 1635, at para. 97.

[26] There is no cheque in hand in the instant case.

[27] Further, a short adjournment would not alter the situation such that the debtors would have sufficient funds to redeem the mortgages. As noted above, the Financing Offer, even if it comes to fruition, would not provide sufficient funds for the debtor to redeem all the outstanding mortgages on the Real Property. Instead, the debtors want to obtain information and financing so that they can make an offer above the sale price in the Sale Transaction. As noted by the Receiver, this is one of the reasons the purchase price is kept confidential in a situation like this until the transaction closes. Otherwise, the debtor may use the information to try to obtain financing just to beat the purchase price and attempt to negotiate with subsequent mortgagees. This would thwart the entire process.

[28] As noted by the court in *B&M Handelman Investments Limited v. Mass Properties Inc.*, 2009 CanLII 37930, 55 C.B.R. (5th) 271, at para. 22:

[...] Ms. Singh does not have an automatic right to redeem. A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

[29] The request for an adjournment is denied.

Should the Court approve the Sale Agreement and the Sale Transaction with the Purchaser?

[30] The Court of Appeal in *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727, 4 O.R. (3d) 1 set out the factors for the court to consider when determining whether a proposed sale should be approved:

- a. Whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;
- b. The efficacy and integrity of the process by which offers were obtained;
- c. Whether there has been unfairness in the working out of the process; and,
- d. The interest of all parties.

[31] I am satisfied that the *Soundair* factors have been met.

[32] The Receiver first sought proposals for the brokerage firm to market the property. After receiving and considering five marketing proposals, the Receiver selected Lennard, based on its expertise and experience. The activities taken to market the Real Property included listing the property on MLS, sending weekly eblasts with relevant details to prospective purchasers and agents, featuring the Real Property on the Lennard Commercial website and LinkedIn, and advertising the Real Property on three occasions in the *Globe & Mail's* Report on Business section. As evidenced by the fact that 127 parties executed NDAs and were granted access to the data room, the Real Property received wide market exposure. As noted above, 14 bidders submitted offers on the first round and seven bidders submitted offers on the second round. The Purchaser's offer was the highest and best offer received in the bidding process and the agreement of purchase and sale does not contain any material conditions. The Real Property is being bought by the Purchaser on an "as is where is" basis. I further note that the Sale Transaction has the support of the Debtor's first ranking secured creditor.

[33] Mr. Ahluwalia asks the court to consider his November 14, 2024 offer when determining whether to approve the sale process and the proposed Sale Transaction. As noted above, Mr. Ahluwalia missed the first bid deadline and submitted a bid significantly below the top six bidders who were asked to re-submit. Mr. Ahluwalia submitted a bid in the second round of bidding in any event, which the Receiver did consider. However, there were at least three parties who had higher bids than Mr. Ahluwalia in the second round. Accordingly, the Receiver accepted the

Purchaser's offer. Mr. Ahluwalia submitted his November 14, 2024 offer after the Receiver had accepted the Purchaser's offer.

[34] A disappointed bidder does not generally have standing to challenge a motion to approve a sale to another bidder: *Re Consumer Packaging Inc.*, 2001 CanLII 6708, at para. 7.

[35] In any event, considering Mr. Ahluwalia's bid after the bid deadline passed and the Purchaser's offer was accepted would thwart the integrity of the sales process. If a party could swoop in at the last minute and submit a bully bid, after a fair and thorough sales process has been run and the highest and best offer accepted, complete uncertainty would be created.

[36] As noted by the Receiver, courts will generally defer to a court-appointed receiver's expertise in reviewing a sale and will not second-guess their recommendation absent exceptional circumstances: *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375, at para. 15.

[37] I am satisfied that the sale agreement and Sale Transaction with the Purchaser should be approved.

Should the Approval and Vesting Order be granted?

[38] The Receiver seeks an approval and vesting order in respect of the Real Property sale to the Purchaser.

[39] Under section 100 of the *Courts of Justice Act* the court has the power to grant approval and vesting orders:

A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

[40] The proposed vesting order will extinguish the registered charges on the Real Property listed out in paragraphs 30 and 31 of the Receiver's factum.

[41] Vesting orders are routinely granted by this court: *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 at para. 106.

[42] I agree with the Receiver's submission that it is appropriate for the court to grant the requested AVO, granting the Real Property to the Purchaser free and clear of the claims and encumbrances set out at paras. 30 and 31 of the Receiver's factum (other than Permitted Encumbrances). The applicant, First Source, is supportive of the transaction being put forward. Further, as set out above, the sale was conducted in a manner that meets the *Soundair* principles.

Should the Interim Distribution be approved?

[43] The Receiver seeks court approval to distribute \$16 million to First Source following the completion of the Transaction. The Receiver seeks authorization to make further payments to First Source from available funds up to the amount of First Source's debt, once the Receiver has determined the amounts due in respect of certain priority claims.

[44] The court routinely grants orders authorizing interim distributions in insolvency proceedings: e.g., *Ontario Securities Commission v. Bridging Income Fund L.P.*, 2022 ONSC 4472, at paras. 8 and 12.

[45] In determining whether it is appropriate to authorize an interim distribution the court may consider: (a) whether the proposed recipient's security is valid and enforceable; (b) whether the amounts that are owed to the proposed recipient exceed the proposed interim distribution amount; and (c) whether the proposed interim distribution would result in interest savings: *Re Abitibowater Inc.*, 2009 QCCS 6461 at para. 75.

[46] In the instant case, First Source has a valid and enforceable security interest in respect of the collateral covered by its security. Counsel to the Receiver provided the Receiver with a security opinion, subject to the usual qualifications, assumptions and disclaimers, which opinion confirms the validity of the charge granted in favour of First Source on the Real Property. The amount of First Source's indebtedness as at October 1, 2024 was \$17,752,258.56. The proposed distribution of \$16 million is less than the amount outstanding on the loan. By repaying a portion of the loan, there will be interest savings.

[47] I am satisfied that the proposed interim distribution should be approved.

Should the Court grant the Sealing Order?

[48] The Receiver seeks a sealing order with respect to the Confidential Appendices of the Third Report. The Confidential Appendices contain information regarding the purchase price for the transaction and information regarding the sales process, including other offers submitted.

[49] Subsection 137(2) of the *Courts of Justice Act* provides that the Court may order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record.

[50] For the court to grant a sealing order, the party requesting the order must establish that:

- a. Court openness poses a serious risk to an important public interest;
- b. The order sought is necessary to prevent this serious risk to the interest because reasonably alternative measures will not prevent this risk; and
- c. As a matter of proportionality, the benefits of the sealing order outweigh its negative effects:

Sherman Estate v. Donovan, 2021 SCC 25, at para. 38.

[51] The requested sealing order is limited in scope. The proposed sealing order balances the open court principle and legitimate commercial requirements for confidentiality in the circumstances. In my view, the benefits of the requested sealing order outweigh the negative impact on the "open court" principle. The Confidential Appendices contain commercially sensitive information that could have a detrimental impact on a future sales process, should one be required if the transaction does not close. No stakeholder will be materially prejudiced by the

sealing order, which applies to only a limited amount of information. As noted by the Receiver, there is not a reasonable alternative to a sealing order.

[52] I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, at para. 53, requirements, as modified in *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 38.

[53] I am satisfied that the Confidential Appendices should be sealed pending further order of this court.

Should the Court grant the other relief sought by the Receiver?

[54] There was no opposition to the other relief sought by the Receiver, specifically, the approval of the Second Report, Third Report, and Supplemental Third Report, and the approval of the fees and disbursements of the Receiver and its counsel.

[55] As noted in *Re Target Canada Co.*, 2015 ONSC 7574, at para. 2, court appointed officers routinely seek court approval of their reports and activities, which relief is routinely granted where there is no opposition. The court in *Target* also recognized, at para. 22, that there are “good policy and practical reasons” for the court to provide such approval. While *Target* was a case involving court approval of Monitor’s reports and activities under a *Companies’ Creditors Arrangement Act* proceeding, subsequent cases have confirmed that the considerations apply equally to the reports and activities of a receiver: *Re Hangfeng Evergreen Inc.*, 2017 ONSC 7161 at para. 15.

[56] I am satisfied that the activities of the Receiver set out in the Second Report, Third Report, and Supplemental Third Report were necessary and undertaken in good faith in accordance with the order appointing the Receiver and should be approved.

[57] Having reviewed the fee affidavits and considered the non-exhaustive factors in *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, at para. 33, I am satisfied that the fees and disbursements of the Receiver and its counsel for the applicable billing period are fair and reasonable and should be approved.

[58] Orders attached.

J. Steele J.

TAB 20

Metcalfe & Mansfield Alternative Investments II Corp. (Re)

92 O.R. (3d) 513

Court of Appeal for Ontario,
Laskin, Cronk and Blair JJ.A.
August 18, 2008

2008 ONCA 587 (CanLII)

Debtor and creditor -- Companies' Creditors Arrangement Act
-- Companies' Creditors Arrangement Act permitting inclusion of
third-party releases in plan of compromise or arrangement to be
sanctioned by court where those releases are reasonably
connected to proposed restructuring -- Companies' Creditors
Arrangement Act, R.S.C. 1985, c. C-36.

In response to a liquidity crisis which threatened the
Canadian market in Asset Backed Commercial Paper ("ABCP"), a
creditor-initiated Plan of Compromise and Arrangement was
crafted. The Plan called for the release of third parties from
any liability associated with ABCP, including, with certain
narrow exceptions, liability for claims relating to fraud. The
"double majority" required by s. 6 of the Companies'
Creditors Arrangement Act ("CCAA") approved the Plan. The
respondents sought court approval of the Plan under s. 6 of the
CCAA. The application judge made the following findings: (a)
the parties to be released were necessary and essential to the
restructuring; (b) the claims to be released were rationally
related to the purpose of the Plan and necessary for it; (c)
the Plan could not succeed without the releases; (d) the
parties who were to have claims against them released were
contributing in a tangible and realistic way to the Plan; and
(e) the Plan would benefit not only the debtor companies but
creditor noteholders generally. The application judge
sanctioned the Plan. The appellants were holders of ABCP notes
who opposed the Plan. On appeal, they argued that the CCAA does

not permit a release of claims against third parties and that the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867.

Held, the appeal should be dismissed.

On a proper interpretation, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. That conclusion is supported by (a) the open-ended, flexible character of the CCAA itself; (b) the broad nature of the term "compromise or arrangement" as used in the CCAA; and (c) the express statutory effect of the "double majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the CCAA in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to interpretation. The second provides the entre to negotiations between the parties [page514] affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity to fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

While the principle that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect is an important one, Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself.

Interpreting the CCAA as permitting the inclusion of third-party releases in a plan of compromise or arrangement is not unconstitutional under the division-of-powers doctrine and does not contravene the rules of public order pursuant to the Civil Code of Quebec. The CCAA is valid federal legislation under the federal insolvency power, and the power to sanction a plan of compromise or arrangement that contains third-party releases is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action or trump Quebec rules of public order is constitutionally immaterial. To the extent that the provisions of the CCAA are inconsistent with provincial legislation, the federal legislation is paramount.

The application judge's findings of fact were supported by the evidence. His conclusion that the benefits of the Plan to the creditors as a whole and to the debtor companies outweighed the negative aspects of compelling the unwilling appellants to execute the releases was reasonable.

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APPEAL from the sanction order of C.L. Campbell J., [2008] O.J. No. 2265, 43 C.B.R. (5th) 269 (S.C.J.) under the Companies' Creditors Arrangement Act.

See Schedule "C" -- Counsel for list of counsel.

The judgment of the court was delivered by

BLAIR J.A.: --

A. Introduction

[1] In August 2007, a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

[2] By agreement amongst the major Canadian participants, the \$32 billion Canadian market in third-party ABCP was frozen on August 13, 2007, pending an attempt to resolve the crisis

through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

[3] Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the [page517] application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to appeal

[4] Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument, we encouraged counsel to combine their submissions on both matters.

[5] The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and -- given the expedited timetable -- the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Cineplex Odeon Corp. (Re)* (2001), 24 C.B.R. (4th) 201 (Ont. C.A.) and *Re Country Style Food Services*, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.) are met. I would grant leave to appeal.

Appeal

[6] For the reasons that follow, however, I would dismiss the appeal.

B. Facts

The parties

[7] The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third-party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer and several holding companies and energy companies.

[8] Each of the appellants has large sums invested in ABCP -- in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants -- slightly over \$1 billion -- represent only a small fraction of the more than \$32 billion of ABCP involved in the restructuring.

[9] The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies and some smaller holders of ABCP product. They participated in the market in a number of different ways.
[page518]

The ABCP market

[10] Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment -- usually 30 to 90 days -- typically with a low-interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

[11] ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

[12] The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over \$116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately \$32 billion of non-bank sponsored ABCP, the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

[13] As I understand it, prior to August 2007, when it was frozen, the ABCP market worked as follows.

[14] Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

[15] The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

[16] When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP

[page519] Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The liquidity crisis

[17] The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature, there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

[18] When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

[19] The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes -- partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

[20] The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze -- the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement -- known as the Montreal Protocol -- the parties committed [page520] to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

[21] The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two-thirds of the \$32 billion of ABCP sought to be restructured in these proceedings.

[22] Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

[23] Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian

ABCP market.

The Plan

(a) Plan overview

[24] Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution". The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper -- which has been frozen and therefore effectively worthless for many months -- into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

[25] The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan [page521] adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

[26] Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

[27] The Plan does not apply to investors holding less than \$1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the \$1 million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be

designed to secure votes in favour of the Plan by various Noteholders and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

(b) The releases

[28] This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in art. 10.

[29] The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers and other market participants -- in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" -- from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

[30] The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

[31] The releases, in effect, are part of a quid pro quo. Generally speaking, they are designed to compensate various participants in [page522] the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

- (a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets and provide below-cost financing for margin funding facilities that are

- designed to make the notes more secure;
- (b) Sponsors -- who in addition have co-operated with the Investors' Committee throughout the process, including by sharing certain proprietary information -- give up their existing contracts;
 - (c) the Canadian banks provide below-cost financing for the margin funding facility; and
 - (d) other parties make other contributions under the Plan.

[32] According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation".

The CCAA proceedings to date

[33] On March 17, 2008, the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25. The vote was overwhelmingly in support of the Plan -- 96 per cent of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan -- 99 per cent of those connected with the development of the Plan voted positively, as did 80 per cent of those Noteholders who had not been involved in its formulation.

[34] The vote thus provided the Plan with the "double majority" approval -- a majority of creditors representing two-thirds in value of the claims -- required under s. 6 of the CCAA.

[35] Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 [page523] and 13. On May 16, the application judge

issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

[36] The result of this renegotiation was a "fraud carve-out" -- an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

[37] A second sanction hearing -- this time involving the amended Plan (with the fraud carve-out) -- was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

[38] The appellants attack both of these determinations.

C. Law and Analysis

[39] There are two principal questions for determination on this appeal:

- (1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its

directors?

(2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it? [page524]

(1) Legal authority for the releases

[40] The standard of review on this first issue -- whether, as a matter of law, a CCAA plan may contain third-party releases -- is correctness.

[41] The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company. [See Note 1 below] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

- (a) on a proper interpretation, the CCAA does not permit such releases;
- (b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;
- (c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867;
- (d) the releases are invalid under Quebec rules of public order; and because
- (e) the prevailing jurisprudence supports these conclusions.

[42] I would not give effect to any of these submissions.

Interpretation, "gap filling" and inherent jurisdiction

[43] On a proper interpretation, in my view, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of

(a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including [page525] those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entre to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

[44] The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society (Re)*, [1998] O.J. No. 3306, 5 C.B.R. (4th) 299 (Gen. Div.). As Farley J. noted in *Dylex Ltd. (Re)*, [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.), at p. 111 C.B.R., "[t]he history of CCAA law has been an evolution of judicial interpretation".

[45] Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

[46] These issues have recently been canvassed by the

Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", [See Note 2 below] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools -- statutory interpretation, gap-filling, discretion and inherent jurisdiction [page526] -- it is not necessary, in my view, to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

[47] The Supreme Court of Canada has affirmed generally -- and in the insolvency context particularly -- that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)* (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26.

[48] More broadly, I believe that the proper approach to the judicial interpretation and application of statutes -- particularly those like the CCAA that are skeletal in nature -- is succinctly and accurately summarized by Jackson and Sarra in their recent article, *supra*, at p. 56:

The exercise of a statutory authority requires the statute to

be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in Quebec as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

[49] I adopt these principles. [page527]

[50] The remedial purpose of the CCAA -- as its title affirms -- is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 318 C.B.R., Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a

reorganization or compromise or arrangement under which the company could continue in business.

[51] The CCAA was enacted in 1933 and was necessary -- as the then secretary of state noted in introducing the Bill on First Reading-- "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, House of Commons Debates (Hansard) (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.), per Doherty J.A. in dissent; *Skydome Corp. v. Ontario*, [1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); *Anvil Range Mining Corp. (Re)* (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.).

[52] In this respect, I agree with the following statement of Doherty J.A. in *Elan*, supra, at pp. 306-307 O.R.:

[T]he Act was designed to serve a "broad constituency of investors, creditors and employees". [See Note 3 below] Because of that "broad constituency" the court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.

(Emphasis added)

Application of the principles of interpretation

[53] An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the [page528] application judge pointed out, the restructuring underpins the financial viability of the Canadian

ABCP market itself.

[54] The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

[55] This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP Dealers, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as Asset Providers and Liquidity Providers, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore -- as the application judge found -- in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and . . . providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark, at para. 50, that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments, at paras. 48-49:

Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.

In these circumstances, it is unduly technical to classify

the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring.

(Emphasis added)

[56] The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper . . ." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor [page529] and creditors. His focus was on the effect of the restructuring, a perfectly permissible perspective given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated, at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal".

[57] I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The statutory wording

[58] Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

(a) the skeletal nature of the CCAA;

- (b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in
 - (c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".
- Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

[59] Sections 4 and 6 of the CCAA state:

4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs. [page530]

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6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

- (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
- (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and

Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or arrangement

[60] While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: L.W. Houlden and C.H. Morawetz, *Bankruptcy and Insolvency Law of Canada*, looseleaf, 3rd ed., vol. 4 (Scarborough, Ont.: Carswell, 1992) at 10A-12.2, N10. It has been said to be "a very wide and indefinite [word]": *Reference re Timber Regulations*, [1935] A.C. 184, [1935] 2 D.L.R. 1 (P.C.), at p. 197 A.C., affg [1933] S.C.R. 616, [1933] S.C.J. No. 53. See also *Guardian Assurance Co. (Re)*, [1917] 1 Ch. 431 (C.A.), at pp. 448, 450 Ch.; *T&N Ltd. and Others (No. 3) (Re)*, [2007] 1 All E.R. 851, [2006] E.W.H.C. 1447 (Ch.).

[61] The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement". I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

[62] A proposal under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, at p. 239 S.C.R.; [page531] *Society of Composers, Authors and Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688,

[2000] O.J. No. 3993 (C.A.), at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes and, therefore, is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Air Canada (Re)*, [2004] O.J. No. 1909, 2 C.B.R. (5th) 4 (S.C.J.), at para. 6; *Olympia & York Developments Ltd. (Re)* (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.), at p. 518 O.R.

[63] There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan -- including the provision for releases -- becomes binding on all creditors (including the dissenting minority).

[64] *T&N Ltd. and Others (Re)*, *supra*, is instructive in this regard. It is a rare example of a court focusing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. Companies Act 1985, a provision virtually identical to the scheme of the CCAA -- including the concepts of compromise or arrangement. [See Note 4 below]

[65] T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the EL claimants)

would assert their claims. In return, T&N's former employees and dependants (the EL claimants) agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of [page532] compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

[66] Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The court rejected this argument. Richards J. adopted previous jurisprudence -- cited earlier in these reasons -- to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example. [See Note 5 below] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many

years to give the term its widest meaning. Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.

(Emphasis added)

[67] I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in T&N were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial [page533] third parties are making to the ABCP restructuring. The situations are quite comparable.

The binding mechanism

[68] Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes [See Note 6 below] and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The required nexus

[69] In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be

made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

[70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan. This nexus exists here, in my view.

[71] In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

- (a) The parties to be released are necessary and essential to the restructuring of the debtor; [page534]
- (b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;
- (c) the Plan cannot succeed without the releases;
- (d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and
- (e) the Plan will benefit not only the debtor companies but creditor Noteholders generally.

[72] Here, then -- as was the case in T&N -- there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being

released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77, he said:

I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.

This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

[73] I am satisfied that the wording of the CCAA -- construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation -- supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The jurisprudence

[74] Third-party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's [page535] Bench in *Canadian Airlines Corp. (Re)*, [2000] A.J. No. 771, 265 A.R. 201 (Q.B.), leave to appeal refused by *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 1028, 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, 293 A.R. 351. In *Muscletech Research and Development Inc. (Re)*, [2006] O.J. No. 4087, 25 C.B.R. (5th) 231 (S.C.J.), Justice Ground remarked (para. 8):

[It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

[75] We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of Canadian Airlines (Re), however, the releases in those restructurings -- including Muscletech -- were not opposed. The appellants argue that those cases are wrongly decided because the court simply does not have the authority to approve such releases.

[76] In Canadian Airlines (Re) the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the wellspring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

[77] Justice Paperny began her analysis of the release issue with the observation, at para. 87, that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company". It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in Michaud v. Steinberg, [See Note 7 below] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument -- dealt with later in these reasons -- that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92). [page536]

[78] Respectfully, I would not adopt the interpretive

principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court-sanctioning statutory mechanism that makes them binding on unwilling creditors.

[79] The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Michaud v. Steinberg*, supra; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749 (C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.); and *Stelco Inc. (Re)* (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883 (C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg*, they do not involve third-party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg* does not express a correct view of the law, and I decline to follow it.

[80] In *Pacific Coastal Airlines*, Tysoe J. made the following comment, at para. 24:

[The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

[81] This statement must be understood in its context, however. *Pacific Coastal Airlines* had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question, it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to

certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of res judicata or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

[82] The facts in Pacific Coastal are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian -- at a contractual level -- may have had some involvement with the particular dispute. [page537] Here, however, the disputes that are the subject matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

[83] Nor is the decision of this court in the NBD Bank case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly owned subsidiary of Dofasco. The bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors". Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the bank. On appeal, he argued that since the bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process -- in short, he was personally protected by the CCAA release.

[84] Rosenberg J.A., writing for this court, rejected this argument. The appellants here rely particularly upon his following observations, at paras. 53-54:

In my view, the appellant has not demonstrated that

allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at p. 297, . . . the CCAA is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.

In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may [page538] not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement.

(Footnote omitted)

[85] Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third-party releases was not under consideration at all. What the court was determining in NBD Bank was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in NBD to the facts now before the Court" (para. 71). Contrary to the facts of this case, in NBD Bank the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release -- as is the situation here. Thus, NBD Bank is of little assistance in determining whether the court has authority to sanction a plan that calls for third-party releases.

[86] The appellants also rely upon the decision of this court in Stelco I. There, the court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement, one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

[Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis--vis the creditors themselves and not directly involving the company.

(Citations omitted; emphasis added)

See Stelco Inc. (Re), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297 (S.C.J.), at para. 7.

[87] This court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the [page539] need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the court were quite different from those raised on this appeal.

[88] Indeed, the Stelco plan, as sanctioned, included third-party releases (albeit uncontested ones). This court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and, therefore, that they were entitled to a separate civil action to determine their rights under the agreement: *Stelco Inc. (Re)*, [2006] O.J. No. 1996, 21 C.B.R. (5th) 157 (C.A.) ("*Stelco II*"). The court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The court said (para. 11):

In [*Stelco I*] -- the classification case -- the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company . . . [H]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process.
(Emphasis added)

[89] The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third-party releases here are very closely connected to the ABCP restructuring process.

[90] Some of the appellants -- particularly those represented by Mr. Woods -- rely heavily upon the decision of the Quebec

Court of Appeal in *Michaud v. Steinberg*, supra. They say that it is determinative of the release issue. In *Steinberg*, the court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 -- English translation):

Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.

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The Act offers the respondent a way to arrive at a compromise with its creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.

. [page540]

The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

[91] Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third-party releases in this fashion (para. 7):

In short, the Act will have become the Companies' and Their Officers and Employees Creditors Arrangement Act -- an awful mess -- and likely not attain its purpose, which is to enable the company to survive in the face of its creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of

operation, contrary to its purposes and, for this reason, is to be banned.

[92] Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature -- they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company -- rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para., 90 he said:

The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms encompass all that should enable the person who has recourse to it to fully dispose of his debts, both those that exist on the date when he has recourse to the statute and those contingent on the insolvency in which he finds himself . . .

(Emphasis added)

[93] The decision of the court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself", however. On occasion, such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in *Steinberg*, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision [page541] appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analyzing the Act -- an approach inconsistent with the jurisprudence referred to above.

[94] Finally, the majority in Steinberg seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases -- as I have concluded it does -- the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

[95] Accordingly, to the extent Steinberg stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in Steinberg considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 amendments

[96] Steinberg led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

- (a) relate to contractual rights of one or more creditors; or
- (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances. [page542]

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

[97] Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third-party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? *Expressio unius est exclusio alterius*, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

[98] The maxim is not helpful in these circumstances, however. The reality is that there may be another explanation why Parliament acted as it did. As one commentator has noted: [See Note 8 below]

Far from being a rule, [the maxim *expressio unius*] is not

even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes it does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

[99] As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg*. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see *Houlden and Morawetz*, vol. 1, *supra*, at 2-144, E11A; *Dans l'affaire de la proposition de: Le Royal Penfield inc. et Groupe Thibault Van Houtte et Associs lte*), [2003] J.Q. no. 9223, [2003] R.J.Q. 2157 (C.S.), at paras. 44-46.

[100] Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the [page543] BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third-party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The deprivation of proprietary rights

[101] Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect: Halsbury's Laws of England, 4th ed. reissue, vol. 44(1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., supra, at 183; E.A. Driedger and Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed., (Markham, Ont.: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The division of powers and paramountcy

[102] Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the Constitution Act, 1867, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the Civil Code of Quebec. [page544]

[103] I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: Reference re: Constitutional Creditors Arrangement Act (Canada), [1934] S.C.R. 659, [1934] S.C.J. No. 46. As the Supreme Court confirmed in that case (p.

661 S.C.R.), citing Viscount Cave L.C. in *Royal Bank of Canada v. Larue*, [1928] A.C. 187 (J.C.P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament". Chief Justice Duff elaborated:

Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

[104] That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action -- normally a matter of provincial concern -- or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion with respect to legal authority

[105] For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "fair and reasonable"

[106] The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

[107] Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In [page545] the absence of a demonstrable error, an appellate court will not interfere: see *Ravelston Corp. Ltd. (Re)*, [2007] O.J. No. 1389, 31 C.B.R. (5th) 233 (C.A.).

[108] I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties -- including leading Canadian financial institutions -- that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end, he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

[109] The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

[110] The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers; (ii) limits the type of damages that may be claimed (no punitive damages, for example); (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order; and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

[111] The law does not condone fraud. It is the most serious kind of civil claim. There is, therefore, some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotini's Restaurant Corp. v. White Spot Ltd.*, [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251 (S.C.), at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings -- the claims here all being untested allegations of fraud -- and to include releases of such claims as part of that settlement.

[112] The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, [page546] that the need "to avoid the potential cascade of litigation that . . . would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

[113] At para. 71, above, I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here -- with two additional findings -- because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

- (a) The parties to be released are necessary and essential to the restructuring of the debtor;
- (b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;
- (c) the Plan cannot succeed without the releases;
- (d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the

Plan;

- (e) the Plan will benefit not only the debtor companies but creditor Noteholders generally;
- (f) the voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
- (g) the releases are fair and reasonable and not overly broad or offensive to public policy.

[114] These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

[115] The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they -- as individual creditors -- make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, [page547] Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

[116] All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only

acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

[117] In insolvency restructuring proceedings, almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices", inasmuch as everyone is adversely affected in some fashion.

[118] Here, the debtor corporations being restructured represent the issuers of the more than \$32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of all Noteholders, not just the interests of the appellants, whose notes represent only about 3 per cent of that total. That is what he did.

[119] The application judge noted, at para. 126, that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out [page548] specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized, at para. 134, that:

No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity

among all stakeholders.

[120] In my view, we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. Disposition

[121] For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

Appeal dismissed.

SCHEDULE "A" -- CONDUITS

Apollo Trust
 Apsley Trust
 Aria Trust
 Aurora Trust
 Comet Trust
 Encore Trust
 Gemini Trust
 Ironstone Trust
 MMAI-I Trust
 Newshore Canadian Trust
 Opus Trust
 Planet Trust
 Rocket Trust
 Selkirk Funding Trust
 Silverstone Trust
 Slate Trust
 Structured Asset Trust
 Structured Investment Trust III
 Symphony Trust
 Whitehall Trust

SCHEDULE "B" -- APPLICANTS

ATB Financial
 Caisse de dpt et placement du Qubec
 Canaccord Capital Corporation [page549]
 Canada Mortgage and Housing Corporation
 Canada Post Corporation
 Credit Union Central Alberta Limited
 Credit Union Central of BC
 Credit Union Central of Canada

Credit Union Central of Ontario
 Credit Union Central of Saskatchewan
 Desjardins Group
 Magna International Inc.
 National Bank of Canada/National Bank Financial
 Inc.
 NAV Canada

Northwater Capital Management Inc.
 Public Sector Pension Investment Board
 The Governors of the University of Alberta

SCHEDULE "C" -- COUNSEL

- (1) Benjamin Zarnett and Frederick L. Myers, for the Pan-Canadian Investors Committee
- (2) Aubrey E. Kauffman and Stuart Brotman, for 4446372 Canada Inc. and 6932819 Canada Inc.
- (3) Peter F.C. Howard, and Samaneh Hosseini, for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merrill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG
- (4) Kenneth T. Rosenberg, Lily Harmer, and Max Starnino, for Jura Energy Corporation and Redcorp Ventures Ltd.
- (5) Craig J. Hill and Sam P. Rappos, for the Monitors (ABCP Appeals)
- (6) Jeffrey C. Carhart and Joseph Marin, for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor
- (7) Mario J. Forte, for Caisse de Dpt et Placement du Qubec
- (8) John B. Laskin, for National Bank Financial Inc. and National Bank of Canada [page550]
- (9) Thomas McRae and Arthur O. Jacques, for Ad Hoc Retail Creditors Committee (Brian Hunter, et al.)
- (10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.
- (11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank
- (12) Jeffrey S. Leon, for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees

- (13) Usman Sheikh, for Coventree Capital Inc.
- (14) Allan Sternberg and Sam R. Sasso, for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.
- (15) Neil C. Saxe, for Dominion Bond Rating Service
- (16) James A. Woods, Sbastien Richemont and Marie-Anne Paquette, for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aroports de Montral, Aroports de Montral Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Mtropolitaine de Transport (AMT), Giro Inc., Vtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP
- (17) Scott A. Turner, for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.
- (18) R. Graham Phoenix, for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Notes

Note 1: Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

Note 2: Georgina R. Jackson and Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law*, 2007 (Vancouver, B.C.: Carswell, 2007).

Note 3: Citing Gibbs J.A. in *Chef Ready Foods*, *supra*, at pp. 319-20 C.B.R.

Note 4: The legislative debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the Companies Act 1985 (U.K.): see House of Commons Debates (Hansard), *supra*.

Note 5: See Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 192; Ontario Business Corporations Act, R.S.O. 1990, c. B.16, s. 182.

Note 6: A majority in number representing two-thirds in value of the creditors (s. 6).

Note 7: Steinberg was originally reported in French: *Steinberg Inc. c. Michaud*, [1993] J.Q. no. 1076, [1993] R.J.Q. 1684 (C.A.). All paragraph references to Steinberg in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055.

Note 8: Reed Dickerson, *The Interpretation and Application of Statutes* (Boston: Little Brown and Company, 1975) at pp. 234-35, cited in Bryan A. Garner, ed., *Black's Law Dictionary*, 8th ed. (West Group, St. Paul, Minn., 2004) at p. 621.

TAB 21

CITATION: Kitchener Frame Limited (Re), 2012 ONSC 234

COURT FILE NO.: CV-11-9298-00CL

DATE: 20120203

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

**IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
R.S.C. 1985, c. B-3, AS AMENDED**

**RE: IN THE MATTER OF THE CONSOLIDATED PROPOSAL OF
KITCHENER FRAME LIMITED AND THYSSENKRUPP BUDD
CANADA, INC., Applicants**

BEFORE: MORAWETZ J.

COUNSEL: Edward A. Sellers and Jeremy E. Dacks, for the Applicants

Hugh O'Reilly, Non-Union Representative Counsel

L. N. Gottheil, Union Representative Counsel

John Porter, for Ernst & Young Inc., Proposal Trustee

Michael McGraw, for CIBC Mellon Trust Company

Deborah McPhail, for Financial Services Commission of Ontario

ENDORSEMENT

[1] At the conclusion of this unopposed motion, the requested relief was granted. Counsel indicated that it would be helpful if the court could provide reasons in due course, specifically on the issue of a third-party release in the context of a proposal under Part III of the *Bankruptcy and Insolvency Act* (“BIA”).

[2] Kitchener Frame Limited (“KFL”) and Thyssenkrupp Budd Canada Inc. (“Budd Canada”), and together with KFL, (the “Applicants”), brought this motion for an order (the “Sanction Order”) to sanction the amended consolidated proposal involving the Applicants dated August 31, 2011 (the “Consolidated Proposal”) pursuant to the provisions of the BIA. Relief was also sought authorizing the Applicants and Ernst & Young Inc., in its capacity as proposal trustee

of each of the Applicants (the “Proposal Trustee”) to take all steps necessary to implement the Consolidated Proposal in accordance with its terms.

[3] The Applicants submit that the requested relief is reasonable, that it benefits the general body of the Applicants’ creditors and meets all other statutory requirements. Further, the Applicants submit that the court should also consider that the voting affected creditors (the “Affected Creditors”) unanimously supported the Consolidated Proposal. As such, the Applicants submit that they have met the test as set out in s. 59(2) of the *BIA* with respect to approval of the Consolidated Proposal.

[4] The motion of the Applicants was supported by the Proposal Trustee. The Proposal Trustee filed its report recommending approval of the Consolidated Proposal and indicated that the Consolidated Proposal was in the best interests of the Affected Creditors.

[5] KFL and Budd Canada are inactive entities with no operating assets and no material liquid assets (other than the Escrow Funds). They do have significant and mounting obligations including pension and other non-pension post-employment benefit (“OPEB”) obligations to the Applicants’ former employees and certain former employees of Budcan Holdings Inc. or the surviving spouses of such former employees or others who may be entitled to claim through such persons in the *BIA* proceedings, including the OPEB creditors.

[6] The background facts with respect to this motion are fully set out in the affidavit of Mr. William E. Aziz, sworn on September 13, 2011.

[7] Affiliates of Budd Canada have provided up to date funding to Budd Canada to enable Budd Canada to fund, on behalf of KFL, such pension and OPEB obligations. However, given that KFL and Budd Canada have no active operations, the *status quo* is unsustainable.

[8] The Applicants have acknowledged that they are insolvent and, in connection with the *BIA* proposal, proceedings were commenced on July 4, 2011.

[9] On July 7, 2011, Wilton-Siegel J. granted Procedural Consolidation Orders in respect of KFL and Budd Canada which authorized the procedural consolidation of the Applicants and permitted them to file a single consolidated proposal to their creditors.

[10] The Orders of Wilton-Siegel J. also appointed separate representative counsel to represent the interests of the Union and Non-Union OPEB creditors and further authorized the Applicants to continue making payments to Blue Cross in respect of the OPEB Claims during the *BIA* proposal proceedings.

[11] On August 2, 2011, an order was granted extending the time to file a proposal to August 19, 2011.

[12] The parties proceeded to negotiate the terms of the Consolidated Proposal, which meetings involved the Applicants, the Proposal Trustee, senior members of the CAW, Union Representative Counsel and Non-Union Representative Counsel.

[13] An agreement in principle was reached which essentially provided for the monetization and compromise of the OPEB claims of the OPEB creditors resulting in a one-time, lump-sum payment to each OPEB creditor term upon implementation of the Consolidated Proposal. The Consolidated Proposal also provides that the Applicants and their affiliates will forego any recoveries on account of their secured and unsecured inter-company claims, which total approximately \$120 million. A condition precedent was the payment of sufficient funds to the Pension Fund Trustee such that when such funds are combined with the value of the assets held in the Pension Plans, the Pension Fund Trustee will be able to fully annuitize the Applicants' pension obligations and pay the commuted values to those creditors with pension claims who so elected so as to provide for the satisfaction of the Applicants' pension obligations in full.

[14] On August 19, 2011, the Applicants filed the Consolidated Proposal. Subsequent amendments were made on August 31, 2011 in advance of the creditors' meeting to reflect certain amendments to the proposal.

[15] The creditors' meeting was held on September 1, 2011 and, at the meeting, the Consolidated Proposal, as amended, was accepted by the required majority of creditors. Over 99.9% in number and over 99.8% in dollar value of the Affected Creditors' Class voted to accept the Consolidated Proposal. The Proposal Trustee noted that all creditors voted in favour of the Consolidated Proposal, with the exception of one creditor, Canada Revenue Agency (with 0.1% of the number of votes representing 0.2% of the value of the vote) who attended the meeting but abstained from voting. Therefore, the Consolidated Proposal was unanimously approved by the Affected Creditors. The Applicants thus satisfied the required "double majority" voting threshold required by the *BIA*.

[16] The issue on the motion was whether the court should sanction the Consolidated Proposal, including the substantive consolidation and releases contained therein.

[17] Pursuant to s. 54(2)(d) of the *BIA*, a proposal is deemed to be accepted by the creditors if it has achieved the requisite "double majority" voting threshold at a duly constituted meeting of creditors.

[18] The *BIA* requires the proposal trustee to apply to court to sanction the proposal. At such hearing, s. 59(2) of the *BIA* requires that the court refuse to approve the proposal where its terms are not reasonable or not calculated to benefit the general body of creditors.

[19] In order to satisfy s. 59(2) test, the courts have held that the following three-pronged test must be satisfied:

- (a) the proposal is reasonable;
- (b) the proposal is calculated to benefit the general body of creditors; and
- (c) the proposal is made in good faith.

See *Mayer (Re)* (1994), 25 CBR (3d) 113; *Steeves (Re)*, 25 CBR (4th) 317; *Magnus One Energy Corp. (Re)*, 53 CBR (5th) 243.

[20] The first two factors are set out in s. 59(2) of the *BIA* while the last factor has been implied by the court as an exercise of its equitable jurisdiction. The courts have generally taken into account the interests of the debtor, the interests of the creditors and the interests of the public at large in the integrity of the bankruptcy system. See *Farrell (Re)* 2003, 40 CBR (4th) 53.

[21] The courts have also accorded substantial deference to the majority vote of creditors at a meeting of creditors; see *Lofchik, Re* [1998] O.J. No. 322 (Ont. Bkcty). Similarly, the courts have also accorded deference to the recommendation of the proposal trustee. See *Magnus One, supra*.

[22] With respect to the first branch of the test for sanctioning a proposal, the debtor must satisfy the court that the proposal is reasonable. The court is authorized to only approve proposals which are reasonable and calculated to benefit the general body of creditors. The court should also consider the payment terms of the proposal and whether the distributions provided for are adequate to meet the requirements of commercial morality and maintaining the integrity of the bankruptcy system. For a discussion on this point, see *Lofchik, supra*, and *Farrell, supra*.

[23] In this case, the Applicants submit that, if the Consolidated Proposal is sanctioned, they would be in a position to satisfy all other conditions precedent to closing on or prior to the date of the proposal ("Proposal Implementation Date").

[24] With respect to the treatment of the Collective Bargaining Agreements, the Applicants and the CAW brought a joint application before the Ontario Labour Relations Board ("OLRB") on an expedited basis seeking the OLRB's consent to an early termination of the Collective Bargaining Agreements. Further, the CAW has agreed to abandon its collective bargaining rights in connection with the Collective Bargaining Agreements.

[25] With respect to the terms and conditions of a Senior Secured Loan Agreement between Budd Canada and TK Finance dated as of December 22, 2010, TK Finance provided a secured creditor facility to the Applicants to fund certain working capital requirements before and during the *BIA* proposal proceedings. As a result of the approval of the Consolidated Proposal at the meeting of creditors, TK Finance agreed to provide additional credit facilities to Budd Canada such that the Applicants would be in a position to pay all amounts required to be paid by or on behalf of the Applicants in connection with the Consolidated Proposal.

[26] On the issue as to whether creditors will receive greater recovery under the Consolidated Proposal than they would receive in the bankruptcy, it is noted that creditors with Pension Claims are unaffected by the Consolidated Proposal. The Consolidated Proposal provides for the satisfaction of Pension Claims in full as a condition precedent to implementation.

[27] With respect to Affected Creditors, the Applicants submit that they will receive far greater recovery from distributions under the Consolidated Proposal than the Affected Creditors

would receive in the event of the bankruptcies of the Applicants. (See Sanction Affidavit of Mr. Aziz at para. 61.)

[28] The Proposal Trustee has stated that the Consolidated Proposal is advantageous to creditors for the reasons outlined in its Report and, in particular:

- (a) the recoveries to creditors with claims in respect of OPEBs are considerably greater under the Amended Proposal than in a bankruptcy;
- (b) payments under the Amended Proposal are expected in a timely manner shortly after the implementation of the Amended Proposal;
- (c) the timing and quantum of distributions pursuant to the Amended Proposal are certain while distributions under a bankruptcy are dependent on the results of litigation, which cannot be predicted with certainty; and
- (d) the Pension Plans (as described in the Proposal Trustee's Report) will be fully funded with funds from the Pension Escrow (as described in the Proposal Trustee's Report) and, if necessary, additional funding from an affiliate of the Companies if the funds in the Pension Escrow are not sufficient. In a bankruptcy, the Pension Plans may not be fully funded.

[29] The Applicants take the position that the Consolidated Proposal meets the requirements of commercial morality and maintains the integrity of the bankruptcy system, in light of the superior coverage to be afforded to the Applicants' creditors under the Consolidated Proposal than in the event of bankruptcy.

[30] The Applicants also submit that substantive consolidation inherent in the proposal will not prejudice any of the Affected Creditors and is appropriate in the circumstances. Although not expressly contemplated under the *BIA*, the Applicants submit that the court may look to its incidental, ancillary and auxiliary jurisdiction under s. 183 of the *BIA* and its equitable jurisdiction to grant an order for substantive consolidation. See *Ashley v. Marlow Group Private Portfolio Management Inc.* (2006) 22 CBR (5th) 126 (Ont. S.C.J.) (Commercial List). In deciding whether to grant substantive consolidation, courts have held that it should not be done at the expense of, or possible prejudice of, any particular creditor. See *Ashley, supra*. However, counsel submits that this court should take into account practical business considerations in applying the *BIA*. See *A & F Baillargeon Express Inc. (Trustee of) (Re)* (1993), 27 CBR (3d) 36.

[31] In this case, the Applicants submit that substantive consolidation inherent in the Consolidated Proposal is appropriate in the circumstances due to, among other things, the intertwined nature of the Applicants' assets and liabilities. Each Applicant had substantially the same creditor base and known liabilities (other than certain Excluded Claims). In addition, KFL had no cash or cash equivalents and the Applicants are each dependant on the Escrow Funds and borrowings under the Restated Senior Secured Loan Agreement to fund the same underlying pension and OPEB obligations and costs relating to the Proposal Proceedings.

[32] The Applicants submit that creditors in neither estate will be materially prejudiced by substantive consolidation and based on the fact that no creditor objected to the substantial consolidation, counsel submits the Consolidated Proposal ought to be approved.

[33] With respect to whether the Consolidated Proposal is calculated to benefit the general body of creditors, TK Finance would be entitled to priority distributions out of the estate in a bankruptcy scenario. However, the Applicants and their affiliates have agreed to forego recoveries under the Consolidated Proposal on account of their secured and unsecured inter-company claims in the amount of approximately \$120 million, thus enhancing the level of recovery for the Affected Creditors, virtually all of whom are OPEB creditors. It is also noted that TK Finance will be contributing over \$35 million to fund the Consolidated Proposal.

[34] On this basis, the Applicants submit that the Consolidated Proposal is calculated to benefit the general body of creditors.

[35] With respect to the requirement of the proposal being made in good faith, the debtor must satisfy the court that it has provided full disclosure to its creditors of its assets and encumbrances against such assets.

[36] In this case, the Applicants and the Proposal Trustee have involved the creditors pursuant to the Representative Counsel Order, and through negotiations with the Union Representative Counsel and Non-Union Representative Counsel.

[37] There is also evidence that the Applicants have widely disseminated information regarding their *BIA* proposal proceedings through the media and through postings on the Proposal Trustee's website. Information packages have also prepared by the Proposal Trustee for the creditors.

[38] Finally, the Proposal Trustee has noted that the Applicants' conduct, both prior to and subsequent to the commencement of the *BIA* proposal proceedings, is not subject to censure in any respect and that the Applicants' have acted in good faith.

[39] There is also evidence that the Consolidated Proposal continues requisite statutory terms. The Consolidated Proposal provides for the payment of preferred claims under s. 136(1) of the *BIA*.

[40] Section 7.1 of the Consolidated Proposal contains a broad release in favour of the Applicants and in favour of certain third parties (the "Release"). In particular, the Release benefits the Proposal Trustee, Martinrea, the CAW, Union Representative Counsel, Non-Union Representative Counsel, Blue Cross, the Escrow Agent, the present and former shareholders and affiliates of the Applicants (including Thyssenkrupp USA, Inc. ("TK USA"), TK Finance, Thyssenkrupp Canada Inc. ("TK Canada") and Thyssenkrupp Budd Company), as well as their subsidiaries, directors, officers, members, partners, employees, auditors, financial advisors, legal counsel and agents of any of these parties and any person liable jointly or derivatively through any or all of the beneficiaries of the of the release (referred to individually as a "Released Party").

[41] The Release covers all Affected Claims, Pension Claims and Escrow Fund Claims existing on or prior to the later of the Proposal Implementation Date and the date on which actions are taken to implement the Consolidated Proposal.

[42] The Release provides that all such claims are released and waived (other than the right to enforce the Applicants' or Proposal Trustee's obligations under the Consolidated Proposal) to the full extent permitted by applicable law. However, nothing in the Consolidated Proposal releases or discharges any Released Party for any criminal or other wilful misconduct or any present or former directors of the Applicants with respect to any matters set out in s. 50(14) of the *BIA*. Unaffected Claims are specifically carved out of the Release.

[43] The Applicants submit that the Release is both permissible under the *BIA* and appropriately granted in the context of the *BIA* proposal proceedings. Further, counsel submits, to the extent that the Release benefits third parties other than the Applicants, the Release is not prohibited by the *BIA* and it satisfies the criteria that has been established in granting third-party releases under the *Companies' Creditors Arrangement Act* ("CCAA"). Moreover, counsel submits that the scope of the Release is no broader than necessary to give effect to the purpose of the Consolidated Proposal and the contributions made by the third parties to the success of the Consolidated Proposal.

[44] No creditors or stakeholders objected to the scope of the Release which was fully disclosed in the negotiations, including the fact that the inclusion of the third-party releases was required to be part of the Consolidated Proposal. Counsel advises that the scope of the Release was referred to in the materials sent by the Proposal Trustee to the Affected Creditors prior to the meeting, specifically discussed at the meeting and adopted by the unanimous vote of the voting Affected Creditors.

[45] Counsel also submits that there is no provision in the *BIA* that clearly and expressly precludes the Applicants from including the Release in the Consolidated Proposal as long as the court is satisfied that the Consolidated Proposal is reasonable and for the general benefit of creditors.

[46] In this respect, it seems to me, that the governing statutes should not be technically or stringently interpreted in the insolvency context but, rather, should be interpreted in a manner that is flexible rather than technical and literal, in order to deal with the numerous situations and variations which arise from time to time. Further, taking a technical approach to the interpretation of the *BIA* would defeat the purpose of the legislation. See *NTW Management Group (Re)* (1994), 29 CBR (3d) 139; *Olympia & York Developments Ltd. (Re)* (1995), 34 CBR (3d) 93; *Olympia & York Developments Ltd. (Re)* (1997), 45 CBR (3d) 85.

[47] Moreover, the statutes which deal with the same subject matter are to be interpreted with the presumption of harmony, coherence and consistency. See *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24. This principle militates in favour of adopting an interpretation of the *BIA* that is harmonious, to the greatest extent possible, with the interpretation that has been given to the *CCAA*.

[48] Counsel points out that historically, some case law has taken the position that s. 62(3) of the *BIA* precludes a proposal from containing a release that benefits third parties. Counsel submits that this result is not supported by a plain meaning of s. 62(3) and its interaction with other key sections in the *BIA*.

[49] Subsection 62(3) of the *BIA* reads as follows:

(3) The acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of the debtor.

[50] Counsel submits that there are two possible interpretations of this subsection:

- (a) It prohibits third party releases – in other words, the phrase “does not release any person” is interpreted to mean “cannot release any person”; or
- (b) It simply states that acceptance of a proposal does not automatically release any party other than the debtor – in other words, the phrase “does not release any person” is interpreted to mean “does not release any person without more”; it is protective not prohibitive.

[51] I agree with counsel’s submission that the latter interpretation of s. 62(3) of the *BIA* conforms with the grammatical and ordinary sense of the words used. If Parliament had intended that only the debtor could be released, s. 62(3) would have been drafted more simply to say exactly that.

[52] Counsel further submits that the narrow interpretation would be a stringent and inflexible interpretation of the *BIA*, contrary to accepted wisdom that the *BIA* should be interpreted in a flexible, purposive manner.

[53] The *BIA* proposal provisions are designed to offer debtors an opportunity to carry out a going concern or value maximizing restructuring in order to avoid a bankruptcy and related liquidation and that these purposes justify taking a broad, flexible and purposive approach to the interpretation of the relevant provisions. This interpretation is supported by *Ted Leroy Trucking Ltd. (Re)*, 2010 SCC 60.

[54] Further, I agree with counsel’s submissions that a more flexible purposive interpretation is in keeping with modern statutory principles and the need to give purposive interpretation to insolvency legislation must start from the proposition that there is no express prohibition in the *BIA* against including third-party releases in a proposal. At most, there are certain limited constraints on the scope of such releases, such as in s. 179 of the *BIA*, and the provision dealing specifically with the release of directors.

[55] In the absence of an express prohibition against including third-party releases in a proposal, counsel submits that it must be presumed that such releases are permitted (subject to compliance with any limited express restrictions, such as in the case of a release of directors). By extension, counsel submits that the court is entitled to approve a proposal containing a third-

party release if the court is able to satisfy itself that the proposal (including the third-party release) is reasonable and for the general benefit for creditors such that all creditors (including the minority who did not vote in favour of the proposal) can be required to forego their claims against parties other than the debtors.

[56] The Applicants also submit that s. 62(3) of the *BIA* can only be properly understood when read together with other key sections of the *BIA*, particularly s. 179 which concerns the effect of an order of discharge:

179. An order of discharge does not release a person who at the time of the bankruptcy was a partner or co-trustee with the bankrupt or was jointly bound or had made a joint contract with the bankrupt, or a person who was surety or in the nature of a surety for the bankrupt.

[57] The order of discharge of a bankrupt has the effect of releasing the bankrupt from all claims provable in bankruptcy (section 178(2) *BIA*). In the absence of s. 179, this release could result in the automatic release at law of certain types of claims that are identified in s. 179. For example, under guarantee law, the discharge of the principal debt results in the automatic discharge of a guarantor. Similarly, counsel points out the settlement or satisfaction of a debt by one joint obligor generally results in the automatic release of both joint obligors. Section 179 therefore serves the limited purpose of altering the result that would incur at law, indicating that the rule that the *BIA* generally is that there is no automatic release of third-party guarantors of co-obligors when a bankrupt is discharged.

[58] Counsel submits that s. 62(3), which confirms that s. 179 applies to a proposal, was clearly intended to fulfil a very limited role – namely, to confirm that there is no automatic release of the specific types of co-obligors identified in s. 179 when a proposal is approved by the creditors and by the court. Counsel submits that it does not go further and preclude the creditors and the court from approving a proposal which contains the third-party release of the types of co-obligors set out in s. 179. I am in agreement with these submissions.

[59] Specific considerations also apply when releasing directors of a debtor company. The *BIA* contains specific limitations on the permissible scope of such releases as set out in s. 50(14). For this reason, there is a specific section in the *BIA* proposal provisions outlining the principles governing such a release. However, counsel argues, the presence of the provisions outlining the circumstances in which a proposal can contain a release of claims against the debtor's directors does not give rise to an inference that the directors are the only third parties that can be released in a proposal. Rather, the inference is that there are considerations applicable to a release or compromise of claims against directors that do not apply generally to other third parties. Hence, it is necessary to deal with this particular type of compromise and release expressly.

[60] I am also in agreement with the alternative submissions made by counsel in this area to the effect that if s. 62(3) of the *BIA* operates as a prohibition it refers only to those limitations that are expressly identified in the *BIA*, such as in s. 179 of the *BIA* and the specific limitations on the scope of releases that can benefit directors of the debtor.

[61] Counsel submits that the Applicants' position regarding the proper interpretation of s. 62(3) of the *BIA* and its place in the scheme of the *BIA* is consistent with the generally accepted principle that a proposal under the *BIA* is a contract. See *Metcalfe & Mansfield Alternative Investments II Corp. (Ltd.)*, 2008 ONSC 587; *Employers' Liability Assurance Corp. v. Ideal Petroleum (1953) Ltd.*, [1978] 1 SCR 230; and *Society of Composeurs, Authors & Music Publishers of Canada v. Armitage* (2000), 20 CBR (4th) 160 (C.A.). Consequently, counsel submits that parties are entitled to put anything into a proposal that could lawfully be incorporated into any contract (see *Air Canada (Re)* (2004), 2 CBR (5th) 4) and that given that the prescribed majority creditors have the statutory right under the *BIA* to bind a minority, however, this principle is subject to any limitations that are contained in the express wording of the *BIA*.

[62] On this point, it seems to me, that any provision of the *BIA* which purports to limit the ability of the debtor to contract with its creditors should be clear and explicit. To hold otherwise would result in severely limiting the debtor's ability to contract with its creditors, thereby the decreasing the likelihood that a viable proposal could be reached. This would manifestly defeat the purpose of the proposal provisions of the *BIA*.

[63] The Applicants further submit that creditors' interests – including the interests of the minority creditors who do not vote in favour of a proposal containing a third-party release – are sufficiently protected by the overriding ability of a court to refuse to approve a proposal with an overly broad third-party release, or where the release results in the proposal failing to demonstrate that it is for the benefit of the general body of creditors. The Applicants submit that the application of the *Metcalfe* criteria to the release is a mechanism whereby this court can assure itself that these preconditions to approve the Consolidated Proposal contained in the Release have been satisfied.

[64] The Applicants acknowledge that there are several cases in which courts have held that a *BIA* proposal that includes a third-party release cannot be approved by the court but submits that these cases are based on a mistaken premise, are readily distinguishable and do not reflect the modern approach to Canadian insolvency law. Further, they submit that none of these cases are binding on this court and should not be followed.

[65] In *Kern Agencies Ltd. (No. 2) (Re)* (1931), 13 CBR 11, the court refused to approve a proposal that contained a release of the debtor's directors, officers and employees. Counsel points out that the court's refusal was based on a provision of the predecessor to the *BIA* which specifically provided that a proposal could only be binding on creditors (as far as relates to any debts due to them from the debtor). The current *BIA* does not contain equivalent general language. This case is clearly distinguishable.

[66] In *Mister C's Ltd. (Re)*, (1995) 32 CBR (3d) 242, the court refused to approve a proposal that had received creditor approval. The court cited numerous bases for its conclusion that the proposal was not reasonable or calculated to benefit the general body of creditors, one of which was the release of the principals of the debtor company. The scope of the release was only one of the issues with the proposal, which had additional significant issues (procedural irregularities,

favourable terms for insiders, and inequitable treatment of creditors generally). I agree with counsel to the Applicants that this case can be distinguished.

[67] *Re Cosmic Adventures Halifax Inc.* (1999) 13 CBR (4th) 22 relies on *Kern* and furthermore the Applicants submit that the discussion of third-party releases is technically *obiter* because the proposal was amended on consent.

[68] The fourth case is *C.F.G. Construction Inc. (Re)*, 2010 CarswellQue 10226 where the Quebec Superior Court refused to approve a proposal containing a release of two sureties of the debtor. The case was decided on alternate grounds – either that the *BIA* did not permit a release of sureties, or in any event, the release could not be justified on the facts. I agree with the Applicants that this case is distinguishable. The case deals with the release of sureties and does not stand for any broader proposition.

[69] In general, the Applicants' submission on this issue is that the court should apply the decision of the Court of Appeal for Ontario in *Metcalfe*, together with the binding principle set out by the Supreme Court in *Ted Leroy Trucking*, dictating a more liberal approach to the permissibility of third-party releases in *BIA* proposals than is taken by the Quebec court in *C.F.G. Construction Inc.* I agree.

[70] The object of proposals under the *BIA* is to permit the debtor to restructure its business and, where possible, avoid the social and economic costs of liquidating its assets, which is precisely the same purpose as the *CCAA*. Although there are some differences between the two regimes and the *BIA* can generally be characterized as more “rules based”, the thrust of the case law and the legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible, encouraging reorganization over liquidation. See *Ted Leroy Trucking*.

[71] Recent case law has indicated that, in appropriate circumstances, third-party releases can be included in a plan of compromise and arrangement that is approved under the *CCAA*. See *Metcalfe*. The *CCAA* does not contain any express provisions permitting such third-party releases apart from certain limitations that apply to the compromise of claims against directors of the debtor company. See *CCAA* s. 5.1 and *Allen-Vanguard Corporation (Re)*, 2011 ONSC 733.

[72] Counsel submits that although the mechanisms for dealing with the release of sureties and similar claimants are somewhat different in the *BIA* and *CCAA*, the differences are not of such significance that the presence of s. 62(3) of the *BIA* should be viewed as dictating a different approach to third-party releases generally from the approach that applies under the *CCAA*. I agree with this submission.

[73] I also accept that if s. 62(3) of the *BIA* is interpreted as a prohibition against including the third-party release in the *BIA* proposal, the *BIA* and the *CCAA* would be in clear disharmony on this point. An interpretation of the *BIA* which leads to a result that is different from the *CCAA* should only be adopted pursuant to clear statutory language which, in my view, is not present in the *BIA*.

[74] The most recent and persuasive example of the application of such a harmonious approach to the interpretation of the *BIA* and the *CCAA* can be found in *Ted Leroy Trucking*.

[75] At issue in *Ted Leroy Trucking* was how to resolve an apparent conflict between the deemed trust provisions of the *Excise Tax Act* and the provisions of the *CCAA*. The language of the *Excise Tax Act* created a deemed trust over GST amounts collected by the debtor that was stated to apply “despite any other Act of Parliament”. The *CCAA* stated that the deemed trust for GST did not apply under the *CCAA*, unless the funds otherwise specified the criteria for a “true” trust. The court was required to determine which federal provision should prevail.

[76] By contrast, the same issue did not arise under the *BIA*, due to the language in the *Excise Tax Act* specifically indicating that the continued existence of the deemed trust depended on the terms of the *BIA*. The *BIA* contained a similar provision to the *CCAA* indicating that the deemed trust for GST amounts would no longer apply in a *BIA* proceeding.

[77] Deschamps J., on behalf of six other members of the court, with Fish J. concurring and Abella J. dissenting, held that the proper interpretation of the statutes was that the *CCAA* provision should prevail, the deemed trust under the *Excise Tax Act* would cease to exist in a *CCAA* proceeding. In resolving the conflict between the *Excise Tax Act* and the *CCAA*, Deschamps J. noted the strange asymmetry which would arise if the *BIA* and *CCAA* were not in harmony on this issue:

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.

[78] It seems to me that these principles indicate that the court should generally strive, where the language of both statutes can support it, to give both statutes a harmonious interpretation to avoid the ills that can arise from “statute-shopping”. These considerations, counsel submits, militate against adopting a strained reading of s. 62(3) of the *BIA* as a prohibition against third-party releases in a *BIA* proposal. I agree. In my opinion, there is no principled basis on which the analysis and treatment of a third-party release in a *BIA* proposal proceeding should differ from a *CCAA* proceeding.

[79] The Applicants submit that it logically follows that the court is entitled to approve the Consolidated Proposal, including the Release, on the basis that it is reasonable and calculated to

benefit the general body of creditors. Further, in keeping with the principles of harmonious interpretation of the *BIA* and the *CCAA*, the court should satisfy itself that the *Metcalfe* criteria, which apply to the approval of a third-party release under the *CCAA*, has been satisfied in relation to the Release.

[80] In *Metcalfe*, the Court of Appeal for Ontario held that the requirements that must be satisfied to justify a third-party release are:

- (a) the parties to be released are necessary and essential to the restructuring of the debtor;
- (b) the claims to be released are rationally related to the purpose of the Plan (Proposal) and necessary for it;
- (c) the Plan (Proposal) cannot succeed without the releases;
- (d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan (Proposal); and
- (e) the Plan (Proposal) will benefit not only the debtor companies but creditors generally.

[81] These requirements have also been referenced in *Canwest Global Communications Corp. (Re)*, 70 CBR (5th) 1 and *Angiotech Pharmaceuticals Inc. (Re)* 76 CBR (5th) 210.

[82] No single requirement listed above is determinative and the analysis must take into account the facts particular to each claim.

[83] The Applicants submit that the Release satisfies each of the *Metcalfe* criteria. Firstly, counsel submits that following the closing of the Asset Purchase Agreement in 2006, Budd Canada had no operating assets or income and relied on inter-company advances to fund the pension and OPEB requirements to be made by Budd Canada on behalf of KFL pursuant to the Asset Purchase Agreement. Such funded amounts total approximately \$112.7 million in pension payments and \$24.6 million in OPEB payments between the closing of the Asset Purchase Agreement and the Filing Date. In addition, TK Finance has been providing Budd Canada and KFL with the necessary funding to pay the professional and other costs associated with the *BIA* Proposal Proceedings and will continue to fund such amounts through the Proposal Implementation Date. Moreover, TK Canada and TK Finance have agreed to forego recoveries under the Consolidated Proposal on account of their existing secured and unsecured inter-company loans in the amount of approximately \$120 million.

[84] Counsel submits that the releases provided in respect of the Applicants' affiliates are the *quid pro quo* for the sacrifices made by such affiliates to significantly enlarge recoveries for the unsecured creditors of the Applicants, particularly the OPEB creditors and reflects that the affiliates have provided over \$135 million over the last five years in respect of the pension and OPEB amounts and additional availability of approximately \$49 million to allow the Applicants to discharge their obligations to their former employees and retirees. Without the Releases,

counsel submits, the Applicants' affiliates would have little or no incentive to contribute funds to the Consolidated Proposal and to waive their own rights against the Applicants.

[85] The Release in favour of Martinrea is fully discussed at paragraphs 121-127 of the factum. The Applicants submit that the third-party releases set out in the Consolidated Proposal are clearly rationally related, necessary and essential to the Consolidated Proposal and are not overly broad.

[86] Having reviewed the submissions in detail, I am in agreement that the Released Parties are contributing in a tangible and realistic way to the Consolidated Proposal.

[87] I am also satisfied that without the Applicants' commitment to include the Release in the Consolidated Proposal to protect the Released Parties, it is unlikely that certain of such parties would have been prepared to support the Consolidated Proposal. The releases provided in respect of the Applicants' affiliates are particularly significant in this regard, since the sacrifices and monetary contributions of such affiliates are the primary reason that the Applicants have been able to make the Consolidated Proposal. Further, I am also satisfied that without the Release, the Applicants would be unable to satisfy the borrowing conditions under the Amended and Restated Senior Secured Loan Agreement with respect to the Applicants having only certain permitted liabilities after the Proposal Implementation Date. The alternative for the Applicants is bankruptcy, a scenario in which their affiliates' claims aggregating approximately \$120 million would significantly erode recoveries for the unsecured creditors of the Applicants.

[88] I am also satisfied that the Releases benefit the Applicants and creditors generally. The primary non-affiliated Creditors of the Applicants are the OPEB Creditors and Creditors with Pension Claims, together with the CRA. The Consolidated Proposal, in my view, clearly benefits these Creditors by generating higher recoveries than could be obtained from the bankruptcies of the Applicants. Moreover, the timing of any such bankruptcy recoveries is uncertain. As noted by the Proposal Trustee, the amount that the Affected Creditors would receive in the event of the bankruptcies of the Applicants is uncertain both in terms of quantum and timing, with the Applicants' funding of OPEB Claims terminating on bankruptcy, but distributions to the OPEB Creditors and other Creditors delayed for at least a year or two but perhaps much longer.

[89] The Applicants and their affiliates also benefit from the Release as an affiliate of the Applicants may become enabled to use the net operating losses (NOL) following a series of transactions that are expected to occur immediately following the Proposal Implementation Date.

[90] I am also satisfied that the Applicants have provided full and adequate disclosure of the Releases and their effect. Full disclosure was made in the proposal term sheet circulated to both Representative Counsel in early August 2011. The Release was negotiated as part of the Consolidated Proposal and the scope of the Release was disclosed by the Proposal Trustee in its Report to the creditors on the terms of the Consolidated Proposal, which Report was circulated by the Proposal Trustee to the Applicants' known creditors in advance of the creditors' meeting.

[91] I am satisfied that the Applicants, with the assistance of the Proposal Trustee, took appropriate steps to ensure that the Affected Creditors were aware of the existence of the release provisions prior to the creditors' meeting.

[92] For the foregoing reasons, I have concluded that the Release contained in the Consolidated Proposal meets the *Metcalf* criteria and should be approved.

[93] In the result, I am satisfied that the section 59(2) *BIA* test has been met and that it is appropriate to grant the Sanction Order in the form of the draft order attached to the Motion Record. An order has been signed to give effect to the foregoing.

MORAWETZ J.

Date: February 3, 2012

TAB 22

Arrangement relatif à Blackrock Metals Inc.

2022 QCCS 2828

SUPERIOR COURT

(Commercial Division)

CANADA
 PROVINCE OF QUEBEC
 DISTRICT OF MONTREAL

No.: 500-11-060598-212

DATE: July 8, 2022 (RECTIFIED July 13, 2022)

 BY THE HONOURABLE MARIE-ANNE PAQUETTE, Chief Justice

IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT UNDER THE
COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36 OF:

BLACKROCK METALS INC.
 BLACKROCK MINING INC.
 BRM METALS GP INC.
 BLACKROCK METALS LP.

Debtors

-and-

DELOITTE RESTRUCTURING INC.

Monitor

-and-

INVESTISSEMENT QUÉBEC
 OMF FUND II H LTD.

Secured Creditors

-and-

13482332 CANADA INC.

Shareholder Bidder

-and-

WINNER WORLD HOLDINGS LIMITED

4470524 CANADA INC.

GOLDEN SURPLUS TRADING

PROSPERITY STEEL

Intervenors

RECTIFIED JUDGMENT
ON THE AMENDED SHAREHOLDER BIDDER'S APPLICATION TO EXTEND THE
PHASE 2 BID DEADLINE (SEQ. 23)
AND
ON THE DEBTORS' APPLICATION TO APPROVE A VESTING ORDER (SEQ. 17) ¹

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OVERVIEW

[1] The debtors BlackRock Metals Inc., BlackRock Mining Inc., BlackRock Metals LP and BRM Metals GP Inc. (collectively: **BlackRock**) were established in 2008. They are developing a metals and materials manufacturing business with a mine in Chibougamau, and a metallurgical plant to be located at the Port of Saguenay (**Project Volt**).

[2] The mine and plant to be built under Project Volt will eventually supply vanadium, high purity pig iron and titanium products, three specialty metals which are, according to

¹ Reasons in support of orders issued on May 31, 2022 and rectified on June 1, 2022

BlackRock, central to the green materials transition in North America. BlackRock's business plan contemplates a forty-one year project life generating strong returns, with a small-scale mining operation.

[3] As of now, BlackRock has been in the process of raising the necessary capital to start the construction and implementation of Project Volt, which is now being estimated to cost approximately US\$1.02 billion. Considering the early stage of its development, no revenues have ever been generated by the project.

[4] BlackRock's only secured creditors are OMF Fund II H Ltd. (**Orion**) and Investissement Québec (**IQ**). On January 18, 2019, BlackRock signed a loan credit agreement with Orion and IQ to supply the necessary working capital required to continue Project Volt. This loan was due and payable on December 1, 2022 and, as of now, Orion and IQ's secured claim amounts to approximately \$100M, which constitutes the best part of BlackRock's pre-filing obligations. Orion and IQ also own, respectively, 18% and 12% of BlackRock's shares.

[5] On December 22, BlackRock filed an Application for an Initial Order and other ancillary relief in the present *Companies' Creditors Arrangement Act* (**CCAA**)² restructuring proceedings.

[6] On January 7, 2022, the Court issued a two-part order in view of the sale of the assets of BlackRock. Firstly, the Court established the parameters of a sale and investment solicitation process (**SISP**) for the sale of such assets.

[7] Secondly, the Court approved the Agreement of Purchase and Sale signed by Orion and IQ as purchaser (**Stalking Horse Agreement**) and ordered that this agreement be considered as constituting the "Stalking Horse Bid" under the SISP. The agreed purchase price under the Stalking Horse Agreement is to be equal to the fair market value of BlackRock's secured debt towards Orion and IQ (approximately \$100M).

[8] Pursuant to the January 7, 2022 orders, Phase 2 Bids under the SISP were to be submitted before May 11, 2022, as will be discussed below.

[9] Two Applications are before the Court in relation to the above:

9.1. Amended Application by the Shareholder Bidder, 13482332 Canada Inc. (**Canada Inc.**) to extend the Phase 2 Bid Deadline (**Bid Extension Application**); and

9.2. BlackRock' Application to approve a vesting order (**RVO application**)

[10] In the Bid Extension Application, Canada Inc. seeks to extend the deadlines provided for in the January 7, 2022 orders, with the view of continuing to canvass the

² R.S.C. 1985, c. C-36.

market for financial partners that would allow it to submit a Phase 2 Bid after the Phase 2 Bid deadline.

[11] In the RVO Application, BlackRock seeks an order approving the sale of its assets essentially along the terms of the IQ and Orion's Stalking Horse Agreement (**Proposed Transaction**).

[12] On May 31, 2022, due to time constraints, the Court rejected the Bid Extension Application and granted the RVO Application, with reasons to follow. The reasons are found below.

1. PROCEDURAL BACKGROUND (COURT ORDERS)

[13] On December 22, 2021, BlackRock filed an Application for an Initial Order and other ancillary relief.

[14] On December 23, 2021, the Court issued a First Day Initial Order pursuant to the CCAA and, *inter alia*, appointed Deloitte Restructuring Inc. as the monitor (**Monitor**).

[15] On January 7, 2022, the Court issued an *Amended and Restated Initial Order* and an *Order Approving a Sale and Investment Solicitation Process (SISP) and Approving a Stalking Horse Agreement of Purchase and Sale*.

[16] The January 7, 2022 orders (**Initial Orders**) provided that BlackRock was authorized to borrow from Orion and IQ, as interim lenders, such amounts from time to time as BlackRock may consider necessary or desirable, up to a maximum principal amount of \$2M outstanding at any time, to fund the ongoing expenditures of BlackRock and to pay such other amounts as may be permitted (**Interim Facility**). The Court also authorized a corresponding Interim Charge, for a maximum amount of \$2.4M, in favor of IQ and Orion.

[17] The Initial Orders also approved a SISP to be conducted in accordance with the approved procedures (**Bidding Procedures**);

17.1. authorized the Monitor and BlackRock to implement the SISP;

17.2. approved the Stalking Horse Agreement, solely for the purposes of:

- (i) constituting the "stalking horse bid" under the SISP; and
- (ii) approving the Expense Reimbursement (as defined in the Stalking Horse Agreement), and subject to further Order of this Court.

[18] Pursuant to the Initial Orders and at the request of the Intervenor (shareholders), the Court extended the SISP by an additional 30 days beyond what was originally contemplated.

[19] The Stay of proceedings was thereafter extended to June 30, 2022, in accordance with further requests made and in accordance with the debate arising from the two Motions identified above.

2. PHASES OF THE SISP

[20] The objective of the SISP was to solicit interest either (i) in one or more sales or partial sales of all, substantially all, or certain portions of the BlackRock's business; and/or (ii) for an investment in a restructuring, recapitalization, refinancing or other form of reorganization of BlackRock or its business.

[21] The Bidding Procedures provide that a party interested in participating in the SISP must sign and deliver to the Monitor a non-disclosure agreement (**NDA**) and upon doing so, is considered a "**Phase 1 Qualified Bidder**", following which the Monitor will provide to such party a confidential information memorandum (**CIM**) and access to the confidential virtual data room (**VDR**) set up by BlackRock and the Monitor.

[22] The Bidding Procedures further provide that if a Phase 1 Qualified Bidder wishes to submit a bid, it must deliver to the Monitor a non-binding letter of intent (**LOI**) which must conform to certain specified requirements (**Phase 1 Qualified Bid**) no later than 5:00 p.m. on March 9, 2022 (**Phase 1 Bid Deadline**).

[23] Following the Phase 1 Bid Deadline, BlackRock shall determine, in consultation with the Monitor, if an LOI qualifies as a "**Phase 1 Successful Bid**", in which case the bidder is thereafter deemed a "**Phase 2 Qualified Bidder**".

[24] Phase 2 Qualified Bidders shall thereafter submit their Phase 2 Qualified Bid no later than 5:00 p.m. on May 11, 2022, or such other date or time as may be agreed by the Monitor in consultation with BlackRock and with the authorization of Orion and IQ as Stalking Horse Bidders, acting reasonably (**Phase 2 Bid Deadline**).

[25] Also pursuant to the Bidding Procedures, the Stalking Horse Bidders are Phase 2 Qualified Bidders for all purposes under the SISP.

[26] Therefore, Canada Inc. had until May 11, 2022, 5:00 p.m. (Eastern Standard Time) to submit its Phase 2 Qualified Bid (**Phase 2 Bid Deadline**).

3. TASKS PERFORMED BY THE MONITOR IN ACCORDANCE WITH THE SISP

[27] Further to the Initial Orders, the Monitor undertook the following steps to conduct the solicitation process in accordance with the SISP:

- a. the Monitor contacted 415 potentially interested parties;
- b. 374 potentially interested parties received the Teaser according to email confirmations received by the Monitor;

- c. 232 potentially interested parties were contacted directly by the Monitor, in addition to the general distribution that occurred on January 10, 2022;
- d. 65 potentially interested parties participated in more serious discussions about the opportunity or confirmed that they were not interested;
- e. 7 interested parties executed an NDA and were granted access to the VDR; and,
- f. 1 interested party (Shareholder Bidder) submitted a non-binding Letter of Interest (LOI) prior to the Phase 1 Bid Deadline.³

4. CANADA INC.'S LOI

[28] Canada Inc. was incorporated on March 8, 2022, as a special purpose vehicle to participate in the SISP and submit a bid.

[29] Canada Inc.'s shares are owned by 3 individuals, Mr. Edward Yu, Mr. Solomon (Sam) Pillersdorf and Mr. Leslie A. Wittlin, who, directly or through corporate entities under their control, own approximately 50% of the outstanding shares of BlackRock. Mr. Yu, Mr. Pillersdorf and Mr. Wittlin also act as directors and officers of the company. Canada Inc.'s representatives submit that they have well established links into the mining industry and, based on same, have assembled a team of experienced advisory professionals in the field.

[30] The Monitor did not receive any other LOI on or before the Phase 1 Bid Deadline. Therefore, Canada Inc.'s non-binding LOI⁴ of March 9, 2022 is the only Phase 1 Successful Bid.

[31] In its LOI, Canada Inc. proposes a purchase price for BlackRock's shares that shall be either the sum of \$100M or such greater amount as would be required to exceed the minimum purchase price as defined in the Initial Order.

5. ORDERS SOUGHT AND CONCLUSIONS OF THE COURT

5.1 The Bid Extension Application

[32] Canada Inc. argues that its tremendous efforts to submit a bid to the Monitor are on the verge of bearing fruit, albeit slightly past the Bid Deadline. Canada Inc. therefore begs the Court to extend the Phase 2 Bid Deadline (which expired on May 11, 2021) for an extra thirty days after the present judgment.

[33] The Monitor, BlackRock and Orion and IQ object to such extension.

³ Fifth Report, par. 27.

⁴ Exhibits A-2, R-3.

[34] For the reasons below, the Court refused the extension sought.

5.2 The RVO Application

[35] The only pending bid therefore is the one made by Orion and IQ, the Stalking Horse Bidders. With the support of BlackRock and of the Monitor, they beg the Court to approve the drafted agreement.⁵

[36] The **Intervenors**, who own approximately 50% of the shares of BlackRock, object to the structure of the Proposed Transaction, as it would amount to an illegal appropriation of their shares, without their consent. They also object to the granting of a release to Orion and IQ, as contemplated under the Stalking Horse Agreement.

[37] For the reasons below, the Court dismissed the Intervenors' objection and approved the transaction in accordance with the RVO.

ANALYSIS

6. BID EXTENSION APPLICATION

6.1 Facts relevant to the issue

[38] As indicated above, Canada Inc.'s LOI⁶ is the only Phase 1 Successful Bid. Therefore, only IQ and Orion (Stalking Horse Bidders) and Canada Inc. (Shareholder Bidder) were permitted to proceed to Phase 2 of the SISF.

[39] More particularly, on March 8-9, 2022, before the Phase 1 Bid Deadline, Canada Inc. was incorporated and delivered to the Monitor a non-binding LOI, which was confirmed as a Phase 1 Successful Bid. Canada Inc. therefore qualified for Phase 2 of the SISF.

[40] To assist in making such a decision, BlackRock and the Monitor requested and received clarifications, particularly with respect to the ability of Canada Inc.'s representatives to fund its bid from their own assets or from third-party financing (**Clarification Letter**)⁷, which will be discussed below.⁸

[41] At a later meeting, held on May 9, 2022, Canada Inc. informed the Monitor and BlackRock that despite having initiated, with the help of its own financial advisors, a solicitation process to identify financial partners that would support its bid, it would not be in position to file a qualified bid by the Phase 2 Deadline.

⁵ Exhibit R-2.

⁶ Exhibits A-2, R-3.

⁷ Exhibit R-5.

⁸ See par. [68] and following of the present judgment.

[42] Canada Inc. therefore verbally requested that the Phase 2 Bid Deadline be extended for an additional 30 days in order to continue to canvass the market for financing.⁹

[43] The Monitor consulted with BlackRock and requested the position of Orion and IQ, as Stalking Horse Bidders, in accordance with paragraph 21 of the approved Bidding Procedures. They expressed serious concerns but were agreeable to considering an extension of the Phase 2 Bid Deadline, subject to several conditions. These conditions included the financing (subordinate to the DIP and to the approximately \$100M of secured debt held by the Orion and IQ) of the costs resulting from the extra 30-day extension (estimated at \$500K) and the confirmation that no further extension would be sought in the future.¹⁰

[44] Canada Inc. replied that it was prepared to advance a first tranche of \$200K of a DIP loan within one week of the acceptance date of their request for a SISP extension, and the balance of \$300K as needed. Canada Inc. contemplated that this proposed loan totaling \$500K was to be made on the same terms and conditions as the existing DIP loan of the Secured Lenders, and was to rank *pari passu* with them in all respects.

[45] The Monitor estimated that it was unlikely that the extension sought would allow Canada Inc. to provide a proper bidding offer at the end of the extension. After further consultation with BlackRock and the Stalking Horse Bidders and with their support, the Monitor denied the extension and informed Canada Inc. accordingly on May 12, 2022.

[46] On May 11, 2022, Canada Inc. filed the present Bid Extension Application.

6.2 Opposing arguments of the parties

[47] Canada Inc. submits that its LOI conforms with the requirements of the Bidding Procedures in that, without limitation, it meets the “Minimum Purchase Price” requirement of providing at closing net cash proceeds that are not less than the aggregate of (a) the amount of cash payable under the Stalking Horse Agreement together with the amount of obligations being credit bid thereunder, (b) the amount of expense reimbursement payable to the Stalking Horse Bidders, plus (c) a minimum overbid amount of \$1M.

[48] Canada Inc. also pleads that there is equity for the stakeholders of BlackRock, including the shareholders, based on their knowledge of the company and on recent pre-money valuations performed by third parties which ranged between USD\$175M and 350M. In order to assist in designing and financing its final bid, Canada Inc. has retained at its own costs the services of two consultants, FTI Capital Advisors Canada and ERG Securities US.

⁹ Exhibit R-6.

¹⁰ Exhibit R-7.

[49] Canada Inc.'s consultants have contacted 156 investors to solicit interest in the opportunity. To date, seven remain highly interested in the opportunity and have executed NDAs and are continuing to perform due diligence on the asset. An additional three have expressed interest and are evaluating the opportunity internally before proceeding to execute an NDA. Investors that have executed NDAs have been added to the VDR and are actively analyzing and reviewing BlackRock's materials. The Consultants have prepared a report on the status of the financing process.¹¹ For example, Canada Inc. submits a signed non-binding letter of interest signed on May 6, 2022, from a serious investment fund for a USD\$65M financing, conditional *inter alia* on a 30-day-due diligence.¹² Canada Inc. further argues that the recent events in Ukraine have improved the outlook of Project Volt and increased the value of its strategic metals.

[50] However, according to Canada Inc., based on the feedback provided to its consultants from investors and given the complexity of this transaction, the condensed timeframe of the SISP is a significant hurdle for investors to perform the necessary due diligence in order to provide a commitment to finance the its Phase 2 Qualified Bid. As such, the Consultants believe that additional time will have a material impact on the likelihood of raising the capital required.

[51] Canada Inc. argues that although it has made significant progress, it needs more time to pursue these various opportunities and finalize the business and financial terms which will form part of the its Phase 2 Qualified Bid.

[52] To that effect, Canada Inc. reminds the Court of its broad discretion under section 11 of the CCAA and points to case law¹³ that suggests that the Court would be justified to refuse an asset sale in the presence of impropriety in the sales process.

[53] The Monitor, BlackRock, Orion and IQ and BlackRock's First Nation Partners¹⁴ oppose to such extension of the Phase 2 Bid Deadline.

[54] BlackRock, the Monitor and Orion and IQ argue that such extension would run contrary to the clear rules of the Bidding Procedures and would break the integrity of the SISP, to the prejudice of all potential bidders who made their decisions based on the rules known to all. Moreover, the extension sought would maintain uncertainty for BlackRock for an additional period, with no realistic chance of obtaining a better offer. Also, the extension would increase the costs and the amounts to be advanced by the Orion and IQ as interim lenders while Canada Inc. is not ready to pay for those expenses for the requested additional period.

¹¹ Exhibit A-3.

¹² Exhibit A-4, filed under seal.

¹³ *Royal Bank v. Soundair Corp.*, 1991 CanLII 2727 (Ont. CA); *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1 (N.S.C.A.); *Bank of Montreal v. Maitland* (1983), 46 C.B.R. (N.S.) 75 (N.S.S.C.).

¹⁴ Exhibit R-11.

6.3 Legal principles

[55] The CCAA primarily seeks to refinance and restructure insolvent companies rather than liquidate them.¹⁵ When selling the assets of the company, one of the objectives is thus naturally to achieve the best possible price for the assets. This usually coincides with finding the best outcome for the company's creditors.

[56] To achieve this goal, the court benefits from a wide discretionary power pursuant to section 11 of the CCAA:

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.

[Emphasis added]

[57] The three baseline requirements to meet for an order to be considered "appropriate in the circumstances" are appropriateness, good faith and due diligence.

[58] In addition, the order sought must advance the policy and remedial objectives of the CCAA to qualify as "appropriate" within the meaning of section 11.¹⁶ The overarching remedial objectives pursued by the CCAA include:¹⁷

1. providing for timely, efficient and impartial resolution of a debtor's insolvency;
2. preserving and maximizing the value of a debtor's assets;
3. ensuring fair and equitable treatment of the claims against a debtor;
4. protecting the public interest; and
5. in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company.

[59] Hence, although the objective of any sale process is obviously to obtain the best possible price from prospective purchasers, monetary considerations cannot be the only relevant factor when the Court determines if it is appropriate to deviate from a process that has been duly followed by all parties involved.

¹⁵ *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, par. 14-15.

¹⁶ *Canada v. Canada North Group Inc.*, 2021 SCC 30, par. 21; *9354-9186 Québec inc v. Callidus Capital Corp*, 2020 SCC 10, par. 48-51.

¹⁷ *9354-9186 Québec inc v. Callidus Capital Corp*, 2020 SCC 10, par. 40.

[60] On the contrary, it is well established that sale processes are important in CCAA proceedings and that modifying same *post facto* every time there is a chance of a better financial outcome could have a negative impact on all the parties involved. Therefore, Courts have often insisted on the importance of preserving the integrity of the sales process. As this court held in *Re Boutiques San Francisco Inc.*:

[20] Dans le cadre des plans d'arrangement qu'elle autorise, le but de la LACC est, entre autres, de favoriser un processus ordonné et encadré où les paramètres choisis doivent par conséquent avoir un sens. Dans le contexte de cette loi, tout comme par exemple dans celui de la *Loi sur la faillite et l'insolvabilité*, la recherche du meilleur prix possible pour les créanciers ne peut se faire en vase clos, en ignorant la protection nécessaire de l'intégrité et de la crédibilité du processus choisi pour atteindre cet objectif.¹⁸

[61] The Bidding Procedures, which govern the SISF approved by this Court, are fundamentally important for assessing the Proposed Transaction as well as the arguments of the parties.¹⁹

6.4 Discussion

[62] The Monitor also explains that efforts have already been made for some years before the beginning of the CCAA proceedings in order to further finance Project Volt. BlackRock, with the assistance of its financial advisors at the time, have conducted a global search since 2015, but, and despite considerable time and effort, have not been able to secure the required funding.

[63] At the inception of the CCAA proceedings, the Court also modified the proposed Bidding Procedures to include a 30 day extension to the "Phase 1 Bid Deadline" based on a request from the Intervenors and their submission that such further time would suffice to ensure a fulsome and fair process. This extension has not led to the desired results.

[64] The Monitor then conducted a thorough solicitation process as part of the Phase 1 of the SISF, as mentioned previously, which culminated in a single LOI submitted by Canada Inc.:

Based on the various discussions with prospective bidders during Phase 1 of the SISF, it was apparent to the Monitor that the BRM project, which had previously been promoted extensively in the market by BRM and its financial advisors for financing purposes, was already very well known by most of the strategic and industry leaders. This situation likely explains why many potentially interested

¹⁸ *Boutiques San Francisco Inc., Re*, 2004 CanLII 480, par. 20 (QC CS). See also *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 3064, par. 70 (leave to appeal dismissed, 2015 QCCA 754).

¹⁹ See *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218, par. 14 (leave to appeal dismissed, 2020 QCCA 1488; leave to appeal to SCC dismissed, 2021 CanLII 34999).

parties declined the opportunity without signing an NDA and without performing due diligence of the VDR.²⁰

[65] The lack of interest of other bidders in taking part in the Debtor's restructuring has thus been apparent since the very first stages of the SISF process. According to the Monitor, potential players who were contacted either found the opportunity too risky, or not strategic or profitable enough, or did not believe in the feasibility of the technology involved. It remains unlikely that this situation will change in the near future.

[66] Moreover, Canada Inc. was unable to secure financing of its own bid during the extended 60 days of Phase 1 of the SISF and waited all the way until that phase's deadline to execute an NDA and to enter into the process.

[67] In determining that Canada Inc.'s non-binding LOI constituted a Phase 1 Successful Bid, the Monitor relied on Canada Inc.'s reassurance that it had both the ability and the means required to pay the offered purchase price and to raise or contribute further capital resources to BlackRock's business to continue it as a going concern. The LOI went on to state that the net worth of the Bidder's representatives was, collectively, well above the said amount and that "[b]ased on their extensive experience and engagement in the industry", they were "well placed to obtain both direct and/or third party financing in an aggregate amount sufficient both to complete the Transaction and thereafter required to proceed with the Business and lead it to profitability as a going concern."²¹

[68] Canada Inc., in its Clarification Letter of March 14, 2022, refused to provide more details about its representatives' respective worth.²² Still, it is not in doubt that they have enough assets to finance its bid if needed.

[69] However, Canada Inc. wrote that it was "unable to advise with certainty to what extent [its] three principals [...] may contribute to the capital required to fund the transaction contemplated by the non-binding LOI." This issue would "clarify as [its] funding plan finalizes through [its] on-going efforts already well underway." Canada Inc. confirmed that it would "have its financing, to the extent necessary and sufficient for the purpose of the binding LOI, on or before the Phase 2 bid deadline", but added that "some or all" of the funds "may come from external sources", which was subject to further due diligence that could only be performed during Phase 2 of the SISF.

[70] These answers are evasive and, in retrospect, proved to include many loopholes. Still, the Clarification letter was considered and the Monitor nonetheless qualified Canada Inc. for Phase 2.

[71] The Monitor understood that Canada Inc.'s primary focus during Phase 2 of the SISF was to secure financing, through equity or debt, in order to submit a binding offer

²⁰ Fifth Report, par. 28.

²¹ Exhibit A-2.

²² Exhibit R-5, par. 3.

prior to the Phase 2 Bid Deadline. Indeed, the due diligence performed during that Phase was limited. Only one meeting occurred, at the request of Canada Inc.'s consultants, with BlackRock and the Monitor, to review the assumptions supporting the financial model of BlackRock. Also, all the groups that were granted access spent a relatively short amount time on the VDR reviewing the information available for this kind of project.²³

[72] At the time of the meeting on May 9, 2022, despite some cursory interest manifested by certain potential capital partners, and except for a non-binding LOI received from a third party for an amount (USD\$65M) significantly less than the one required to exceed the Stalking Horse Bid (\$100M), Canada Inc. received no other letter of intent or confirmation of interest in writing from a potential capital partner during the SISP.

[73] Critically, Canada Inc. also revealed on May 9, 2022 that none of its representatives actually intended to participate in the financing of an eventual Phase 2 Qualified Bid, should there be such a bid.

[74] The Monitor testified that had he known in due time that the shareholders had no intention to finance the bid using their own personal assets, Canada Inc. would likely not have qualified for Phase 2 of the SISP. This aspect of the LOI was described as a key consideration in the Monitor's decision at the time.

[75] In addition, the failure by Canada Inc. to confirm that it would fund all of the Debtor's costs, including professional costs, during the extended 30-day period, indicates that it is not willing to put "skin in the game" as evidence of its *bona fide* intentions. It appears that Canada Inc. is unwilling to fund the costs of a further delay notwithstanding that any successful bid would necessarily have to cover those costs in order to exceed the value of the Stalking Horse Bid.

[76] The above findings remain, in spite of the letter from VanadiumBank Inc., which Canada Inc. filed the day before the hearing.²⁴ This letter is presented as a new "financing proposal" in favor of Canada Inc. for up to \$125M in support of its bid.

[77] Actually, it appears that VanadiumBank was incorporated only a few weeks before the hearing.²⁵ Notwithstanding its name, it is not a bank. Its offer to Canada Inc. is not to lend funds out of its own pocket, but rather to arrange a loan facility after seeking and obtaining the required financing from third parties in the market.

[78] In other words, with VanadiumBank's proposal, Canada Inc. is nowhere closer to achieving its financial goals before the proposed extended Phase 2 Bid Deadline. The Court therefore gives no weight to VanadiumBank's letter.

²³ Fifth Report, par. 38-41.

²⁴ Exhibit A-11.

²⁵ Exhibit R-14.

[79] It now seems clear that, as it was unable to meet the requirements of the Initial order, Canada Inc. instead decided to launch what could be described as a parallel SISP, which was nowhere authorized and which runs contrary to the letter and spirit of the SISP as ordered by the Court.

[80] Although the Court recognizes Canada Inc. and its representatives' efforts in securing third party financing for their bid, and their belief in the potential of BlackRock's projects to attract new interest as the market evolves, it is time for the SISP to come to an end and for the CCAA proceedings to move forward.

[81] It is advantageous to the stakeholders generally that BlackRock complete the restructuring process as soon as possible in order to, in particular, end the negative narrative surrounding the company, to limit any further uncertainty and risk and facilitate the completion of the financing necessary for Project Volt, if possible.

[82] The SISP provided for a level playing field to all potential bidders. The rules were known to all parties and certain potential bidders might have decided not to participate in the SISP because of its duration (which is often the case in insolvency proceedings). Any modification of the rules after they are set and after all the players have made their choices accordingly should not be taken lightly. In the case at hand, there is no justification whatsoever to such a disruption of the fairness of the process. The overarching remedial objectives of the CCAA are better served by rejecting the Bid Extension Application.

7. RVO APPLICATION

[83] The Court's refusal to further extend the Phase 2 Deadline leaves the Stalking Horse Bid from IQ and Orion as the only Phase 2 Qualified Bid. Pursuant to the RVO Application, the Court shall now turn to the question of whether it should approve the Proposed Transaction as per the terms of his bid and, in particular, BlackRock's restructuration through a reverse vesting order (**RVO**).

7.1 Legal Principles

[84] In assessing the relevant criteria and determining whether the proposed transaction shall be approved, the Court is mindful not to modify the contractual terms that have been duly negotiated between the parties.²⁶ In this case, it takes the form of a RVO.

[85] RVOs are a fairly new way to achieve the remedial objective of the CCAA: instead of selling the assets of a debtor, a series of transactions will result in i) the purchaser becoming the sole shareholder of a debtor and ii) the unwanted liabilities be vested out

²⁶ *Mecachrome Canada Inc. (In the matter of the plan of compromise or arrangement of) c. Ernst & Young Inc.*, 2009 QCCS 6355, par. 28.

to a separate entity, thereby ensuring that the purchaser will not inherit the unwanted liabilities.²⁷

[86] Albeit new, RVOs have been confirmed by the courts as an appropriate way for a debtor to sell its business when the circumstances justify such structure.²⁸ In particular, CCAA courts have approved RVO structures in several complex mining transactions and have recognized that their benefits, which include maximizing recovery for creditors, importantly limiting delays and transaction costs, and facilitating the preservation of the insolvent business' going concern, justify the use of this innovative restructuring tool.

[87] In addition to section 11, discussed above, section 36 of the CCAA has been interpreted as providing courts with the jurisdiction and the relevant criteria to issue an RVO:

36 (1) [Restriction on disposition of business assets] A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

(2) [Notice to creditors] A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

(3) [Factors to be considered] In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

²⁷ Exhibit R-2.

²⁸ See *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218, par. 71-79 (leave to appeal dismissed, 2020 QCCA 1488; leave to appeal to SCC dismissed, 2021 CanLII 34999); *Quest University Canada (Re)*, 2020 BCSC 1883, par. 151-172 (leave to appeal dismissed, 2020 BCCA 364); *Clearbeach and Forbes*, 2021 ONSC 5564, par. 24-26; *Harte Gold Corp. (Re)*, 2022 ONSC 653, par. 36-39, 77.

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[...]

(6) [Assets may be disposed of free and clear] The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

[...] [Emphasis added]

[88] This Court approved an RVO in the face of opposition by a creditor in *Arrangement relatif à Nemaska Lithium inc.*²⁹. It was held that section 36 should be interpreted broadly and in accordance with the policy and remedial objectives of the CCAA and the wide discretionary power vested to the supervising judge pursuant to section 11. The Court relied in part on the Supreme Court ruling in *9354-9186 Québec inc. v. Callidus Capital Corp.*³⁰ It added:

[52] La LACC donne donc au juge surveillant la flexibilité nécessaire pour rendre les ordonnances «indiquées» afin de faciliter la restructuration d'une compagnie insolvable.

[53] La nature des problèmes économiques contemporains commande que des solutions innovatrices soient envisagées et, si elles permettent que les objectifs fondamentaux de la LACC soient atteints, au bénéfice de tous, alors elles doivent être entérinées.

[...]

[71] Le Tribunal est d'avis que les termes «disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires» / «sell or otherwise dispose of assets outside the ordinary course of business» de l'article 36(1) LACC permettent un grand éventail d'actes et modes de disposition, incluant, en partie ou en totalité, par voie de «dévolution inversée», une solution innovatrice, à être analysée au cas par cas.

[72] L'article 36(1) LACC ne comporte aucune restriction à cet égard.

²⁹ 2020 QCCS 3218 (leave to appeal dismissed, 2020 QCCA 1488; leave to appeal to SCC dismissed, 2021 CanLII 34999).

³⁰ 2020 CSC 10.

[73] Sortir des sentiers battus n'est pas contre-indiqué, au contraire, surtout lorsque cela permet de meilleurs résultats.

[74] D'ailleurs, dans l'affaire *Callidus*, la Cour suprême mentionne ce qui suit quant au pouvoir discrétionnaire général du Tribunal prévu à l'article 11 LACC :

«[...] le pouvoir conféré par l'art. 11 n'est limité que par les restrictions imposées par la LACC elle-même, ainsi que par l'exigence que l'ordonnance soit « indiquée » dans les circonstances.»

[75] Dans la présente affaire, la solution d'une «dévolution inversée», efficace et rapide, n'affecte pas le résultat final pour les créanciers des Débitrices, au contraire, elle l'améliore.

[76] En effet, le maintien des permis, licences et autorisations existants et des contrats essentiels à l'exploitation des entreprises, et l'utilisation possible des divers attributs fiscaux disponibles, ont facilité l'obtention de concessions de la part des Offrants, et confirmées par le Contrôleur, ce qui devrait permettre qu'une distribution plus importante soit éventuellement effectuée au bénéfice des créanciers des Débitrices.

[89] The Court of Appeal refused leave in that case, while noting that some issues raised by the appeal did “appear to qualify as being significant to the practice of insolvency”:

[36] [...] This is particularly the case regarding the issue of the scope of authority of the CCAA supervising judge in the context of an order that is not strictly limited to the “sale or disposition of assets” provided for under section 36 (6) CCAA, which, according to the Applicants, results in an outcome that would normally form part of an arrangement subject to prior approval by the creditors. There is also an issue of principle raised regarding the granting of broad third party releases (that are not limited to the transaction itself), outside the confines of an arrangement and without determining their appropriateness and submitting same to the required vote of creditors.³¹

[90] In *Re Quest University Canada*, the Supreme Court of British Columbia cautioned that in the case of an RVO, “the ability of a CCAA court to be innovative and creative is not boundless; as always, the court must exercise its discretion with a view to the statutory objectives and purposes of the CCAA [...]”³² On the other hand, the Court added that “[t]here is no provision in the CCAA that prohibits an RVO structure. As is usually the case in CCAA matters, the court must ensure that any relief is ‘appropriate’ in the

³¹ *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488 (leave to appeal to SCC dismissed, 2021 CanLII 34999).

³² *Quest University Canada (Re)*, 2020 BCSC 1883, par. 154 (leave to appeal dismissed, 2020 BCCA 364).

circumstances and that all stakeholders are treated as fairly and reasonably 'as the circumstances permit' [...]."³³

[91] Similarly, the Ontario Superior Court of Justice relied on sections 11 and 36 of the CCAA to issue an RVO in *Clearbeach and Forbes*.³⁴

[92] An RVO structure was approved most recently by the same court in *Harte Gold Corp.*³⁵ Although the Court was unconvinced that such an order could rely entirely on section 36 of the CCAA, it concluded that its discretion under section 11 was clearly broad enough to encompass it. Furthermore, the criteria set out at paragraph 36(3) provide an analytical framework that could be applied *mutatis mutandis* to an RVO transaction:

[36] The jurisdiction of the court to issue an RVO is frequently said to arise from s. 11 and s. 36(1) of the CCAA. However, the structure of the transaction employing an RVO typically does not involve the debtor 'selling or otherwise disposing of assets outside the ordinary course of business', as provided in s. 36(1). This is because the RVO structure is really a purchase of shares of the debtor and "vesting out" from the debtor to a new company, of unwanted assets, obligations and liabilities.

[37] I am, therefore, not sure I agree with the analysis which finds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction.³⁶

[93] It is true that a Canadian appeal court has yet to rule definitively on the legality of an RVO under the CCAA. This being said, and although the contexts might differ, the Court sees no compelling reason why it should set aside its reasoning in *Nemaska Lithium*.

[94] Even if this type of transaction was not contemplated by section 36 of the CCAA, section 11 could clearly step in as a basis for the Court's jurisdiction. The Supreme Court of Canada recently held that the other provisions of the CCAA, dealing with specific orders which the courts can issue, do not restrict the general language and power of section 11.³⁷

³³ *Id.*, par. 157, citing *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, par. 14-15.

³⁴ 2021 ONSC 5564, par. 24.

³⁵ 2022 ONSC 653.

³⁶ *Harte Gold Corp. (Re)*, 2022 ONSC 653, par. 36-37.

³⁷ *Canada v. Canada North Group Inc.*, 2021 SCC 30, par. 23. See also *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, par. 70.

[95] The Court agrees with the judge in *Harte Gold Corp* that paragraph 36(3), in any event, lays out a useful analytical framework for the issue at bar. These criteria, which are laid out above, should be applied in conjunction with the factors enumerated in *Royal Bank v. Soundair Corp.*:³⁸

- 95.1. “whether sufficient efforts to get the best price have been made and whether the parties acted providently”;
- 95.2. “the efficacy and integrity of the process followed”;
- 95.3. “the interests of the parties”; and
- 95.4. “whether any unfairness resulted from the process.”³⁹

[96] The Court also agrees that an RVO structure should remain the exception and not the rule, and should be approved only in the limited circumstances where it constitutes the appropriate remedy.

[97] Some authorities indeed call for caution. For instance, Professor Janis Sarra recently stressed the importance for courts to provide detailed reasons when approving RVOs.⁴⁰ Among other things, Professor Sarra reminds us that this type of order deviates significantly from the usual CCAA framework, which is meant to provide all creditors with an opportunity to be heard in the process:

[...] [T]here must be exceptional circumstances for the court to be persuaded to bypass provisions of insolvency legislation aimed at giving both secured and unsecured creditors a meaningful voice/vote in the proceedings, as they are the residual claimants to the value of the debtor’s assets during insolvency. [...]

[...]

The CCAA, particularly in its various amendments over the years, has sought to achieve an appropriate balance between various interests affected by a debtor company’s insolvency. Part I sets out the framework of the statute, well-known to practitioners and Canadian courts. It allows for a compromise or arrangement to be proposed between a debtor company and its secured and unsecured creditors, a meeting of the creditors to vote on the plan, and, if a majority in number representing two-thirds in value of the creditors, or the class of creditors, present and voting either in person or by proxy at the meeting, agree to any plan of compromise or arrangement, the plan may be sanctioned by the court and, if so sanctioned, is

³⁸ 1991 CanLII 2727 (Ont. CA); *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1742, par. 34-35.

³⁹ See *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218, par. 50 (leave to appeal dismissed, 2020 QCCA 1488; leave to appeal to SCC dismissed, 2021 CanLII 34999); *Clearbeach and Forbes*, 2021 ONSC 5564, par. 25.

⁴⁰ Janis SARRA, “Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions”, 2022 CanLII Docs 431.

binding. There are specific provisions addressing Crown claims, employees and pensioners, and treatment of equity claims, all designed to balance multiple interests in complex proceedings.

[...]

This statutory framework represents a careful balancing of interests and prejudice, and gives voice and vote to the creditors that are the residual claimants to the value of the debtor company. Many of the provisions are aimed at mitigating the imbalance in power that secured creditors have in insolvency proceedings, at least during the period of negotiations for a plan, with a view to maximizing the value of the assets, preserving going-concern value, and protection of employees and the public interest.

It makes sense, therefore, that in any application to bypass this carefully crafted statutory process, the court consider whether there are compelling and exceptional circumstances to justify this extraordinary remedy, even where the RVO is not specifically contested, as the court needs to be satisfied of the integrity of the system and the potential prejudice to creditors and other stakeholders that may not be appearing before it. Reasons are important for stakeholders to understand the benefits and prejudice that may accrue to any particular transaction.⁴¹

[98] As the Supreme Court of British Columbia held in *Quest University*:

[171] I do not consider that an RVO structure would be generally employed or approved in a CCAA restructuring to simply rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests. Clearly, every situation must be considered based on its own facts; different circumstances may dictate different results. A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the CCAA.⁴²

[Emphasis added]

[99] In particular, the following comments made in *Harte Gold Corp* are enlightening:

[38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the “norm” or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an

⁴¹ *Id.*, p. 4, 26. See ss. 4-6 of the CCAA.

⁴² *Quest University Canada (Re)*, 2020 BCSC 1883, par. 171 (leave to appeal dismissed, 2020 BCCA 364).

unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:

- (a) Why is the RVO necessary in this case?
- (b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
- (c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and
- (d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[Emphasis added]

7.2 Discussion on criteria to approve an RVO

[100] The Court will now apply the criteria set out in paragraph 36(3) of the CCAA to the RVO Application, keeping in mind the other relevant factors identified by the case law, and will analyze the appropriateness of the RVO structure in particular.

[101] The process leading to the proposed sale was reasonable in the circumstances (s. 36(3)(a) of the CCAA). As detailed in the Fifth Report, BlackRock and the Monitor have conducted the SISF in accordance with the Bidding Procedures approved by this Court on January 7, 2022. The market has been adequately canvassed through a fulsome, fair and transparent process. It should be reiterated that BlackRock had already deployed a global search for financing during the years leading up to the initiation of the CCAA Proceedings, to no avail.

[102] In the present circumstances, the Court concludes that sufficient efforts have been made to get the best price for BlackRock's assets and that the parties acted providently. The record also shows the efficacy and integrity of the process followed.

[103] The Monitor approved of the process leading to the proposed sale and filed with the court a report stating that in their opinion the sale would be more beneficial to the creditors than a sale or disposition under a bankruptcy (s. 36(3)(a) and (b) of the CCAA).

The Monitor not only approved the SISP but also participated in the negotiation and development of the Bidding Procedures and had primary carriage of the process throughout. In the course of the SISP, the Monitor consulted with BlackRock.

[104] The Fifth Report concludes that the SISP was properly conducted and that the Proposed Transaction is beneficial for all the stakeholders compared to a bankruptcy scenario. The Monitor “is of the view that creditors who will suffer a shortfall following the Purchase Agreement would not obtain any greater recovery in a sale in bankruptcy.” “Furthermore, bankruptcy proceedings would: (i) [c]ause additional delays and uncertainty in the sale of [BlackRock]’s assets; (ii) [j]eopardize the going concern operations of [BlackRock]; and, (iii) [l]ikely result in employees to be unemployed.”⁴³

[105] BlackRock’s creditors were duly consulted (s. 36(3)(d) of the CCAA). The secured creditors of BlackRock are Orion and IQ who are also the Stalking Horse Bidders. Obviously, they have been consulted extensively and they consent to the RVO Application.

[106] Importantly, the Grand Council of the Crees (Eeyou Istchee) and the Cree Nation Government also expressed support for the Proposed Transaction, as outlined by their counsel in a letter sent to the Monitor on May 19, 2022:

Our clients consider that the approval of the Stalking Horse Agreement offers the most, and perhaps the only, viable prospect to bring the BlackRock Mining Project into successful commercial operation and hence to secure for the Cree Nation of Eeyou Istchee the critically important benefits of the BallyHusky Agreement.⁴⁴

[107] The other creditors are unsecured creditors who have been duly advised of the Initial Application and Order, including the Bidding Procedures. They have decided not to participate in the SISP and nothing indicates that they would oppose to the RVO Application.

[108] The effects of the proposed sale or disposition on the creditors and other interested parties are beneficial overall (s. 36(3)(e) of the CCAA). The Stalking Horse Bid is the best available alternative for BlackRock’s creditors and other interested parties and should allow for BlackRock to emerge as a rehabilitated business in a stronger position to complete the Construction Financing and move forward with Project Volt. This outcome is advantageous to BlackRock and its stakeholders, including their creditors, employees, trading partners and First Nations partners.

[109] It is true that the RVO will result in the claim of unsecured creditors being transferred to ResidualCo, an empty shell where all unassumed liabilities will be transferred. This transfer simply reflects the fact that the BlackRock’s value, as tested in

⁴³ Fifth Report, par. 57-60.

⁴⁴ Exhibit R-11.

the market through the SISP and for many years prior to the current restructuring, is not high enough to generate value for these unsecured creditors.

[110] As for the other stakeholders, they will benefit on the whole from the approval of the Proposed Transaction, as it will allow the Debtors' business to emerge in a position to move forward as a going concern. This will benefit the employees, trading partners and First Nations partners and it will have indirect socio-economic benefits in the province of Quebec.

[111] The consideration to be received for the assets is reasonable and fair, taking into account their market value (s. 36(3)(f) of the CCAA). The consideration being paid by Orion and IQ, which is in excess of \$100M, is importantly linked to the preservation the Debtor's permits (crucial to the conduct of the contemplated mining activities), certain existing contracts and its tax attributes.

[112] The reasonableness of the consideration is well established. Given the amount of the secured debt held by Orion and IQ, the consideration which they will pay exceeds i) what the market would be willing to pay to inherit intangible assets BlackRock has been able to build over time and ii) the capacity to raise on the market the financing required for Project Volt.

[113] Nobody submitted a higher bid after extensive attempts to raise financing over many years.

[114] Exceptionally, the RVO structure is appropriate in the circumstances. In his Fifth Report, the Monitor outlines the reasons why, in his opinion, the reverse vesting order structure that would be implemented would be "more appropriate and beneficial than a traditional vesting order structure and that the reverse vesting order structure is necessary, reasonable and justified in the circumstances":⁴⁵

- (i) Numerous agreements, permits, licenses, authorizations, and related amendments are part of the assets that have to be transferred as per the Purchase Agreements. It could be more complex to transfer the benefits of these assets in a traditional vesting order structure since consents, approvals or authorizations may be required. A reverse vesting order structure minimizes risks, costs or delays of having these assets transferred;
- (ii) The proposed reverse vesting order structure results in better economic results for some creditors of BRM who see their pre-filing claim being assumed and retained. Also, the reverse vesting order structure will avoid any delays or costs associated with the assignments of the assumed contracts;

⁴⁵ Fifth Report, par. 65-66.

- (iii) The contracts or obligations of the creditors and the stakeholders that are considered Excluded Assets and Excluded Obligations according to Schedule B of the Purchase Agreement will not be in a worse position than they would have been with a more traditional vesting of assets to a third party;
- (iv) Most assets of BRM are intangibles, such as agreements, permits, licenses, authorizations and related amendments, and their value depend on the capacity of the purchasers to complete the financing and achieve the project. These assets would have no or limited value if some of them were not being preserved. The reverse vesting order structure allows to avoid any potential risks around the transfer to the purchaser.

[115] The Court agrees with the Monitor's conclusions. RVO structures have been found by courts to be appropriate in situations such as the present case, where a traditional sale of assets would lead to uncertainty regarding the transfer of numerous agreements, permits, authorizations and other regulatory approvals that are required for the continuation of a company's business.⁴⁶

[116] Indeed, BlackRock operates in the highly regulated mining industry. Their business is almost entirely constituted of such intangible assets, which provide a head start of several years to the purchaser. Some of these assets cannot be assigned or are at least difficult to assign. Therefore, the capacity to restructure BlackRock depends heavily on the capacity to keep the existing legal entities in place while restructuring the share-capital of BlackRock. That is exactly what the RVO provides for.

[117] If BlackRock was forced to proceed with a traditional asset sale, it could significantly increase the costs, generate uncertainties and reduce the value its assets, to the detriment of all parties involved.

[118] Moreover, despite the Intervenor's firm belief, the SISP has unequivocally demonstrated that there is no realizable value in BlackRock's business or assets beyond the secured debt of IQ and Orion, such that there is no equity left for its unsecured creditors, let alone its shareholders.

[119] The Court adds that Shareholders have little or no say in CCAA proceedings like the present one, where the debtor company is insolvent and its shares have lost all value. This goes to their legal interest in contesting an arrangement or transaction proposed by the company.⁴⁷

[120] In any case, the shareholders and unsecured creditors of BlackRock are not in a worse position with an RVO than they would be under a traditional asset sale. Either way,

⁴⁶ See *supra*, note 28.

⁴⁷ *Proposition de Peloton Pharmaceutiques inc.*, 2017 QCCS 1165, par. 65-78; *Forest c. Raymor Industries inc.*, 2010 QCCA 578, par. 4-6; *Stelco Inc., Re*, 2006 CanLII 1773, par. 18 (Ont. SC).

they would have no economic interest because the purchase price paid would not generate any value for the unsecured creditors (and even less so for the shareholders).

[121] This is consistent with the conclusions of the Ontario Superior Court of Justice in *Harte Gold Corp.*:

[59] Because the transaction contemplates the cancellation of all existing shares and related rights in Harte Gold and the issue of new shares to the purchaser, the existing shareholders of Harte Gold will receive no recovery on their investment. Being a public company, Harte Gold has issued material change notices as the events described above were unfolding. By the time of the commencement of the CCAA proceedings, the shareholders had been advised in no uncertain terms that there was no prospect of shareholders realizing any value for their equity investment.

[60] The evidence of Harte's financial problems and balance sheet insolvency, the unsuccessful prefiling strategic review process, and the hard reality that the only parties willing to bid anything for Harte Gold were the holders of secured debt (and only for, effectively, the value of the secured debt plus carrying and process costs) only serves to emphasize that equity holders will not see, and on any other realistic scenario would not see, any recovery of their equity investment in Harte Gold.

[61] Under s. 186(1) of the OBCA, "reorganization" includes a court order made under the Bankruptcy and Insolvency Act or an order made under the Companies Creditors Arrangement Act approving a proposal. While the term "proposal" is unfortunate (because there are no formal "proposals" under the CCAA), I view the use of this term in the non-technical sense of the word; that is, as encompassing any proposal such as the proposed transaction brought forward for the approval of the Court under the provisions of the CCAA in this case.

[62] Section 186(2) of the OBCA provides that if a corporation is subject to a reorganization, its articles may be amended by the court order to effect any change that might lawfully be made by an amendment under s. 168. Section 168(1)(g) provides that a corporation may from time to time amend its articles to add, change or remove any provision that is set out in its articles, including to change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares. This provides the jurisdiction of the court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser.

[...]

[64] [...] In circumstances like Harte Gold's, where the shareholders have no economic interest, present or future, it would be unnecessary and, indeed,

inappropriate to require a vote of the shareholders [...]. The order requested for the cancellation of existing shares is, for these reasons, justified in the circumstances.⁴⁸

[Emphasis added]

[122] In particular, paragraphs 61 and 62 of the above excerpt answer the Intervenor's argument about the jurisdiction of the Court to cancel their shares under *the Canada Business Corporations Act*⁴⁹ (**CBCA**). The same logic applies with sections 173 and 191 of that statute. The power to cancel and issue shares in the context of an RVO is captured by the possibility for a court order to "change the designation of all or any of [the corporation's] shares, and add, change or remove any rights, privileges, restrictions and conditions [...] in respect of all or any of its shares, whether issued or unissued", pursuant to 191(2) and 173(1)(g) of the CBCA.

[123] It should also be noted that the Intervenor's opposition to the RVO structure in particular appears to be new. Canada Inc.'s non-binding LOI had already conceded on March 9, 2022 that its proposed bid could itself "take the form of a reverse vesting order".⁵⁰ Ultimately, it seems that the Intervenor is not objecting to the use of an RVO *per se*, but only to the extinguishment of their equity interests, which would occur irrespective of the use of an RVO structure or of a traditional vesting order.

[124] Therefore, the fact that the transaction is structured as an RVO only has benefits and does not prejudice any of the stakeholders. The Court finds that in the specific circumstances of the present case, the proposed RVO is an appropriate arrangement.

7.3 Discussion on the releases

[125] The Proposed Transaction contemplates releases for various parties, including Orion and IQ, from all claims relating to, in particular, BlackRock, its restructuring or the Proposed Transaction.

[126] While the Intervenor does not object to a release being granted to BlackRock directors or to the Monitor, they argue that Orion and IQ's actions constitute an abuse of both their rights as shareholders and of the CCAA process. Thus, the effect of the requested releases in favour of Orion and IQ would be to dismiss the Intervenor's potential claims without the benefit of hearing any evidence allowing for the determination of their potential liability.

[127] For the reasons below, the Court holds that the releases in favor of Orion and IQ will form part of the Proposed Transaction.

⁴⁸ *Harte Gold Corp. (Re)*, 2022 ONSC 653, par. 59-64.

⁴⁹ R.S.C. 1985, c. C-44.

⁵⁰ Exhibit A-2.

[128] It is now commonplace for third-party releases, in favor of parties to a restructuring, their professional advisors as well as their directors, officers and others, to be approved outside of a plan in the context of a transaction.⁵¹ In fact, similar releases have been approved by this Court in recent cases involving RVO transactions, including in *Nemaska Lithium*.⁵²

[129] This being said, the courts should not grant releases blindly and systematically.

[130] In *Harte Gold Corp.*, the Court approved releases in favor of various parties that included the purchaser and its directors and officers and considered the criteria ordinarily canvassed with respect to third-party releases provided for under a plan, as articulated in *Re Lydian International Limited*⁵³ and elsewhere⁵⁴. They are the following:

- a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;
- b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;
- c) Whether the plan could succeed without the releases;
- d) Whether the parties being released were contributing to the plan; and
- e) Whether the release benefitted the debtors as well as the creditors generally.⁵⁵

[131] In the present file, IQ's and Orion's participation was obviously instrumental to the restructuring of BlackRock's business. Considering the SISP and the opportunity given to BlackRock's stakeholders to participate in the process, it is reasonable for IQ and Orion to now start with a clean slate and not to be under the threat of potential claims as they will be leading BlackRock's efforts with Project Volt. The release will provide more certainty and finality.

[132] The release is thus reasonably connected and justified as part of the Proposed Transaction,⁵⁶ and it is to the benefit of BlackRock and its stakeholders generally as it will allow BlackRock to emerge as a solvent entity and be in the best possible position to,

⁵¹ See *Re Green Relief Inc.*, 2020 ONSC 6837, par. 23-25; *8640025 Canada Inc. (Re)*, 2021 BCSC 1826, par. 43.

⁵² *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218, par. 103-106 (leave to appeal dismissed, 2020 QCCA 1488; leave to appeal to SCC dismissed, 2021 CanLII 34999).

⁵³ 2020 ONSC 4006.

⁵⁴ *Harte Gold Corp. (Re)*, 2022 ONSC 653, par. 78-86. See also *Re Green Relief Inc.*, 2020 ONSC 6837, par. 27-28.

⁵⁵ *Re Lydian International Limited*, 2020 ONSC 4006, par. 54. See also: *Metcalfe & Mansfield Alternative Investments II Cord. (Re)*, 2008 ONCA 587;

⁵⁶ See *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, par. 70 (leave to appeal to SCC dismissed, 2008 CanLII 46997).

hopefully, secure financing for Project Volt. They are also fair and reasonable in the present circumstances.

[133] The eventual claims for which Orion and IQ should not be released, according to the Intervenor, are based on allegations of abuse related solely to Orion's and IQ's Stalking Horse Bid and their conduct during the SISP.

[134] The Court was sensitive to the shareholders' submissions initially and extended the SISP delays to ensure that the process was as fulsome and fair as possible. Still, and in spite of all the efforts made over the years, IQ and Orion remain the only entities who are ready to take over the development of BlackRock and to further invest in same.

[135] In the process leading to the Bidding Procedures Order, to the refusal of the Bid Extension Application and to the approval of the Proposed Transaction (Reverse RVO), the Court was able to appreciate the context leading up to the final outcome ordered as per the present judgment and also found the Proposed Transaction, as proposed by Orion and IQ, to be fair and reasonable. The Court sees little to no room for a finding of abuse in the events leading to the CCAA proceedings, to the SISP or to the approved transaction.

[136] To the contrary, there is no good reason to leave the door open to the Intervenor's potential claims against Orion and IQ, to BlackRock's detriment.

[137] Therefore, the release provided for in the Proposed Transaction will be granted.

FOR THESE REASONS, THE COURT:

[138] **DECIDES** in accordance with the attached orders.

MARIE-ANNE PAQUETTE, Chief Justice

Me Jean Legault
Me Jonathan Warin
Me Ouassim Tadlaoui
LAVERY DE BILLY
Attorneys for Debtor

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Me Jean-Yves SimardM. Laurent Crépeau**DS AVOCATS**

Attorneys for the Shareholder Bidder

Me Alain Riendeau

Me Brandon Farber

FASKEN MARTINEAU

Attorneys for the Monitor

Me Luc Morin

Me Guillaume Michaud

Me Noah Zucker

NORTON ROSE FULBRIGHT

Attorneys for the Secured Creditor, Investissement Québec

Me Doug Mitchell

IMK AVOCATS

Attorney for the Intervenor

Me David Bish (Par Teams)

Me Julie Himo

TORYS

Attorneys for the Secured Creditor, OMF fund ii h Ltd. (orion)

Me Brendan O'Neill

GOODMANS

Attorney for the Special Committee Of The Board Of Blackrock

Me Geneviève Cloutier

Me François Dandonneau

GOWLING WLG (Canada) S.E.N.C.R.L., s.r.l.

Attorneys For The Grand Council Of The Crees And The Cree Nation Government

Me Gilles Robert

Me Kloé Sévigny

MINISTÈRE DE LA JUSTICE DU CANADA

Attorneys For The Canada Revenue Agency

Hearing dates: May 30, 31, 2022

TAB 23

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N°: 500-11-060598-212

DATE: JANUARY 7, 2022

PRESIDING: THE HONOURABLE MARIE-ANNE PAQUETTE, J.S.C.

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

BLACKROCK METALS INC.

-and-

BLACKROCK MINING INC.

-and-

BRM METALS GP INC.

-and-

BLACKROCK METALS LP

Applicants

-and-

DELOITTE RESTRUCTURING INC.

Monitor

**ORDER APPROVING A SALE AND INVESTMENT SOLICITATION PROCESS AND
APPROVING A STALKING HORSE AGREEMENT OF PURCHASE AND SALE**

- [1] **CONSIDERING** the Applicants' *Application for the issuance of (i) an Initial Order, (ii) an Amended and Restated Initial Order, and (iii) an Order approving a Sale and Investment Solicitation Process and approving a Stalking Horse Agreement of Purchase and Sale (the "Application")*, the affidavits and the exhibits in support thereof;
- [2] **CONSIDERING** the submissions of counsel;

[3] **CONSIDERING** the pre-filing report and the second report prepared by Deloitte Restructuring Inc. (the “**Monitor**”);

[4] **CONSIDERING** the provisions of the *Companies’ Creditors Arrangement Act* (“**CCAA**”);

THE COURT:

[5] **GRANTS** the Application.

DEFINITIONS

[6] **DECLARES** that all capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Bidding Procedures (as defined below).

SERVICE

[7] **DECLARES** that sufficient prior notice of the presentation of the Application has been given by the Applicants to interested parties, and that further service thereof is hereby dispensed with.

[8] **PERMITS** the service of the present Order (this “**Order**”) at any time and place and by any means whatsoever.

SISP

[9] **APPROVES** and **RATIFIES** the Sale and Investment Solicitation Process (“**SISP**”) set forth in the Procedures for the Sale and Investment Solicitation Process attached as Schedule “A” hereto (the “**Bidding Procedures**”).

[10] **AUTHORIZES** the Monitor and the Applicants, as applicable, to implement the SISP and to take such steps and execute such documentation as may be necessary or incidental thereto, the whole in accordance with the Bidding Procedures.

[11] **ORDERS** that the Monitor and each of the Applicants as well as their respective affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liability of any nature or kind to any person in connection with or as a result of performing their duties under the SISP, except to the extent of such losses, claims, damages or liabilities resulting from gross negligence or willful misconduct of any such person or entity, as applicable, as determined by this Court.

STALKING HORSE AGREEMENT

[12] **APPROVES** the fully binding and conditional agreement of purchase and sale between the Applicants, as vendors, Investissement Québec (“**IQ**”) and OMF Fund II H. Ltd. (“**Orion**”), as purchasers, (the “**Stalking Horse Bidders**”) dated December 22, 2021 (the “**Stalking Horse Agreement**”), a copy of which was filed as **Exhibit P-23** to the Application, solely for the purposes of: (i) constituting the “stalking horse” Bid under the SISP; and (ii) approving the Expense Reimbursement (as defined in the Stalking Horse Agreement), and subject to the further Order of this Court referred to in paragraph [13] below;

- [13] **AUTHORIZES** the Applicants to execute the Stalking Horse Agreement *nunc pro tunc*, provided that nothing herein approves the transaction contemplated in the Stalking Horse Agreement and **DECLARES** that the approval of such transaction, shall be considered by this Court in a subsequent application to be filed and presented to this Court following the completion of the SISP or upon termination thereof in accordance with the terms thereof.
- [14] **DECLARES** that all of the Property of the Applicants is hereby subject to a charge, hypothec and security for an aggregate amount of \$2,5M (the “**Transaction Charge**”) in favour of the Stalking Horse Bidders as security for the payment of the Expense Reimbursement. The Transaction Charge shall have the priority established by paragraphs 47 and 48 of the *Amended and Restated Initial Order* dated January 7, 2022.
- [15] **DECLARES** that the Stalking Horse Bidders are parties to the CCAA Proceedings.
- [16] **ORDERS** that the Stalking Horse Agreement shall not be rendered invalid or unenforceable and the rights and remedies of the Stalking Horse Bidders thereunder shall not otherwise be limited or impaired in any way by (a) the Applicants’ CCAA proceedings and the declarations of insolvency made in connection therewith; (b) any application(s) for bankruptcy order(s) issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA**”) or, any bankruptcy order made pursuant to such application(s); (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of security interests, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an “**Agreement**”) which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:
- (a) the execution, delivery or performance of the Stalking Horse Agreement shall not create or be deemed to constitute a breach by the Applicants of any Agreement to which it is a party; and
 - (b) the Stalking Horse Bidders shall not have any liability to any person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicants entering into the Stalking Horse Agreement.
- [17] **ORDERS** that the Stalking Horse Bidders, their affiliates and their respective equity owners, and each of their respective affiliates, present and former partners, directors, employees, agents, controlling persons, lenders, legal counsel and advisors shall have no liability with respect to any and all losses, claims, damages or liability of any nature or kind to any person in connection with or as a result of entering into, negotiating, or performing under the Stalking Horse Agreement, except to the extent of such losses, claims, damages or liabilities resulting from gross negligence or willful misconduct of any such person or entity, as applicable, as determined by this Court. However, for greater certainty, the present order shall not release in any manner whatsoever the Stalking Horse Bidders, their affiliates and subsidiaries, from any of their obligations under or contemplated by the Stalking Horse Agreement or any ancillary documents agreed upon by the Stalking Horse Bidders to give effect to the Stalking Horse Agreement; and ii) any claim from any of the Applicants’ shareholders, the whole without prejudice to the Stalking Horse Bidders seeking, at the approval stage of the contemplated transaction, the releases that are currently contemplated in said contemplated transaction.

GENERAL

- [18] **ORDERS** that the Monitor and the Applicants are authorized and permitted under applicable law to disclose and transfer to Potential Bidders (including the Stalking Horse Bidders) and to their advisors personal information in the custody or control of the Applicants relating to the operation of the business being sold pursuant to the Stalking Horse Agreement, including human resources and payroll information, records pertaining to the Applicants' past and current employees, and information about any consumer, website visitor or other individual (collectively, "**Personal Information**"), but only to the extent necessary to negotiate, determine whether to proceed with, and attempt to complete a transaction in accordance with the SISP (a "**Transaction**"). Each Potential Bidder (including the Stalking Horse Bidders) to whom any Personal Information is disclosed shall maintain and protect the Personal Information with security safeguards appropriate to the sensitivity of the Personal Information and as may otherwise be required by applicable federal or provincial privacy legislation and limit the use of such information to its evaluation of a Transaction, and if it does not complete a Transaction with the Applicants, shall return all such information to the Applicants, or in the alternative permanently destroy all such information.
- [19] **ORDERS** that the Applicants and the Monitor may from time to time apply to this Court for advice and directions in the discharge of their respective powers and duties hereunder or under the SISP.
- [20] **REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, in the United States of America or elsewhere, to give effect to this Order and to assist the Monitor and the Applicants, as applicable, and their respective agents in carrying out the terms of this Order.
- [21] **ORDERS** the provisional execution of this Order notwithstanding appeal and without any security or provision for costs whatsoever.
- [22] **WITHOUT COSTS.**

Mr. Jean Legault
Mr. Jonathan Warin
Mr. Ouassim Tadlaoui
Lavery, de Billy
Attorneys for Applicants

MARIE-ANNE PAQUETTE, J.S.C.

TAB 24

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walter Energy Canada Holdings, Inc. (Re)*,
2018 BCSC 1135

Date: 20180709
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 and Arrangement of New Walter Energy
Canada Holdings, Inc., New Walter Canadian Coal Corp., New Brule Coal
Corp., New Willow Creek Coal Corp., New Energybuild Holdings ULC**

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:

Marc Wasserman
Patrick Riesterer

Counsel for United Mine Workers of America
1974 Pension Plan and Trust:

Tevia Jeffries

Counsel for Warrior Met Coal, LLC

Matthew Nied

Counsel for the United Steelworkers, Local 1-
424:

Stephanie Drake

Counsel for KPMG Inc., Monitor:

Peter Reardon
Vicki Tickle

Place and Date of Hearing/Judgment with
Reasons to Follow:

Vancouver, B.C.
July 3, 2018

Place and Date of Written Reasons:

Vancouver, B.C.
July 9, 2018

INTRODUCTION

[1] This is the final chapter of these *Companies' Creditors Arrangement Act*, R.S.C. 1985, c C-36, as amended (the "CCAA") proceedings.

[2] These proceedings began approximately two-and-a-half years ago. The realizations from the significant assets of the petitioners, now called the "New Walter Canada Group", consisted primarily of coal mining assets located in British Columbia and the United Kingdom.

[3] The main issue within the proceedings was the distribution of asset recoveries in light of various claims advanced by the stakeholders. Those stakeholders include the unionized workers in British Columbia, represented by the United Steelworkers, Local 1-424 (the "USW"), the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Plan") and Warrior Met Coal, LLC ("Warrior").

[4] After significant contested proceedings, appeals filed and extensive negotiations between the New Walter Canada Group and all stakeholders, assisted by the CRO and the Monitor, a settlement was reached in September 2017. The provisions of the Settlement Term Sheet, as defined and approved in accordance with my earlier reasons should be read with these reasons: *Walter Energy Canada Holdings, Inc. (Re)*, 2017 BCSC 1968 (the "Settlement Reasons").

[5] After the completion of further procedures in these CCAA proceedings, the petitioners now apply for a Sanction Order. In these reasons, I have capitalized certain terms, as set out in various court orders and related documents, including the plan.

BACKGROUND

[6] On December 7, 2015, this Court granted an Initial Order in favour of the initial corporate group comprising the petitioners, called "Old Walter Canada Group", pursuant to the CCAA. The stay granted in the Initial Order has been extended numerous times in this proceeding and presently expires December 31, 2018.

[7] The realization procedures undertaken and results achieved by Mr. Aziz, the CRO, have been very successful. At present, the Monitor estimates that approximately \$61.5 million will be available in December 2018 for distribution to the stakeholders.

[8] On August 16, 2016, this Court granted a Claims Process Order to establish a claims process to be implemented by the Old and New Walter Canada Groups.

[9] As stated above, in September 2017, the New Walter Canada Group, the 1974 Plan and Warrior agreed to a Settlement Term Sheet that resulted in a full and final settlement of most of the outstanding issues among these stakeholders in these CCAA proceedings: Settlement Reasons at paras. 11-30. The Settlement Term Sheet is a complex document, but can be generally summarized as providing for:

- (a) payment in full of Proven Claims of Affected Creditors;
- (b) payment of \$13 million to the 1974 Plan in full satisfaction of its claim against the New Walter Canada Group within these proceedings;
- (c) payment of \$75,000 to the USW in respect of its costs in these proceedings;
and
- (d) a substantial distribution to Warrior in respect of its Deemed Interest Claim in full satisfaction of that Claim.

[10] On October 6, 2017, the Settlement Term Sheet was approved by this Court, after considering in particular that the Affected Claims (which included those advanced by the USW) were to be paid in full: Settlement Reasons at paras. 31-42.

[11] The implementation of the Settlement Term Sheet was conditional upon the completion of the claims process to identify any further claims. On August 15, 2017, this Court granted a Claims Process Amendment Order to identify remaining Restructuring Claims and Directors/Officers Claims that had not yet been solicited.

[12] That further claims process has now been completed and the New Walter Canada Group and the Monitor have determined that there are sufficient funds to make the distributions contemplated in the Settlement Term Sheet after establishing certain reserves for Disputed Claims and other matters. In particular, it is anticipated that there will be sufficient Available Funds to pay the Affected Creditors in full, pay the 1974 Plan Settlement Amount and pay the USW Settlement Amount with significant sums remaining to pay a large amount to Warrior in respect of its Deemed Interest Claim.

[13] On May 28, 2018, the New Walter Canada Group filed its Original Plan, as developed by it in consultation with the Monitor and certain stakeholders. On May 31, 2018, the New Walter Canada Group obtained a Meeting Order granting leave to file the Original Plan and authorizing certain amendments to the Original Plan, pursuant to s. 4 of the CCAA.

[14] A somewhat unusual aspect of the Meeting Order was that the New Walter Canada Group's class of unsecured creditors (including the Affected Creditors and Warrior) would be deemed to hold meetings and deemed vote their Claims in favour of the Original Plan or, if amended, any later filed plan. I considered that this was an expeditious manner to proceed since the Settlement Term Sheet provided for payment in full to the Affected Creditors and in light of Warrior's agreement to the Settlement Term Sheet. On May 21, 2014, such a deeming provision was granted by Justice Spivak in a CCAA meeting order where the affected creditors were similarly to be paid in full under the plan filed in those proceedings (*Re Arctic Glacier Income Fund*, The Queen's Bench, Winnipeg Centre, File No. CI 12-01-76323).

[15] The essential terms of the Original Plan were to implement what was contained in the Settlement Term Sheet, including payment in full of Proven Claims owed to Affected Creditors.

[16] The Meeting Order authorized the New Walter Canada Group to call the Creditors Meetings and outlined the notice that was to be provided to creditors regarding the meetings. On June 22, 2018, in advance of the deemed meetings, the

New Walter Canada Group amended the Original Plan, as I will describe in more detail below (the “Amended Plan”). The materials establish that the notice procedures in respect of the Amended Plan have been followed. The notice provisions included specific mailings to the Affected Creditors, specific notice to Warrior, posting of materials on the Monitor’s website and newspaper notices.

[17] The notice to Affected Creditors included a request that any person with a concern regarding the Amended Plan should advise the Monitor of such concerns by June 25, 2018. Twelve such Affected Creditors did provide responses, but no person took exception to the substance of the Amended Plan or the meeting and voting process set out in the Meeting Order. For the most part, the responses were to express frustration in the delay of distribution.

[18] On June 27, 2018, the deemed meetings and voting took place:

- (a) the consolidated class of creditors, comprised of all of the Affected Creditors, including Warrior with respect to its Shared Services Claim (the “Affected Creditors Class”) was established to vote on the Amended Plan. The Affected Creditors Class were deemed to have met and voted unanimously in favour of a resolution to approve the Amended Plan; and
- (b) Warrior was the only creditor entitled to vote its Deemed Interest Claim and it was deemed to have voted in favour of a resolution to approve payment of that Claim in accordance with the Amended Plan.

DISCUSSION

[19] Section 6(1) of the CCAA provides this Court with express jurisdiction to sanction a plan of compromise or arrangement where the requisite double majority of creditors has approved the plan.

[20] The general requirements for court approval of a CCAA plan are well established:

- (a) there must be strict compliance with all statutory requirements;

(b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the CCAA; and

(c) the plan must be fair and reasonable.

See *Canadian Airlines Corp.*, 2000 ABQB 442 at para. 60, leave to appeal denied, 2000 ABCA 238, aff'd 2001 ABCA 9; *Sino-Forest Corp.*, 2012 ONSC 7050 at para. 51, leave to appeal denied, 2013 ONCA 456; *Bul River Mineral Corporation*, 2015 BCSC 113 at para. 40; *TLC The Land Conservancy of British Columbia, Inc.*, 2015 BCSC 656 at para. 47.

a) Has there been strict compliance with statutory requirements?

[21] I am satisfied that there has been strict requirements with all provisions of the CCAA. This is supported by the evidence of Mr. Aziz, the CRO, including that found in his most recent affidavit #23 sworn June 26, 2018.

[22] In addition, in its Nineteenth Report dated June 27, 2018, the Monitor states that to the best of its knowledge, the petitioners have met all CCAA requirements and complied with all court orders granted in this proceeding.

[23] Further, s. 6 of the CCAA has been complied with in terms of a sanction order being only available if the plan contains certain specified provisions concerning crown claims, employee claims and pension claims:

a) the Amended Plan satisfies the requirements of s. 6(3) because it provides that the Monitor shall, within six months after the Plan Sanction Date, pay in full, on behalf of the New Walter Canada Group, to Her Majesty in Right of Canada or any province all amounts of any kind that could be subject to a demand under s. 6(3) of the CCAA that were outstanding on the Filing Date and which have not been paid by the Plan Implementation Date;

- b) the Amended Plan does not provide for payment of any "Employee Priority Claims" or "Pension Priority Claims" pursuant to ss. 6(5) and 6(6) of the CCAA because no such claims exist; and
- c) the Amended Plan complies with s. 6(8) of the CCAA in that the New Walter Canada Group are distributing all their available assets to or on behalf of their creditors. No distribution is to be made on account of equity claims.

b) Has anything been done that is not authorized by the CCAA?

[24] Again, no issues arise in this respect. No stakeholder has raised any such concerns.

[25] Throughout these proceedings, the Monitor has updated the Court on the progress of the proceedings and its review of the activities of the petitioners, citing no irregularities. Indeed, on each stay extension application, the Monitor has advised that, in its view, the petitioners were acting in good faith and with due diligence throughout the course of these proceedings. See *Canwest Global Communications Corp. Re*, 2010 ONSC 4209 at para. 17.

c) Is the Amended Plan fair and reasonable?

[26] In the Settlement Reasons at paras. 31-42, I found the Settlement Term Sheet to be fair and reasonable. As the Amended Plan simply implements the terms of that document, it must necessarily follow, with one minor exception discussed below, that the Amended Plan is also fair and reasonable.

[27] This is not a restructuring plan by which the New Walter Canada Group is to re-emerge. The Amended Plan is simply a means by which the monies realized from the asset dispositions by the petitioners and the CRO will be distributed to the stakeholders. In that circumstance, in addition to the other benefits outlined in the Settlement Reasons:

- (a) the Amended Plan will result in full payment of Proven Claims owed to Affected Creditors, which comprise the vast majority of the New Walter Canada Group's creditors. By any measure, such a result in an insolvency proceeding is rarely achieved;
- (b) the Amended Plan will also resolve the heavily contested claim advanced by the 1974 Plan. The compromise of that claim at \$13 million has been accepted by the 1974 Plan, a sophisticated litigant who no doubt has fully assessed the merits of doing so after receiving legal advice; and
- (c) similarly, Warrior, another sophisticated litigant, has agreed to a compromise of its claim as against the Available Net Proceeds, having agreed that the settlement amount for the 1974's Plan's claim is to come from that fund, rather than detract from the full payment to the Affected Creditors.

[28] The only issue that arose in relation to the fairness and reasonableness of the Original Plan related to the releases provided for in Article 9, and specifically Article 9.1 entitled "CCAA Plan Releases".

[29] At the hearing on May 31, 2018, when the Meeting Order was sought, I questioned the New Walter Canada Group's counsel as to the appropriateness of the broad range of releases in the Original Plan and the naming of some of the releasees set out in Article 9.1. For example, the Original Plan provided for a general release in favour of the Financial Advisor, PJT Partners LP, despite that entity having only a limited role in the sales and solicitation process. In addition, there was an amorphous reference to an "auditor, financial advisor consultant, and agent" of the primary releasees, being the petitioners, the Monitor, the CRO and Directors and Officers of the petitioners

[30] In *Bul River*, I discussed the court's jurisdiction to approve a plan of arrangement that includes releases and relevant considerations in terms of whether such releases are fair and reasonable:

[77] The CCAA does not contain any express provisions either permitting or prohibiting the granting of releases, including third party releases, as part of a plan of compromise or arrangement. Nevertheless, there is authority to the effect that the court may approve releases found in a plan of arrangement while exercising its statutory jurisdiction under the CCAA. The leading decision is *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (CanLII), leave to appeal to S.C.C. refused (2008), 390 N.R. 393 (note). At paras. 40-52 of *Metcalfe*, a plan containing third party releases was sanctioned. At para. 46, the court stated that such jurisdiction may be exercised where the releases are “reasonably related to the proposed restructuring”.

[78] The approach in *Metcalfe* was adopted in *Canwest* at paras. 28-30. The court in *Canwest* noted that third party releases should be the exception and not requested or granted as a matter of course: para. 29.

[79] In *Kitchener Frame Ltd. (Re)*, 2012 ONSC 234 (CanLII), although in the context of a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the court summarized the requirements that would justify third party releases:

[80] In *Metcalfe*, the Court of Appeal for Ontario held that the requirements that must be satisfied to justify third-party releases are:

- a) the parties to be released are necessary and essential to the restructuring of the debtor;
- b) the claims to be released are rationally related to the purpose of the Plan ... and necessary for it;
- c) the Plan ... cannot succeed without the releases;
- d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan...; and
- e) the Plan ... will benefit not only the debtor companies but creditors generally.

[80] *Metcalfe* has been applied in numerous decisions where third party releases have been approved: see, for example, *Sino-Forest Corp. (Re)*, 2012 ONSC 7050 (CanLII) at paras. 70-77; *SkyLink Aviation Inc. (Re)*, 2013 ONSC 2519 (CanLII) at paras. 30-33. In British Columbia, see *Angiotech Pharmaceuticals, Inc. (Re)*, 2011 BCSC 450 (CanLII) at para. 12, where the court sanctioned a plan that included releases in favour of various persons, including the monitor, financial advisors and the interim lender.

[81] It remains the case that any person proposing releases in a plan of arrangement, and any party seeking a court order sanctioning or even supplementing such releases, must ensure, from the outset, that a proper rationale exists for them.

[31] In his affidavit, Mr. Aziz describes that, arising from concerns expressed by the Court, the Original Plan was amended to considerably narrow not only those persons who will be released, but also the scope of some releases. He states that,

broadly speaking, the Amended Plan now provides for full and final releases for three groups of releasees:

- (a) The New Walter Canada Group Parties: the New Walter Canada Group, the Directors, the Officers, and all present and former Employees who filed or could have filed indemnity claims against the Old Walter Canada Group or the New Walter Canada Group, and all affiliates and legal counsel thereof;
- (b) The Restructuring Support Parties: the Monitor, KPMG Inc., and its affiliates; the CRO; Philip L. Evans Jr., in his capacity as consultant to the Old and New Walter Canada Groups; the Financial Advisor, but only with respect to its activities regarding the sale and investor solicitation process conducted in connection with the SISP Order; and, all affiliates, partners, members and legal counsel thereof; and
- (c) The Derivative Released Parties: any person claiming to be liable derivatively through any of the foregoing persons.

[32] The Monitor considers the releases contained in the Amended Plan to be fair and reasonable in the circumstances.

[33] I conclude:

- a) the Restructuring Support Parties have made necessary and tangible contributions to this CCAA proceeding. As noted by all counsel, courts have routinely sanctioned releases in favour of third parties such as the monitor, legal counsel, financial advisors, and other parties retained to advise the petitioner(s) or the Court throughout the conduct of a CCAA proceeding and who, by doing so, contribute to the success of a CCAA proceeding;
- b) the narrowing of the releases has resulted in a more focussed basis for the releases such that they are more rationally connected to the purposes of the CCAA and the Amended Plan given their respective contributions

toward this successful restructuring. For example, the release in favour of the Financial Advisor has been limited to its activities conducted in connection with the SISP Order. In addition, the Amended Plan is consistent with the scope of protections for the Financial Advisor set out in the SISP Order. The releases previously proposed for the “financial advisors, auditor, agents and consultants” were eliminated. The Amended Plan retained a release only for one consultant, Mr. Evans, who assisted the Old and New Walter Canada Groups throughout the sales process. Mr. Evans also assisted the New Walter Canada Group with respect to the Unresolved Claim and will continue to do so; and

- c) the releases in favour of the New Walter Canada Group Parties are also typically granted. In addition, the Amended Plan does not release or discharge any petitioner from any Excluded Claim, any Director from any Claim that cannot be compromised pursuant to s. 5.1(2) of the CCAA, any releasee other than the petitioners and the Directors and Officers from liability for gross negligence or willful misconduct, or any releasee from any obligation created by or existing under the Amended Plan or any related document.

[34] The final factor raised by the New Walter Canada Group is that no stakeholder registered any objection to the releases in the Amended Plan. In this case, that factor can not be taken too far, where sophisticated parties agreed to those releases in both the Original Plan and Amended Plan and perhaps less sophisticated creditors were not concerned given that they expect full payment.

[35] It remains the case that, when exercising its jurisdiction, the Court must consider the appropriateness of any releases at two different junctures: firstly, whether it is appropriate to approve the filing of a plan, typically when a meeting order is sought (such as happened here); and secondly, when there is an application for a sanction order. In the latter circumstance, the court may determine that

releases are not fair and reasonable despite a plan having been approved by the creditors in accordance with the CCAA procedures.

[36] All of this is to say that it is incumbent upon the drafters of any CCAA plan to consider, *at the outset of that exercise*, the appropriateness of any releases sought and whether the necessary support is either before the court or can be put before the court at both junctures mentioned above. This will avoid any concerns or issues that may later develop either from a stakeholder or from the court while exercising its jurisdiction under the CCAA to provide oversight and safeguard all interests, whether formal objections are raised or not.

[37] I find that the releases in the Amended Plan are appropriate in the circumstances and do not detract from the overall fairness and reasonableness of the Amended Plan.

CONCLUSION

[38] The Sanction Order is granted on the terms sought, including that:

- a) the Amended and Restated Plan of Compromise and Arrangement of the New Walter Canada Group dated June 22, 2018 is sanctioned and approved;
- b) the New Walter Canada Group and the Monitor are authorized to take all steps necessary to implement the Amended Plan; and
- c) the New Walter Canada Group and the Monitor are authorized to take such steps as may be necessary following the Plan Implementation Date to make distributions and complete such transactions as are contemplated by the Amended Plan, to seek an orderly wind-down or other process acceptable to the New Walter Canada Group for Energybuild, to complete the Claims Process, and to address any other matters that arise in connection with the CCAA Proceedings.

“Fitzpatrick J.”

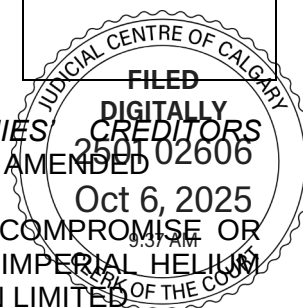
TAB 25

CERTIFIED *E. Wheaton*
by the Court Clerk as a true copy of
the document digitally filed on Oct
6, 2025

COURT FILE NUMBER 2501-02606
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY

IN THE MATTER OF THE COMPANIES
ARRANGEMENT ACT, RSC 1985, c C-36, AS AMENDED
AND IN THE MATTER OF THE PLAN OF COMPROMISE OR
ARRANGEMENT OF ROYAL HELIUM LTD., IMPERIAL HELIUM
CORP., AND ROYAL HELIUM EXPLORATION LIMITED

Clerk's Stamp



DOCUMENT **TRANSACTION APPROVAL AND REVERSE
VESTING ORDER**

ADDRESS FOR
SERVICE AND
CONTACT
INFORMATION OF
PARTY FILING THIS
DOCUMENT

Burnet, Duckworth & Palmer LLP

2400, 525 – 8th Avenue SW

Calgary, AB T2P 1G1

Lawyers: David LeGeyt / Ryan Algar / Jessica MacKinnon

Phone Number: (403) 260-0210 / 0126 / 0112

Fax Number: (403) 260-0332

Email Address: dlegeyt@bdplaw.com

ralgar@bdplaw.com

jmackinnon@bdplaw.com

File No.: 64793-8

DATE ON WHICH ORDER WAS PRONOUNCED: **October 1, 2025**

LOCATION WHERE ORDER WAS PRONOUNCED: **Calgary, Alberta**

NAME OF JUSTICE WHO MADE THIS ORDER: **Justice B.B. Johnston**

UPON THE APPLICATION by Alvarez & Marsal Canada Inc. ("**A&M**"), in its capacity as court-appointed monitor (A&M in such capacity, the "**Monitor**") of Royal Helium Ltd. ("**RHL**"), Imperial Helium Corp. ("**IHC**"), and Royal Helium Exploration Limited ("**RHEL**" and collectively with RHL and IHC, the "**Companies**"), for an order, among other things, approving the transactions (the "**Transactions**") contemplated by the reorganization and amalgamation agreement among the Companies, Keranic Industrial Gas Inc. ("**Keranic**" and the existing shareholders of Keranic being the "**Purchaser**"), 102218166 Saskatchewan Ltd. ("**ResidualCo**"), and 102218200 Saskatchewan Inc. ("**SubCo**") (the "**Amalgamation Agreement**"), and appended as a confidential supplemental appendix to the Sixth Report of the Monitor dated

September 24, 2025 (the "**Sixth Report**"), an executed copy of which is attached to the Affidavit No. 2 of Kylie Thibault sworn September 26, 2025;

AND UPON HAVING READ the Order granted by Justice J.T. Neilson on June 10, 2025 (the "**Enhanced Powers Order**"), the application filed by the Monitor on September 24, 2025, the Sixth Report, including the Confidential Appendices appended thereto, the draft Transaction Approval and Reverse Vesting Order, and the Bench Brief of the Monitor; **AND UPON HEARING** the submissions of counsel for the Monitor, the Purchaser, and any other parties who may be present;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. Service of notice of this application and supporting materials is hereby declared to be good and sufficient, no other person is required to have been served with notice of this application, and the time for service of this application is abridged to that actually given.

CAPITALIZED TERMS

2. Unless otherwise defined herein, capitalized terms appearing in this Order shall have the meanings given to them in the Amalgamation Agreement.

APPROVAL OF THE TRANSACTIONS

3. The Amalgamation Agreement and the Transactions are hereby approved, and the Monitor's execution of the Amalgamation Agreement for and on behalf of the Companies is hereby authorized and approved, with such amendments as the Monitor and the Purchaser may agree upon. The Monitor, for and on behalf of the Companies, is hereby authorized and directed to cause the Companies to complete the Transactions in accordance with the terms of the Amalgamation Agreement, perform their obligations under the Amalgamation Agreement (and any ancillary documents related thereto), and take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transactions.

REORGANIZATION AND ISSUANCE OF SHARES OF THE COMPANY

4. On the Closing Date, the Monitor, for and on behalf of the Companies, is hereby authorized and directed to cause the Companies to complete the Transactions in accordance with the Amalgamation Agreement, and without limiting the generality of the foregoing, upon the delivery of the Monitor's certificate to the Purchaser (the "**Effective Time**") substantially in the form set out in **Schedule "A"** hereto (the "**Monitor's Certificate**"), the following shall be deemed to occur in accordance with the timing, sequence, terms, and conditions set forth in the Amalgamation Agreement:

(a) the Agent Shares shall be released to the Agent in accordance with the terms of the Amalgamation Agreement;

(b) RHL shall:

(i) consolidate the Existing Shares on an 8:1 basis resulting in the total issued and outstanding common shares of RHL being reduced to 47,160,078 (the "**RHL Shares**");

(ii) amend RHL's articles of incorporation as follows:

A. the classes of the Existing Shares will be amended to distinguish two classes of shares: Class A common voting shares ("**Class A shares**") and Class B preferred non-voting shares ("**Class B shares**");

B. the Class A shares shall contain a restriction providing that, until RHL returns to trading on the TSX Venture Exchange, the Class A Shares shall be voted in accordance with the Purchaser or its successor's chosen vote on all matters;

C. the Class B shares shall contain a right of conversion; and

D. the RHL Shares will be re-designated as Class A shares;

- (c) the Companies shall each cancel all existing warrants, options, convertible debentures, and any other instruments granting the right to purchase or acquire any shares, interests, participations, or other equivalents of capital stock or share capital in the Companies;
- (d) the Convertible Promissory Notes and the Subscription Receipts will convert into Units;
- (e) the Subscription Receipt Agent appointed under the Subscription Receipt Agreement pursuant to the Brokered Financing shall pay the proceeds of the Brokered Financing to the Monitor in accordance with the Directions to Pay;
- (f) the Purchaser shall pay the remainder of the Closing Date Cash to the Monitor, in accordance with the Directions to Pay;
- (g) the Amalgamation shall occur pursuant to the following steps and in accordance with Article 2 of the Amalgamation Agreement:
 - (i) each Keranic Share issued and outstanding before the Closing Time (the "**Transferred Keranic Shares**") shall be cancelled without any repayment of capital in respect thereof and its holder shall receive therefor one (1) fully paid and non-assessable RHL Share, free and clear of all Claims and Encumbrances, at a deemed price of \$0.50 per RHL Share;
 - (ii) each SubCo Share issued and outstanding immediately before the Closing Time shall be replaced by one Amalco Common Share issued to RHL;
 - (iii) in consideration of the issue of the RHL Shares to effect the Amalgamation, Amalco will issue to RHL one fully paid and non-assessable Amalco Common Share for each RHL Share issued pursuant to subparagraph 4(g)(i) of this Order;
 - (iv) all issued and outstanding Keranic Warrants shall be exchanged for RHL Warrants on the basis of one (1) RHL Warrant for each Keranic Warrant, and each RHL Warrant so issued shall entitle the holder thereof to receive, upon the subsequent exercise thereof, that number of RHL Shares equal

- to the number of Keranic Shares issuable under the Keranic Warrants immediately prior to the Closing Time on the same terms and conditions as such Keranic Warrants, and all such Keranic Warrants shall be cancelled;
- (v) all issued and outstanding Keranic Broker Warrants shall be exchanged for RHL Broker Warrants on the basis of one (1) RHL Broker Warrant for each Keranic Broker Warrant, and each RHL Broker Warrant so issued shall entitle the holder thereof to receive, upon the subsequent exercise thereof, that number of RHL Units equal to the number of Units issuable under the Keranic Broker Warrants immediately prior to the Closing Time on the same terms and conditions as such Keranic Broker Warrants, and all such Keranic Broker Warrants shall be cancelled; and
 - (vi) Amalco shall be a wholly-owned Subsidiary of RHL with RHL holding all of the issued and outstanding Amalco Common Shares;
 - (h) Amalco shall authorize an intercompany dividend to RHL in the amount of the Closing Date Cash in accordance with the Directors' Resolution;
 - (i) Amalco shall deliver (or cause to be delivered) the Closing Date Cash to the Monitor in accordance with the Directions to Pay;
 - (j) all of the Companies' right, title, and interest in and to the Excluded Assets, including the Closing Date Cash, shall be transferred to and vest absolutely and exclusively in the name of ResidualCo and all Claims and Encumbrances attached to the Excluded Assets shall continue to attach to the Excluded Assets with the same nature and priority as they had immediately prior to their transfer;
 - (k) concurrently with step (j) above, all Excluded Liabilities shall be transferred to, assumed by, and vest absolutely and exclusively in the name of ResidualCo, and the Excluded Liabilities shall be novated and become obligations of ResidualCo and shall no longer be obligations of the Companies;

- (l) concurrently with steps (j) and (k) above, the Companies shall be forever released and discharged from all such Excluded Liabilities, and all Encumbrances securing the Excluded Liabilities shall be forever released and discharged in respect of the Companies and the Retained Assets;
 - (m) each of the directors, officers and employees of the Companies shall be terminated or resign effective as of the Closing Date;
 - (n) each of the Companies shall appoint the following individuals as officers:
 - (i) Andrew Davidson as CEO and President;
 - (ii) Michael Gleeson as CFO and Treasurer; and
 - (o) each of the Companies shall appoint Andrew Davidson, Aaron Joyes, Kenneth MacNeill, and Richard Wingate as directors.
5. The Companies, the Purchaser, SubCo, and ResidualCo are hereby permitted to execute and file articles of amendment, amalgamation, continuance, or reorganization or such other documents or instruments as may be required to permit or enable and effect the Amalgamation, including, without limitation, the steps set out in paragraph 4 of this Order, and such articles, documents, or other instruments shall be deemed to be duly authorized, valid, and effective notwithstanding any requirement under federal or provincial law to obtain director or shareholder approval with respect to such actions or to deliver any statutory declarations that may otherwise be required under corporate law to effect the Amalgamation.
6. This Order shall constitute the only authorization required by the Companies, SubCo, or ResidualCo to proceed with the Transactions, including, without limitation, the Amalgamation and no director or shareholder approval shall be required and no authorization, approval, or other action by, notice to, or filing with any governmental authority or regulatory body exercising jurisdiction in respect of the Companies is required for the due execution, delivery, and performance by the Companies, SubCo, or ResidualCo of their obligations under the Amalgamation Agreement and the completion of the Transactions.

7. The Registrar of Corporations and any Deputy Registrars appointed pursuant to section 22-1(1) of *The Business Corporations Act, 2021*, SS 2021, c 6 shall accept and receive any documents or instruments as may be required to permit or effect the Transactions contemplated in the Amalgamation Agreement.

VESTING OF ASSETS AND LIABILITIES

8. Subject to the terms of the Amalgamation Agreement, upon delivery of the Monitor's Certificate, the following shall be deemed to sequentially occur:
 - (a) all of the Companies' right, title, and interest in and to the Excluded Assets (including, for certainty, the right to receive the Closing Date Cash) shall vest absolutely and exclusively in the name of ResidualCo and all Claims and Encumbrances attached to the Excluded Assets shall continue to attach to the Excluded Assets with the same nature and priority as they had immediately prior to their transfer;
 - (b) all Excluded Liabilities shall be transferred to, assumed by, and vest absolutely and exclusively in the name of ResidualCo, the Excluded Liabilities shall be novated and become obligations of ResidualCo and not obligations of the Companies, the Companies shall be forever released and discharged from the Excluded Liabilities, and all Encumbrances securing the Excluded Liabilities shall be forever released and discharged in respect of the Companies; provided, however, that nothing in this Order shall be deemed to cancel any Encumbrances against the Companies that are expressly permitted by the Amalgamation Agreement, including without limitation, any Encumbrances which relate in whole or in part to any Retained Liabilities, all of which shall continue to apply with respect to such Retained Liabilities;
 - (c) the commencement or prosecution, whether directly, indirectly, derivatively, or otherwise of any demands, claims, actions, counterclaims, suits, judgements, or other remedies or recoveries with respect to any indebtedness, liability, obligation, or cause of action against the Companies in respect of the Excluded Liabilities shall be permanently enjoined;

- (d) the nature of the Retained Liabilities retained by the Companies, including, without limitation, their amount or secured or unsecured status, shall not be affected or altered as a result of the Amalgamation Agreement or the steps and actions taken in accordance with the terms thereof;
 - (e) the nature and priority of the Excluded Liabilities assumed by ResidualCo, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of their transfer to and assumption by ResidualCo; and
 - (f) any Person that, prior to the Effective Time, had a valid Claim against the Companies in respect of the Excluded Liabilities shall no longer have such Claim against the Companies but will have an equivalent Claim against ResidualCo (including, without limitation, in respect of the Closing Date Cash received by ResidualCo pursuant to the Amalgamation Agreement) in respect of the Excluded Liabilities from and after the Effective Time in its place and stead, and nothing in this Order limits, lessens, or extinguishes the Excluded Liabilities or the Claims of any person as against ResidualCo.
9. Upon the delivery of the Monitor's Certificate and the Purchaser filing a certified copy of this Order, together with any applicable registration fees, all governmental authorities (collectively, the "**Governmental Authorities**") are hereby authorized, requested, and directed to accept delivery of the Monitor's Certificate and certified copy of this Order as though they were originals and to register such transfers, interest authorizations, discharges, and discharge statements of conveyance as may be required in order to give effect to the terms of this Order and the Amalgamation Agreement.
 10. In order to effect the transfers and discharges described above, this Court directs each of the Governmental Authorities to take such steps as are necessary to give effect to the terms of this Order and the Amalgamation Agreement. Presentment of this Order and the Monitor's Certificate shall be the sole and sufficient authority for the Governmental Authorities to make and register transfers of title or interest and cancel and discharge registrations such that the Retained Assets of the Companies shall be free from all Encumbrances.

11. Without limiting the generality of the preceding paragraph, the Registrar of Personal Property Security for Saskatchewan and the Registrar of Personal Property Security for Alberta shall be and are hereby directed to forthwith cancel and discharge the following registrations:

Jurisdiction	Registration Number	Registration Date	Debtor	Secured Party
Saskatchewan	302449197	08/01/2023	IMPERIAL HELIUM CORP.	CERTARUS LTD.
Saskatchewan	302518948	02/22/2024	IMPERIAL HELIUM CORP.	CERTARUS LTD.
Saskatchewan	302597241	09/11/2024	ROYAL HELIUM LTD.	REMOTE POWER CORP.
Alberta	23080108668	08/01/2023	IMPERIAL HELIUM CORP.	CERTARUS LTD.
Alberta	24022225032	02/22/2024	IMPERIAL HELIUM CORP.	CERTARUS LTD.
Alberta	24091102404	09/11/2024	IMPERIAL HELIUM CORP. ROYAL HELIUM LTD.	REMOTE POWER CORP.
Alberta	24091107657	09/11/2024	IMPERIAL HELIUM CORP. ROYAL HELIUM LTD.	REMOTE POWER CORP.

12. The Purchaser shall be authorized to take all steps necessary to effect the discharge of the Encumbrances (other than the Permitted Encumbrances) as against the Retained Assets. For certainty, the registrations listed in **Schedules "B"** and **"B.1"** hereto, are Permitted Encumbrances and shall not be discharged.

COURT PROCEEDINGS

13. Upon the filing of the Monitor's Certificate:
- (a) ResidualCo shall be added as an applicant in these proceedings and any reference in any Order of this Court in respect of these proceedings to the "Applicants", "Companies", RHL, IHC, or RHEL shall be deemed to refer to ResidualCo, *mutatis mutandis*;
 - (b) RHL, IHC, and RHEL each shall be deemed to cease to be an "Applicant" in these proceedings and shall be deemed to be released from the purview of any Order of this Court granted in respect of these proceedings, save and except for this Order, the terms of which shall continue to apply in relation to RHL, IHC, and RHEL: and
 - (c) the title of these proceedings shall be amended as follows:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT*,
RSC 1985, c. C-36, as amended

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF 102218166 SASKATCHEWAN LTD.

RELEASES

14. Effective upon the filing of the Monitor's Certificate, (i) each of the current directors, officers, employees, contractors, executive team, agents, representatives, and all of their respective advisors, including financial advisors and legal counsel of the Companies and Keranic; (ii) David Young and Jeff Shephard, in their capacities as current and former directors and officers of the Companies (iii) the Monitor and its legal counsel; and (iv) Andrew Davidson in his capacity as a director of ResidualCo (the persons listed in (i), (ii), (iii) and (iv) being collectively, the **"Released Parties"**) shall be deemed to be forever

irrevocably released and discharged from any and all present and future claims (including, without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of actions, counterclaims, suits, damages, judgements, executions, recoupments of debts, sums of money, expenses, accounts liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place prior to the issuance of the Monitor's Certificate in connection with the Transactions (including the Amalgamation) or completed pursuant to the terms of this Order (collectively, the "**Released Claims**"), which Released Claims are hereby fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties, save and except for any and all Released Claims arising out of or in connection with any fraud, gross negligence, or willful misconduct on the part of the Released Parties, or any claim that is not permitted to be released pursuant to section 5.1(2) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended ("**CCAA**").

15. From and after the Effective Time, all Persons shall be absolutely and forever barred, estopped, foreclosed, and permanently enjoined from pursuing, asserting, exercising, enforcing, issuing, or continuing any steps or proceedings, or relying on any rights, remedies, claims, or benefits in respect of or against the Monitor, the Companies, Keranic, Amalco, or the Retained Assets in any way relating to, arising from, or in respect of:
 - (a) the Excluded Assets;
 - (b) the Excluded Liabilities;
 - (c) any and all Claims and Encumbrances (other than the Retained Liabilities) against or relating to the Companies, the Excluded Assets, the Excluded Liabilities, or the Retained Assets existing immediately prior to the Effective Time;
 - (d) the Companies' insolvency prior to the Effective Time;

- (e) the commencement or existence of these CCAA proceedings and any subsequent bankruptcy proceedings in respect of ResidualCo; or
- (f) the completion of the Transactions.

INSURED CLAIMS

16. Notwithstanding anything set out in any of the Orders made by the Court in these CCAA Proceedings, any Person shall be permitted to commence or continue an action, application or other proceeding in respect of any claim or liability which is an insured claim (the "**Insured Claims**") under any insurance policy maintained by the Companies (collectively, the "**Insurance Policies**") to the point of determination of liability, if any. The Person asserting an Insured Claim shall be entitled to recover solely from the proceeds under the Insurance Policies to the extent available in respect of any such Insured Claim, and recovery of such Insured Claim shall be irrevocably and forever limited solely to such proceeds, without any additional rights of enforcement, recovery or recourse as against the Released Parties, and such Person shall have no right to, and shall not, directly or indirectly, make any claim or seek any recoveries from the Companies or any of the Released Parties, other than enforcing such Person's rights to be paid by the applicable insurer(s) from the proceeds of the applicable Insurance Policies. Nothing herein shall prejudice, compromise, release or otherwise affect any rights or defenses of any insurer with respect to its obligations under any of the Insurance Policies.

THE MONITOR

17. Without in any way limiting the Monitor's powers set out in the Initial Order, the Enhanced Powers Order and any other Order of this Court in these CCAA proceedings, or under the CCAA or applicable law, the Monitor is hereby authorized to undertake and perform such activities and obligations as are contemplated to be undertaken or performed by the Monitor pursuant to this Order and the Amalgamation Agreement or any ancillary document related thereto.
18. Notwithstanding anything contained in this Order, the Monitor, its employees and

representatives are not and shall not be or deemed to be a director, officer or employee of ResidualCo, de facto or otherwise, and shall incur no liability in connection therewith, save and except for any gross negligence or willful misconduct on its part. Nothing in this Order shall affect, vary, derogate from, limit other otherwise amend any protections in favour of the Monitor at law or pursuant to the CCAA, the Initial Order or any other Order granted in these CCAA proceedings. For greater certainty, the terms of the Initial Order and any other Orders granted in these proceedings shall apply in respect of authorizing the Monitor to take such steps and actions on behalf of the Companies as necessary or desirable to complete the Transaction pursuant to this Order.

19. No action lies against the Monitor by reason of this Order or the performance of any act authorized by this Order, except with leave of the Court following an action brought on not less than ten (10) days' notice to the Monitor and its legal counsel. The entities related to or affiliated with the Monitor or belonging to the same group as the Monitor (including without limitation, any agents, employees, legal counsel or other advisors retained or employed by the Monitor) shall benefit from the protection granted to the Monitor under this paragraph.
20. The Monitor may rely on written notice from the Keranic or its counsel regarding the fulfilment of the conditions to closing under the Amalgamation Agreement and shall incur no liability with respect to the delivery of the Monitor's Certificate.
21. The Monitor shall file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof in connection with the Transactions, but, for greater certainty, any delay in the filing of the Monitor's Certificate shall not delay closing.
22. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is

authorized, entitled, and empowered to:

- (a) assign or cause to be assigned, at any time after the Closing Date, ResidualCo into bankruptcy and the Monitor shall be entitled but not obligated to act as trustee in bankruptcy thereof; and
- (b) apply to this Court for advice and directions or any orders necessary or advisable to carry out its powers and obligations under this Order or any other Order granted by this Court, including for advice and directions with respect to any matter.

TRANSACTION AND AMALGAMATION BINDING

23. Notwithstanding:

- (a) the pendency of these proceedings and any declaration of insolvency made herein;
- (b) the pendency of any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**"), in respect of ResidualCo, and any bankruptcy order issued pursuant to any such applications;
- (c) any assignment in bankruptcy made by ResidualCo; and
- (d) the provisions of any federal or provincial statute;

the execution of the Amalgamation Agreement and the implementation of the Amalgamation and the Transactions shall be binding on any trustee in bankruptcy that may be appointed in respect of ResidualCo, and shall not be void or voidable by creditors of ResidualCo, nor shall it constitute or be deemed to be a transfer at undervalue, settlement, fraudulent preference, assignment, fraudulent conveyance, or other reviewable transaction under the *BIA* or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

MISCELLANEOUS MATTERS

24. The Monitor, the Companies, Keranic, and any other interested party shall be at liberty to apply for further advice, assistance, and direction as may be necessary to give full force and effect to the terms of the Amalgamation Agreement and this Order.
25. The Court shall retain exclusive jurisdiction to, among other things, interpret, implement, and enforce the terms and provisions of the Amalgamation Agreement and this Order, including any dispute arising from the same.
26. This Honourable Court hereby requests the aid and recognition of any court, tribunal, regulatory, or administrative body having jurisdiction in Canada or in any of its provinces or territories or in any foreign jurisdiction, to act in aid of and to be complimentary to this Court in carrying out the terms of this Order, to give effect to this Order, and to assist the Monitor and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor, as an officer of the Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.
27. Service of this Order shall be deemed good and sufficient by serving the same on the members of the service list created in these proceedings and posting a copy of this Order on the Monitor's website.
28. Service of this Order may be effected by facsimile, electronic mail, personal delivery, or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.



Justice of the Court of King's Bench of Alberta

TAB 26

CITATION: Lydian International Limited (Re), 2020 ONSC 4006

COURT FILE NO.: CV-19-00633392-00CL

DATE: 2020-07-10

**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 PLAN OF COMPROMISE OR ARRANGEMENT OF
LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES
CORPORATION AND LYDIAN U.K. CORPORATION LIMITED

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Elizabeth Pillon, Maria Konyukhova, Sanja Sopic, and Nicholas Avis*, for the Applicants

D. J. Miller and Rachel Bergino, for Alvarez & Marsal Inc.

Robert Mason and Virginie Gauthier, for Osisko Bermuda Limited

Pamela Huff and Chris Burr, for Resource Capital Fund VI L.P.

David Bish and Michael Pickersgill, for Orion Capital Management

Alexander Steele, for Caterpillar Financial Services (UK) Limited

Bruce Darlington, for ING Bank N.V./Abs Svensk Exportkredit (publ)

John LeRoux, Hasan Ciftehan, Mehmet Ali Ekingen and Atilla Bozkay, each in their capacity as a Shareholders of Lydian International Limited

**HEARD by ZOOM Hearing
and DECIDED:**

June 29, 2020

REASONS RELEASED:

July 10, 2020

ENDORSEMENT

[1] Lydian International Limited, Lydian Canada Ventures Corporation and Lydian U.K. Corporation Limited (the "Applicants") bring this motion for an order (the "Sanction and Implementation Order"), among other things:

- a) declaring that the Meeting of Affected Creditors held on June 19, 2020 was duly convened and held, all in accordance with the Meeting Order;
- b) sanctioning and approving the Applicants' Plan of Arrangement (the "Plan") as approved by a requisite majority of Affected Creditors at the Meeting, in accordance with the Plan Meeting Order (each as defined below), a copy of which is attached as Schedule "A" to the draft Sanction and Implementation Order; and
- c) granting various other related relief (as more particularly outlined below).

[2] The Applicants submit that the Plan represents the culmination of the Applicants' restructuring efforts and allows for the resolution of these CCAA Proceedings. The Monitor and the majority of the Affected Creditors are supportive of the Plan and if sanctioned and implemented, the Plan will provide a path forward for Lydian Canada and Lydian UK as part of a privatized Restructured Lydian Group (as defined in the Plan) and ultimately lead to the termination of these CCAA Proceedings.

[3] Shortly after the conclusion of the hearing on June 29, 2020, which was conducted by Zoom, I granted the motion with reasons to follow.

[4] The facts with respect to this motion are more fully set out in the Affidavit of Edward A. Sellers sworn June 24, 2020 (the "Sellers Sanction Affidavit"), the Affidavit of Edward A. Sellers sworn June 15, 2020 (the "Sellers Meeting Affidavit") and the Affidavit of Mark Caiger sworn June 11, 2020 (the "BMO Affidavit"). Mr. Sellers and Mr. Caiger were not cross-examined. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Sellers Sanction Affidavit, the Sellers Meeting Affidavit, and the Plan. All references to currency in this factum are references to United States dollars, unless otherwise indicated.

Background

[5] The Applicants are three entities at the top of the Lydian Group. The Lydian Group owns a development-stage gold mine in south-central Armenia through its wholly owned non-applicant operating subsidiary Lydian Armenia. The Applicants contend that they have been unable to access their main operating asset, the Amulsar mine, since June 2018 due to blockades and the associated actions and inactions of the Government of Armenia ("GOA"), and as a result, this has prevented the Applicants from completing construction of the mine and generating revenue in the ordinary course.

[6] The Applicants further contend that the effects of the blockades, amongst other factors, caused the Applicants to seek protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). An Initial Order was granted on December 23, 2019. Alvarez & Marsal Canada Inc. was appointed as Monitor.

[7] In the two years since the blockades began, the Applicants contend that they have used their best efforts to resolve the factors that led to their insolvency, including engaging in negotiations with the GOA, defending their commercial rights and commencing legal proceedings in Armenia to attempt to remove the blockades but these efforts have yet to result in the Applicants re-gaining access to the Amulsar site.

[8] In early 2018, the Applicants retained BMO to canvass the market for potential refinancing or sale options. BMO has conducted multiple rounds of a sales process to market the Lydian Group's mining assets. BMO also ran a process to solicit interest in financing the Applicants' potential Treaty Arbitration. These efforts have not yet resulted in a transaction capable of satisfying the claims of the Applicants' secured lenders.

[9] Since the blockades began, the Senior Lenders have been funding the Applicants' efforts to find a solution to the situation caused by the blockades. The Senior Lenders provided additional financial support to the Lydian Group totalling in excess of \$43 million.

[10] As of March 31, 2020, the Lydian Group owed its secured lenders more than \$406.8 million.

[11] According to the Applicants, the secured lenders are no longer willing to support the Applicants' efforts to monetize their assets. The Equipment Financiers CAT and ING have taken enforcement steps and Ameriabank has issued preliminary notice of enforcement.

[12] Further, the Applicants point out that the liquidity made available to the Applicants since April 30, 2020 has been conditioned on the Applicants: (i) proposing a restructuring that would be equivalent to the Senior Lenders enforcing their security over the shares of Lydian Canada; and (ii) meeting a deadline to exit the CCAA Proceedings imposed by a majority of the Applicants' Senior Lenders, or further enforcement steps would be taken.

[13] The Applicants submit that the Plan represents the most efficient mechanism to effect an orderly transition of the Lydian Group's affairs. The Applicants contend that the Plan minimizes adverse collateral impacts on Lydian Armenia, provides for winding down the proceedings before this court and the Jersey Court and avoids uncoordinated enforcement steps being taken on the Lydian Group's property to the detriment of the Lydian Group's stakeholders generally.

The Plan

[14] The Plan recognizes and continues the priority position of the Senior Lenders in the Restructured Lydian Group. The Senior Lenders make up the only class eligible to vote on the Plan and receive a distribution thereunder.

[15] According to the Applicants, secured creditors and unsecured creditors with claims at or below Restructured Lydian will continue to maintain their claims in the Restructured Lydian Group, including Lydian Armenia, with the same priority as they previously had, ranking behind the Senior Lenders. Stakeholders with claims at the Lydian International level will continue to have their claims on the Plan Implementation Date, which are intended to be addressed through

the proposed J&E Process in Jersey. Equity claims and unsecured claims against Lydian International will not be assumed by Restructured Lydian as part of the Plan.

[16] The purpose of the Plan is to (a) implement a corporate and financial restructuring of the Applicants, (b) provide for the assignment or settlement of all intercompany debts owing to the Applicants prior to the Effective Time to, among other things, minimize adverse tax consequences to Lydian Armenia and its stakeholders, (c) provide for the equivalent of an assignment of substantially all of the assets of Lydian International to an entity owned and controlled by the Senior Lenders (“SL Newco”), through an amalgamation of Lydian Canada with SL Newco resulting in a new entity (“Restructured Lydian”), and (d) provide a release of all of the existing indebtedness and obligations owing by Lydian International to the Senior Lenders. The Plan will result in the privatization of the Lydian Group to continue as the Restructured Lydian Group.

[17] The steps involved in the Plan’s execution are described in detailed in paragraphs 71 to 74 of the Sellers Meeting Affidavit.

[18] The Plan provides for certain releases. The releases are more fully described in the Sellers Meeting Affidavit at paragraph 83.

[19] Mr. Sellers in the Sellers Sanction Affidavit at para. 16 states that the releases were critical components of the negotiations and decision-making process for the D&Os and Senior Lenders in obtaining support for the Plan and resolving these CCAA Proceedings for the benefit of the Restructured Lydian Group, including Lydian Armenia, and all of its stakeholders.

[20] Mr. Sellers further states that the Released Parties made significant contributions to the Applicants’ restructuring, both prior to and throughout these CCAA Proceedings, which resulted directly in the preservation of the Lydian Group’s business, provided numerous opportunities for the Applicants to seek to monetize their assets for the benefit of stakeholders generally and led to the successful negotiation of the Plan for the benefit of the Restructured Lydian Group.

[21] The Plan provides for a Plan Implementation Date on or prior to June 30, 2020. The majority of the Applicants’ Senior Lenders have agreed to fund the costs associated with implementing the Plan and termination of the CCAA Proceedings and the J&E Process in Jersey, through the DIP Exit Facility Amendment, which will make a DIP Exit Credit Facility available to the Applicants totalling an estimated additional \$1.866 million.

[22] The test that a debtor company must satisfy in seeking the Court’s approval for a plan of compromise or arrangement under the CCAA is well established:

- a) there must be strict compliance with all statutory requirements;
- b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA and prior Orders of the Court in the CCAA proceedings; and

- c) the plan must be fair and reasonable.

Issues

[23] The issues for determination on this motion are whether:

- a) the Plan is fair and reasonable and should be sanctioned;
- b) the releases contemplated by the Plan are appropriate;
- c) the increase to the DIP Charge to capture the amounts to be advanced under the DIP Exit Credit Facilities is appropriate;
- d) the Stay Period should be extended;
- e) the unredacted Sellers Sanction Affidavit should be sealed; and
- f) the Monitor's activities, as detailed in the Fifth Report, Sixth Report and Seventh Report, should be approved and the fees of Monitor and its counsel through to June 23, 2020 should be approved.

LAW AND ANALYSIS

Approval of the Plan

[24] To determine whether there has been strict compliance with all statutory requirements, the court considers factors such as whether: (a) the applicant meets the definition of a "debtor company" under section 2 of the CCAA; (b) the applicant has total claims against it in excess of C\$5 million; (c) the notice calling the creditors' meeting was sent in accordance with the order of the court; (d) the creditors were properly classified; (e) the meeting of creditors was properly constituted; (f) the voting was properly carried out; and (g) the plan was approved by the requisite majority.

[25] The Applicants submit that they have complied with the procedural requirements of the CCAA, the Initial Order, the Amended and Restated Initial Order, the Meeting Order and all other Orders granted by this Court during these CCAA Proceedings. In particular:

- a) at the time the Initial Order was granted, the Applicants were found to be "debtor companies" to which the CCAA applied and that the Applicants' liabilities exceeded the C\$5 million threshold amount under the CCAA;
- b) the classification of the Applicants' Senior Lenders into one voting class (namely, the Affected Creditors class) was approved pursuant to the Meeting Order. This classification was not opposed at the hearing to approve the Meeting, nor was the Meeting Order appealed; the Applicants properly effected notice in accordance with the Meeting Order prior to the

Meeting. In addition, the Applicants issued a press release on June 15, 2020 announcing their intention to seek an Order of the Court to file the Plan and call, hold and conduct a meeting of the Senior Lenders;

- c) the Meeting was properly constituted and the voting on the Plan was carried out in accordance with the Meeting Order; and
- d) the Plan was approved by the Required Majority.

[26] Sections 6(3), 6(5) and 6(6) of the CCAA provide that the Court may not sanction a plan unless the plan contains certain specified provisions concerning Crown claims, employee claims and pension claims. The Applicants' submit that these provisions of the CCAA are satisfied by the Plan. Crown claims and employee claims are treated by the Plan as Unaffected Claims, meaning that such claims, if any, are not compromised or otherwise affected. The Applicants do not maintain any pension plans, and thus section 6(6) of the CCAA does not apply. In compliance with s. 6(8) of the CCAA, the Plan does not provide for any recovery to equity holders.

[27] I accept the foregoing submissions. I am satisfied that the statutory prerequisites to approval of the Plan have been satisfied, and that there has been strict compliance with all statutory requirements.

[28] The Applicants submit that no unauthorized steps have been taken in these CCAA Proceedings and throughout the entirety of these CCAA Proceedings, they have kept this Court and Monitor apprised of all material aspects of the Applicants' conduct, activities, and key issues they have worked to resolve. I accept this submission.

[29] The Applicants' submit that when considering whether a plan of compromise and arrangement is fair and reasonable, the court should consider the relative degree of prejudice that would flow from granting or refusing to grant the relief sought. Courts should also consider whether the proposed plan represents a reasonable and fair balancing of interests, in light of the other commercial alternatives available (see: *Re Canadian Airlines Corp*, 2000 ABQB 442 at paras. 3, 94, 96, and 137 – 138; and *Re Canwest Global Communications Corp*, 2010 ONSC 4209).

[30] The CCAA permits the filing of a Plan by an Applicant to its secured creditors. The Applicants' submit the fact that unsecured creditors may receive no recovery under a proposed plan of arrangement does not, of itself, negate the fairness and reasonableness of a plan of arrangement (*Anvil Range Mining Corp. (Re)*, 2002 CanLII 42003 (ONCA); and *1078385 Ontario Ltd., (Re)*, 2004 CanLII 55041 (ONCA) at paras 30-31 ([CanLII](#)), affirming 2004 CanLII 66329 (ONSC)).

[31] The Plan was presented to the Senior Lenders, who are the Applicants' only secured creditors and they voted on the Plan as a single class. The Senior Lenders voted in favour of the Plan by the Required Majority. The value of the claims of Orion and Osisko, who voted in

favour of the Plan comprise 77.8% of the total value of the Affected Creditors who were present and voting.

[32] RCF, a secured lender and 32% shareholder, did not vote in favour of the Plan. RCF has advised that it “does not intend at this time to propose or fund an alternative to the Plan, and in the absence of such an alternative we expect that the Court will have no choice but to issue the Sanction and Implementation Order.”

[33] I have been advised that an issue as between the Senior Lenders and ING has been resolved and for greater certainty this Plan does not compromise any claim that ING may have in respect of proceeds from a successfully-asserted arbitration claim. In addition, the Senior Lenders have agreed that, after payment of all claims of the Senior Lenders to proceeds from a successfully-asserted arbitration claim whether on account of: (i) claims of the Senior Lenders prior to the Plan Implementation Date; or (ii) further advances made by the Senior Lenders (or their affiliates) after the Plan Implementation Date, (whether such further advances are made as equity, secured debt or unsecured debt), the proceeds will be paid to Lydian Armenia in an amount sufficient and to be used to pay ING’s claims against Lydian Armenia prior to any further monies being returned to equity holders.

[34] The Applicants submit that the structure and the nature of the releases in the Plan recognizes and continues the priority position of the Senior Lenders. Secured creditors and unsecured creditors with claims at or below Restructured Lydian will continue to maintain their claims in the Restructured Lydian Group, including Lydian Armenia, with the same priority as they previously had, ranking behind the Senior Lenders.

[35] The Applicants state that they have considered and believe the Plan is the best available outcome for the Applicants, and the interests of the stakeholders generally in the Lydian Group.

[36] As noted in the BMO Affidavit, despite multiple rounds of the SISP and the Treaty Arbitration financing solicitation process, the Applicants submit that no transaction which would satisfy the Lydian Group’s secured obligations is currently available to the Applicants.

[37] The Applicants submit that the monetization of Treaty Arbitration is also not open to the Applicants at this time, and if initiated would require an extended period to litigate and significant additional financial resources.

[38] The Applicants submit that for the purposes of valuing an estate at a plan sanction hearing, the “value has to be determined on a current basis. [...] It is inappropriate to value the assets on a speculative or (remote) possibility basis.” A relevant consideration in this analysis is the scope and extent of previous sale or capital raising efforts undertaken by the company and any financial advisors. In support of this submission, the Applicants reference: *Anvil Range Mining Corp. (Re)*, 2002 CanLII 42003 (ONCA), para 36 ([CanLII](#)); *Philip Services Corp., Re*, 1999 CanLII 15012 (ONSC) at para 9 ([CanLII](#)) 1078385 *Ontario Ltd., (Re)*, 2004 CanLII 55041 (ONCA) at paras 30-31 ([CanLII](#)), affirming 1078385 *Ontario Ltd. (Re)*, 2004 CanLII 66329 (ONSC) ([CanLII](#)).

[39] The Applicants submit that the outcome of the Plan, that being the distribution of the Applicants' estates to the Senior Lenders, is essentially identical to what would be achieved with any other options available in the circumstances. Without the Plan, the Senior Lenders could (a) privatize the Applicants' assets through the enforcement of share pledges and other security, or (b) could credit bid their debt to acquire the shares or assets; or (c) enforce their secured positions following the Applicants filing for bankruptcy, administration, or liquidation proceedings across multiple jurisdictions. In each scenario (as with the Plan), the Applicants' assets are transitioned to the Senior Lenders.

[40] The foregoing submissions were not challenged.

[41] The Monitor supports the Plan. As noted in the Monitor's Seventh Report, "it is the Monitor's view that the Plan represents a better path forward than any other alternative that is available to the Applicants and is fair and reasonable."

[42] I am aware that concerns with respect to the fairness of the Plan have been raised by numerous shareholders of Lydian International and oral submissions were made by John LeRoux, Hasan Ciftehan, Mehmet Ali Ekingen and Atilla Bozkay.

[43] In addition, a number of emails were sent directly to the court, which were forwarded to counsel to the Monitor. In addition, certain emails were sent to the Monitor. None of the emails were in a proper evidentiary form.

[44] The concerns of the shareholders included criminal complaints of activities in Armenia, the content of certain press releases and the impact of the COVID-19 pandemic. Some shareholders requested a delay of three months in these proceedings.

[45] As previously noted, equity claims and unsecured claims against Lydian International will not be assumed by Restructured Lydian as part of the Plan. Simply put, the shareholders of Lydian International will not receive any compensation for their shareholdings. This is a reflection of the insolvency of the Applicants and the priority position afforded to shareholders by the CCAA.

[46] I recognize that the shareholders' monetary loss will be crystalized if the Plan is sanctioned. However, a monetary loss resulting from the ownership, purchase or sale of their equity interest is an "equity claim" as defined in s. 2(1) of the CCAA. This definition is significant as s. 6(8) of the CCAA provides:

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

[47] The Plan does not provide for payment in full of claims that are not equity claims. Consequently, equity claimants are not in the position to receive any compensation.

[48] The economic reality facing the shareholders existed prior to the COVID-19 pandemic. The Applicants were insolvent when they filed these proceedings on December 23, 2019. The financial situation facing the Applicants has not improved since the filing. In fact, it has declined. The mine is not operating with the obvious result that it is not generating revenues and interest continues to accrue on the secured debt. The fact that shareholders will receive no compensation is unfortunate but is a reflection of reality which does not preclude a finding that the Plan is fair and reasonable for the purposes of this motion.

[49] The Senior Lenders have voted in sufficient numbers in favour of the Plan. I am satisfied that there are no viable alternatives, and, in my view, it is not feasible to further delay these proceedings.

[50] Section 6.6 of the Plan provides for full and final releases in favour of the Released Parties, who consist of (a) the Applicants, their employees, agents and advisors (including counsel) and each of the members of the Existing Lydian Group's current and former directors and officers; (b) the Monitor and its counsel; and (c) the Senior Lenders and each of their respective affiliates, affiliated funds, their directors, officers, employees, agents and advisors (including counsel) (collectively, the "Ancillary Releases"). A chart setting out the impact of the releases is attached as Schedule "A" to these reasons.

[51] The Applicants submit that the releases apply to the extent permitted by law and expressly do not apply to, among other things:

- a) Lydian Canada's, Lydian UK's or the Senior Lenders' obligations under the Plan or incorporated into the Plan;
- b) obligations of any Existing Lydian Group member other than Lydian International under the Credit Agreement and Stream Agreement, and any agreements entered into relating to the foregoing, from and after the Plan Implementation Date;
- c) any claims arising from the willful misconduct or gross negligence of any applicable Released Party; and
- d) any Director from any Director Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

[52] Unsecured creditors' claims, other than the Ancillary Releases in favour of the Directors, are not compromised or released and remain in the Restructured Lydian Group.

[53] The Applicants submit that it is accepted that there is jurisdiction to sanction plans containing releases if the release was negotiated in favour of a third party as part of the "compromise" or "arrangement" where the release reasonably relates to the proposed restructuring and is not overly broad. There must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan (see: *Re Canadian Airlines Corp*, 2000 ABQB 442).

at para 92 (CanLII) CCAA at s. 5(1); *Re Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at paras 61 and 70 (CanLII); *Re Canwest Global Communications Corp*, 2010 ONSC 4209 at para 28-30 (CanLII); and *Re Kitchener Frame Ltd*, 2012 ONSC 234 at paras 85-88 (CanLII).

[54] The Applicants submit that in considering whether to approve releases in favour of third parties, courts will consider the particular circumstances of the case and the objectives of the CCAA. While no single factor will be determinative, the courts have considered the following factors:

- a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;
- b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;
- c) Whether the plan could succeed without the releases;
- d) Whether the parties being released were contributing to the plan; and
- e) Whether the release benefitted the debtors as well as the creditors generally.

[55] The Applicants submit that the releases were critical components of the decision-making process for the Applicants' directors and officers and Senior Lenders' participation in these CCAA Proceedings in proposing the Plan and the Applicants submit that they would not have brought forward the Plan absent the inclusion of the releases.

[56] The Applicants also submit that the support of the Senior Lenders is essential to the Plan's viability. Without such support, which is conditional on the releases, the Plan would not succeed.

[57] The Applicants submit that the Released Parties made significant contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings. The extensive efforts of the Applicants' directors and officers and the Senior Lenders and Monitor resulted in the negotiation of the Plan, which forms the foundation for the completion of these CCAA Proceedings. The Senior Lenders financial contributions through forbearances, additional advances and DIP and Exit Financing were instrumental.

[58] The Applicants also submit that the releases are an integral part of the CCAA Plan which provides an orderly and effective alternative to uncoordinated and disruptive secured lender enforcement proceedings. The Plan permits unsecured creditors future potential recovery in the Restructured Lydian Group, which may not exist in bankruptcy (*Re Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at paras 71 (CanLII); and *Re Kitchener Frame Ltd*, 2012 ONSC 234 at paras 80-82 (CanLII)).

[59] The Applicants submit that this Court has exercised its authority to grant similar releases, including in circumstances where the released claims included claims of parties who did not vote on the plan and were not eligible to receive distributions (*Target Canada Co. et al.* (2 June 2016), Toronto CV-15-10832-00CL (Ont. Sup. Ct. [Comm. List]) Sanction and Vesting Order at Schedule “B” art. 7 ([Monitor’s website](#)); *Rubicon Minerals Corporation et al.* (8 December 2016), Toronto CV-16-11566-00CL (Ont. Sup. Ct. [Comm. List]) Sanction Order at Schedule “A” art. 7 ([Monitor’s website](#)); and *Nortel Networks Corporation et al.* (30 November 2016), Toronto 09-CL-7950 (Ont. Sup. Ct. [Comm. List]) Plan of Compromise and Arrangement at art. 7 ([Monitor’s website](#))).

[60] Full disclosure of the releases was made in (a) the draft Plan that was circulated to the Service List and filed with this Court as part of the Applicants’ Motion Record (returnable June 18, 2020); and (b) the Plan attached to the Meeting Order. The Applicants also issued the Press Releases. This notification process ensured that the Applicants’ stakeholders had notice of the nature and effect of the Plan and releases.

[61] The foregoing submissions with respect to the releases were not challenged.

[62] In my view, each of the Released Parties has made a contribution to the development of the Plan. In arriving at this determination, I have taken into account the activities of the Released Parties as described in the Reports of the court-appointed Monitor. I am satisfied that it is appropriate for the Plan to include the releases in favour of the Released Parties.

[63] The development of this Plan has been challenging and as the Monitor has stated, “the Plan represents a better path forward than any other alternative that is available to the Applicants and is fair and reasonable”.

[64] I accept this assessment and find that the Plan is fair and reasonable in the circumstances.

DIP Charge

[65] The terms of the DIP Exit Facility Amendment are described in the Sellers Sanction Affidavit. The DIP Exit Facility Amendment provides for exit financing totalling \$1.866 million to assist in implementing the Plan and taking the necessary ancillary steps to terminate the CCAA Proceedings and support the J&E Process.

[66] This Court has the jurisdiction to authorize funding in the context of a CCAA restructuring pursuant to s. 11.2(1) and 11.2(2) of the CCAA. In considering whether to approve DIP financing, the Court is to consider the non-exhaustive list of factors set out in s. 11.2(4) of the CCAA. These same provisions of the CCAA provide this Court with the authority to approve amendments to a DIP agreement and secure all obligations arising from the amended DIP loans with an increased DIP charge.

[67] The Applicants submit that, based on the following, the DIP Amendment should be approved and the increase to the DIP Facility should be secured by the DIP Charge:

- a) the DIP Exit Credit Facility is necessary to enable the Applicants to implement the Plan;
- b) the Monitor is supportive of the DIP Exit Facility Amendment;
- c) the DIP Exit Facility Amendment is not anticipated to give rise to any material financial prejudice; and
- d) the DIP Lenders are the majority of Senior Lenders.

[68] I am satisfied that the requested relief in respect to the DIP Amendment is reasonably necessary and appropriate in the circumstances.

Sealing Request

[69] The Applicants seek to seal the unredacted Sellers Sanction Affidavit on the basis that the redacted portions of the Sellers Sanction Affidavit contain commercially sensitive information, the disclosure of which could be harmful to stakeholders.

[70] The redactions currently being sought are consistent with previous Orders in these CCAA Proceedings. In my view, the documents in question contain sensitive commercial information. Having considered the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 Sec. 41 at para. 53 I am satisfied that the request for a sealing order is appropriate and is granted.

Stay Period

[71] On the Plan Implementation Date, the CCAA Proceedings with respect to Lydian UK and Lydian Canada will be terminated, such that Lydian International will be the only remaining Applicant in the CCAA Proceedings. The Applicants are requesting an extension of the Stay Period for Lydian International until and including the earlier of (i) the issuance of the Monitor's CCAA Termination Certificate and (ii) December 21, 2020 to enable the remaining Applicant and the Monitor to take the steps necessary to implement the Plan and terminate the CCAA Proceedings and initiate the J&E Process. The Applicants are also requesting an extension of the Stay Period for the Non-Applicant Stay Parties (other than Lydian US) until and including the earlier of the issuance of the Monitor's Plan Implementation Certificate.

[72] I am satisfied that the Applicants in requesting the extension of the Stay Period have demonstrated that circumstances exist that make the order appropriate; and that they have acted and are acting in good faith and with due diligence such that the request is appropriate.

Approval of Monitor's Activities

[73] The Applicants are seeking an order approving the Monitor's activities to date, as detailed in the Fifth Report, Sixth Report and the Seventh Report (collectively, the "Reports").

This Court has already approved the activities of the Monitor that were detailed in its previous reports. There was no opposition to the request.

[74] I am satisfied that the Reports and the activities described therein should be approved. The Reports were prepared in a manner consistent with the Monitor's duties and the provisions of the CCAA and in compliance with the Initial Order. The Reports are approved in accordance with the language provided in the draft order.

Approval of Monitor's Fees

[75] The Applicants further seek approval of the fees and disbursements of (i) the Monitor for the period April 14, 2020 to June 23, 2020, inclusive, and (ii) counsel to the Monitor for the period April 16, 2020 to June 23, 2020. The Applicants have reviewed the fees of the Monitor and its counsel and support the payment of the same.

[76] I am satisfied that the fee requests are appropriate in the circumstances and they are approved.

DISPOSITION

[77] The Applicants' motion is granted. The Plan is sanctioned and approved. The ancillary relief referenced in the motion is also granted and an Order reflecting the foregoing has been signed.

Date: July 10, 2020

Chief Justice Geoffrey B. Morawetz

SCHEDULE “A”

Lydian International Limited et al.

Impact of the Releases Described in s. 6.6 of the Plan

Lydian Jersey		
Type of Claim	Treatment	Plan Reference
Senior Lender Claims Held by RCF, Orion and Osisko	Released	Section 6.3(n)
Unsecured Guarantee of Equipment Lessors ING, CAT, Ameriabank	Not Released. Addressed in the J&E Process in Jersey	Section 6.6 (carve-out (E))
Other Unsecured Claims Includes Maverix Metals claim against Lydian Jersey	Not Released. Addressed in the J&E Process in Jersey.	Section 6.6 (carve-out (E))
Equity Claims Held by RCF, Orion, and public Shareholders	Not Released. Addressed in the J&E Process in Jersey.	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Intercompany Claims Claims by Lydian Jersey against Lydian Canada and other subsidiaries	Assigned to Lydian Canada	Section 6.3(h)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

Lydian Canada		
Type of Claim	Treatment	Plan Reference
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims of Equipment Lessors¹ ING, CAT, Ameriabank	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Jersey in Lydian Canada	Not Released (but subject to amalgamation with SL Newco)	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

¹ This includes contractual rights as outlined in the Waiver and Consent Agreement between Lydian Jersey, Lydian Canada, Lydian UK and Lydian Armenia dated November 26, 2018 (the “**Waiver**”).

Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

Lydian UK		
Type of Claim	Treatment	Plan Reference
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims of Equipment Lessors ING, CAT, Ameriabank ²	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Canada in Lydian UK	Not Released	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

² This includes the contractual rights outlined in the Waiver.

11910728 Canada Inc. ("DirectorCo")		
Type of Claim	Treatment	Plan Reference
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Canada in DirectorCo	Not Released	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii) of the Plan
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian International Holdings Limited, Lydian Resources Armenia Limited, and Lydian Resources Kosovo Limited		
Type of Claim	Treatment	Plan Reference
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Other Secured Claims Includes claim of Maverix Metals in shares of Lydian Resources Armenia Limited, which is subordinated to claims of Senior Lenders	Not Released	Section 6.6
Unsecured Claims Includes Maverix Metals claim against Lydian International Holdings Limited	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian UK in Lydian International Holdings Limited, and shareholdings of Lydian International Holdings Limited in Lydian Resources Armenia ("BVI") and Lydian Resources Kosovo Limited Includes Maverix Metals' share pledge in BVI	Not Released	Section 6.6 (carve-out (E))
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii) of the Plan
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian Armenia		
Type of Claim	Treatment	Plan Reference
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Equipment Lessor Secured Claims ING, CAT and Ameriabank (to the extent secured by their collateral)	Not Released	Section 6.6 (carve-out (E))
Equipment Lessor Unsecured Claims ING, CAT and Ameriabank (unsecured deficiency claims)	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims e.g. Trade creditors	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings held by BVI / DirectorCo (as sole shareholder representative of BVI)	Not Released	Section 3.5
D&O Claims Claims against the Directors	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6 (i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian US Lydian Zoloto, Lydian Resources Georgia Limited ("Lydian Georgia") and Georgian Resource Company LLC ("Lydian GRC", and collectively with Lydian US, Lydian Zoloto and Lydian Georgia, the "Released Guarantors" under the Plan)		
Type of Claim	Treatment	Plan Reference
Senior Lender Claims Held by RCF, Orion and Osisko	Released	Section 6.3(n)
Unsecured Claims	Not Released	Section 6.6
Equity Claims (a) Shareholdings of Lydian Jersey in Lydian US, Lydian Georgia and Lydian Zoloto; and (b) Shareholdings of Lydian Georgia in Lydian GRC	(a) Not Released. Per s. 6.4 of the Plan, Lydian US and Lydian Zoloto to be wound-up and dissolved pursuant to the laws of Colorado and Armenia, respectively. (b) Lydian Georgia shares held by Lydian Jersey to be transferred to Lydian Georgia Purchaser on Plan Implementation Date. (b) Shares of Lydian GRC held by Lydian Georgia not released. See note re: Lydian Georgia above.	Section 3.5 and section 6.4
D&O Claims, Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

TAB 27

Court of King's Bench of Alberta

Citation: Delta 9 Cannabis Inc (Re), 2025 ABKB 52

Date: 20250129
Docket: 2401 09688
Registry: Calgary

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

In the Matter of the Compromise or Arrangement of Delta 9 Cannabis Inc., Delta 9 Logistics Inc., Delta 9 Bio-Tech Inc., Delta 9 Lifestyle Cannabis Clinic Inc., and Delta 9 Cannabis Store Inc.

Corrected judgment: A corrigendum was issued on March 6, 2026, the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision of the Honourable Justice M.A. Marion

I. Introduction and Background

[1] “**Delta 9**”, comprised of Delta 9 Cannabis Inc (**Delta 9 Parent**), Delta 9 Logistics Inc, Delta 9 Lifestyle Cannabis Clinic Inc, Delta 9 Cannabis Store Inc and Delta 9 Bio-Tech Inc (**Bio-Tech**), is a vertically integrated group of companies in the business of cannabis cultivation, processing, extraction, wholesale distribution, retail sales and business to business sales.

[2] In recent years, Delta 9 has suffered losses due to a number of factors, including intense competition; over-supply of cannabis products leading to significant price compression; illicit supply of cannabis; burdensome regulatory costs; significant capital required for new product development; increased financing costs due to changing capital market investor sentiment driving investment away from the cannabis sector; and higher interest rates. By March 2024, Delta 9 was in breach of covenants owed to its secured creditor and, in May 2024, it received a demand and notice of intention to enforce security under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*).

[3] Delta 9 then sought relief under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (CCAA). On July 15, 2024, the Court granted an initial order (**Initial Order**) under the CCAA providing, among other things, a stay of proceedings against Delta 9 (**Stay**).

[4] On July 24, 2024, on the “comeback” application with respect to the Initial Order, the Court granted an Amended and Restated Initial Order (**ARIO**), a Claims Procedure Order and an order approving a sale and investment solicitation process (**SISP**) with respect to Bio-Tech (**Bio-Tech SISP Order**). The ARIO approved, among other things, the appointment of a Chief Restructuring Officer, Delta 9 group borrowing funds from 2759054 Ontario Inc operating as Fika Herbal Goods (**Fika** or **Plan Sponsor**) subject to an approved interim financing term sheet, among other things.

[5] On September 11, 2024, the Court granted an order, among other things, extending the Stay period under the ARIO to November 1, 2024 and approving an amendment to the Interim Financing Term Sheet between the Delta 9 group and Fika.

[6] On November 1, 2024, I granted a further extension order extending the Stay to January 31, 2025, approving a further amendment to the interim financing, increasing the financing charge, and amending a claims procedure order to allow the court-appointed monitor (**Monitor**) to accept late claims.

[7] On November 8, 2024, I dismissed Fika’s application seeking, among other things, a creditors’ meeting for a proposed plan of arrangement: *Delta 9 Cannabis Inc (Re)*, 2024 ABKB 657.

[8] On November 21, 2024, Fika’s counsel notified the Court that January 10, 2025 had been scheduled for two separate applications in this matter: determining the amount owing under a credit facility between SNDL Inc and Delta 9 (**SNDL Dispute**) and an application for approval of an amended plan of arrangement (**Plan**).

[9] On December 2, 2024, the Court granted an order (**Meeting Order**) for, among other things, a creditor’s meeting (**Meeting**) for the Plan.

[10] On December 20, 2024, the Meeting was held in accordance with the Meeting Order. The single class of unsecured affected creditors (**Affected Creditors**) overwhelmingly approved the Plan.

[11] On December 30, 2024, Delta 9’s counsel served unfiled applications (**Applications**) to the service list in this matter, which included:

- (a) an application for a Sanction Order and Stay Extension (**Sanction Application**) relating to the Plan for defined “Plan Entities”, extending the Stay, and approving the fees and disbursements of the Monitor and its legal counsel; and
- (b) an application for a “Sale Approval and Vesting Order” (**SAVO**) and an “Approval and Reverse Vesting Order” (**ARVO**), for two proposed transactions:
 - (i) first, approving a sale and vesting of certain assets to 6599362 Canada Ltd (**659**) contemplated in a December 28, 2024 asset purchase agreement (**APA**), including in particular a 95,000 square-foot cannabis cultivation

and processing facility in Winnipeg, Manitoba (**Bio-Tech Facility**) (the **659 Transaction**); and

- (ii) second, approving a December 28, 2024 share purchase agreement (**SPA**) between Delta 9 Parent, Bio-Tech and Simply Solventless Concentrates Ltd (**SSCL**) by which Delta 9 Parent would sell its shares of Bio-Tech to SSCL pursuant to a reverse vesting order (**RVO**) structure (the **SSCL Transaction**).

[12] At the same time, Delta 9's counsel served a sixth affidavit of John Arbuthnot IV (**Arbuthnot**) dated December 30, 2024 (**Sixth Affidavit**) and a seventh Arbuthnot affidavit dated December 30, 2024 (**Seventh Affidavit**).

[13] On January 3, 2025, the Monitor's counsel provided the Court with the sixth report of the Monitor dated January 4, 2025 (**Sixth Monitor's Report**).

[14] On January 4, 2025, Delta 9's counsel advised the Court that the SNDL Dispute application had been adjourned by consent to be heard by another Justice on February 11, 2025. On January 6, 2025, Delta 9's counsel served filed copies of the Applications, the Sixth Affidavit, the Seventh Affidavit, and briefs supporting the Applications.

[15] On January 9, 2025, Delta 9's counsel provided the Court updated proposed forms of orders and an affidavit of service. Counsel also advised that they had recently been told that the Canada Revenue Agency (**CRA**) may oppose aspects of the Applications and provided the Court additional case authorities and evidence filed earlier in the action that Delta 9 might rely on.

[16] On January 9, 2025, the Monitor's counsel provided the Court with a supplement to the Sixth Monitor's Report (**Monitor's Supplement**).

[17] There was no questioning on any of the evidence filed in respect of or relied on at the Hearing.

[18] On January 10, 2025, I heard the Applications (**Hearing**).

[19] During the Hearing, CRA objected to certain aspects of the Applications, particularly the releases contemplated in the AVRO for the SSCL Transaction. I understand that CRA raised its opposition only shortly before the Hearing. During oral argument at the Hearing, CRA provided me a written brief, which seeks (among other things) a lifting of the Stay to allow it to issue director's liability assessments against Bio-Tech's director (Arbuthnot) and former directors for Bio-Tech's unremitted excise duties. CRA filed no application or evidence in support of its position. It referred to, among other things, an SSCL press release that was not in evidence and upon which I have not relied in making my decision.

[20] No party sought an adjournment of the Hearing, or the opportunity to file any further evidence. The Applications proceeded on the record before me.

[21] Ultimately, only CRA had any opposition to the Applications.

[22] On January 10, 2025, I granted uncontested aspects of the Applications, for a restricted court access and sealing order, and approving the Monitor and its counsel's fees and disbursements. I reserved on the core aspects of the Applications.

II. Issues

[23] The issues raised in the Applications are:

- (a) Should the Court sanction the Plan?
- (b) Should the Court extend the Stay?
- (c) Should the Court approve the 659 Transaction on the terms proposed?
- (d) Should the Court approve the SSCL Transaction on the terms proposed?

III. Analysis

A. Sanction Application

1. Legal Framework for Plan Sanction under the CCAA

[24] The Court may sanction a compromise or plan of arrangement if a majority in number representing two thirds in value of the creditors (or class of creditors), at a creditors' meeting, vote in agreement to a compromise or arrangement as proposed (or altered or modified at the meeting): CCAA, section 6(1); **9354-9186 Québec inc v Callidus Capital Corp**, 2020 SCC 10 [**Callidus**] at para 57; Once sanctioned, the plan is binding on each class of creditors that participated in the vote: CCAA, section 6(1); **Callidus** at para 57.

[25] The general test courts apply when considering whether to sanction a plan is well established. It requires: (i) strict compliance with all statutory requirements; (ii) all materials filed and procedures carried out must be authorized by the CCAA; and (iii) a fair and reasonable plan: **Target Canada Co (Re)**, 2016 ONSC 316 [**Target Canada 2016**] at para 70; **Re Northland Properties Ltd**, 1988 CanLII 3250 aff'd 1989 CanLII 2672 (BC CA); **Canadian Airlines Corp (Re)**, 2000 ABQB 442 at para 60 leave to appeal refused 2000 ABCA 238; **Lutheran Church Canada (Re)**, 2016 ABQB 419 at para 114; **Re: Canwest Global Communications Corp**, 2010 ONSC 4209 at para 14; **Laurentian University of Sudbury**, 2022 ONSC 5645 at para 23.

[26] In considering whether the applicant has complied with all statutory requirements under the CCAA, the Court will typically consider the following, as described in **Laurentian University** at para 24 (citing **Canwest Global** at para 15):

- (a) if the applicant comes within the definition of a "debtor company" under section 2(1) of the CCAA;
- (b) if the applicant has total claims in excess of \$5 million;
- (c) if the creditors were properly classified;
- (d) if the notice of meeting was sent in accordance with the meeting order;

- (e) if the meeting was properly constituted;
- (f) if the voting was properly carried out; and
- (g) if the plan was approved by the requisite majorities.

[27] The assessment of whether a plan is fair and reasonable engages the Court's discretion: **Canadian Airlines** at para 95. In considering whether a plan is fair and reasonable, perfection is not required: **Laurentian University** at para 31; **AbitibiBowater Inc (Re)**, 2010 QCCS 4450 at para 33. The Court should consider the relative degrees of prejudice that would flow from granting or refusing to grant the relief sought and whether the plan represents a fair balancing of interests in light of other options: **Laurentian University** at para 31; **Canadian Airlines** at para 3.

[28] Accordingly, the Court will consider the following, as set out in **Laurentian University** at para 32 (citing **Canwest Global** at para 21), and recently confirmed in **Nordstrom Canada Retail, Inc**, 2024 ONSC 1622:

- (a) whether the claims were properly classified and whether the requisite majorities of creditors approved the plan;
- (b) what creditors would receive on bankruptcy or liquidation as compared to the plan;
- (c) alternatives available to the plan and bankruptcy;
- (d) oppression of the rights of creditors;
- (e) unfairness to shareholders; and
- (f) the public interest.

[29] The CCAA specifically allows for releases of directors for pre-filing claims that relate to the obligations of the company where the directors are by law liable in their capacity as directors for payment of such obligations: CCAA, section 5.1. However, the Court's power to sanction a plan goes further to include plans that contain other third-party releases: **Canadian Airlines** at para 92; **Wiebe v Weinrich Contracting Ltd**, 2020 ABCA 396 at para 32; **Metcalf & Mansfield Alternative Investments II Corp, (Re)**, 2008 ONCA 587 at paras 43, 78; **Lutheran Church Canada** at para 171; **Canwest Global** at paras 28-30; **Laurentian University** at para 39.

[30] While no single factor will be determinative, the jurisprudence about releases of third parties has developed over time and currently reflects the consideration of the following key factors summarized in **Laurentian University** at para 40 and **Green Relief Inc**, 2020 ONSC 6837 at para 27 (both citing **Lydian International Limited (Re)**, 2020 ONSC 4006 at para 54):

- (a) whether the released claims are rationally connected to the purpose of the plan;
- (b) whether the plan can succeed without the releases;
- (c) whether the parties being released contributed to the plan;
- (d) whether the releases benefit the debtors as well as the creditors generally;

- (e) whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and
- (f) whether the releases are fair, reasonable and not overly broad.

[31] Some factors may assume greater weight in one case than in another. Where releases are objected-to, the Court may also analyze the quality of the claims the objecting party wishes to maintain: **Green Relief** at paras 28-29.

[32] Finally, in considering whether a plan is fair and reasonable, courts are also mindful of the CCAA's remedial purpose: **Canadian Airlines** at para 95; **Canwest Global** at para 20.

[33] A modern summary of the CCAA's remedial purpose is set out in **Callidus** at paras 40-42. In summary: among Canada's insolvency statutes' objectives (providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company), the CCAA generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" and has "the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally": **Callidus** at paras 40-41, citing (among others): **Century Services Inc v Canada (Attorney General)**, 2010 SCC 60 at para 70 [**Century Services**]; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp 4-5 and 14; **Ernst & Young Inc v Essar Global Fund Ltd**, 2017 ONCA 1014 at para 103.

2. Should the Court Sanction the Plan?

[34] The Plan affects the Affected Creditors but not persons holding unaffected claims (as defined). It contemplates certain "convenience" Affected Creditors with small claims to elect to receive the lesser of \$4,000 and the value of their allowed affected claim. It also provides for the establishment by the Plan Sponsor of a \$750,000 cash creditor pool and a creditor equity pool of Fika shares worth \$4,000,000 (and the entitlement of each eligible voting non-convenience Affected Creditor with a proven claim to receive a *pro rata* cash and equity payment from those pools on Plan implementation in satisfaction of their claims). SNDL will ultimately be paid in full as part of Plan implementation (subject to confirmation of the total amount as affected by resolution of the adjourned SNDL Dispute). Upon sanctioning, the Plan shall constitute the full, final and absolute settlement of all rights by Affected Creditors.

[35] The Plan provides for releases (**Plan Releases**) of the Plan Entities, past and current employees, legal and financial advisors, other Plan Entities' representatives, directors and officers, the Monitor (and its legal advisors), and the Plan Sponsor.

[36] I accept the unchallenged evidence and find that there has been compliance with the CCAA statutory requirements and that all materials filed, and procedures carried out, including the Meeting, were CCAA-authorized and compliant. The Plan was overwhelmingly approved by the required special majority of properly classified and unsecured Affected Creditors.

[37] With respect to whether the Plan is fair and reasonable, I accept the unchallenged evidence and find that:

- (a) the Plan Entities and the Plan Sponsor made considerable efforts to prepare the Plan in a manner that addresses, to the extent possible, the various stakeholder concerns;
- (b) there are no other viable restructuring options available other than the Plan, the alternative to which would be formal liquidation. Under a formal liquidation, the Affected Creditors would likely receive no recovery, while under the Plan they receive significant and material recovery and a potential upside through the receipt of Plan Sponsor shares. In a liquidation scenario, there would be increased professional fees and bankruptcy costs;
- (c) there is no prejudice to the Affected Creditors, who voted overwhelmingly in favour of the Plan. A high degree of creditor support creates an inference that a plan is fair, reasonable and economically feasible, and a court should be reluctant to second guess creditors' business assessment of a plan: **Canadian Airlines** at para 97; **Kerr Interior Systems Ltd (Re)**, 2008 ABQB 286 at para 106;
- (d) the Plan provides the Plan Entities with the greatest opportunity to repay the outstanding debts to SNDL and continue with a stronger owner. It allows for the continuation of the retail cannabis operations to continue as normal without disruption or further store closures following the Plan, with continuing employment of employees and contractors;
- (e) the Monitor's opinion, pursuant to section 23(1)(i) of the CCAA, is that "the Plan is fair and reasonable and provides the best available return"; and
- (f) there are challenges to restructuring cannabis companies at an operational level. To the Monitor's knowledge, since January 2022 there have been 66 companies in the cannabis industry that have entered insolvency proceedings in Canada and, of those, only five have successfully restructured their operations, with the rest resulting in liquidation.

[38] There was no opposition to the sanctioning of the Plan. CRA raised a concern about ongoing tax remittances between the date of plan sanctioning and implementation, but was satisfied by Delta 9's counsel's explanation that CRA's post-filing claims were unaffected by the Plan and for which the Plan Entities would remain responsible.

[39] I have considered the Plan Releases. I find that the Plan is fair and reasonable with the Plan Releases included, for these reasons:

- (a) I am advised they are typical forms of releases in CCAA proceedings (although that alone does not justify their inclusion);
- (b) the inclusion of the Plan Releases was not opposed by any party (although that alone does not justify their inclusion);

- (c) the Plan Releases are rationally connected to the Plan and its purposes. For example, they release claims of the Affected Creditors as part of the consideration for Affected Creditors obtaining partial recovery of their claims under the Plan;
- (d) the Plan could not succeed without the releases as Plan implementation relies on the continued participation and involvement of the releasees;
- (e) I accept the unchallenged evidence that the proposed releasees contributed to the Plan in precarious circumstances. It is obvious from the cumulative evidence in this matter that the negotiation of the terms of the Plan and the Delta 9 restructuring has been complex, protracted and difficult, involving significant work by Delta 9 Parent, the Chief Restructuring Officer, the Plan Sponsor, SNDL, CRA and the Monitor (and their various consultants, advisors, counsel and representatives);
- (f) the Plan Releases are a key component of the Plan, and a condition of Plan implementation which (as discussed above) benefits the debtors and the Affected Creditors and other stakeholders. The Plan Releases ensure that all stakeholders have certainty and finality about their liabilities at the conclusion of the Plan Entities' restructuring;
- (g) the terms of the Plan Releases were expressly included in Article 9 of the Plan which was provided to the Affected Creditors; and
- (h) the Plan Releases are fair, reasonable and not overly broad. The Plan confirms that the Plan Releases do not apply to (1) unaffected claims (as defined in the Plan); (2) obligations to Affected Creditors under the Plan or under any court order made in these CCAA proceedings; (3) SNDL's claim related to the SNDL Dispute; (4) claims finally determined to be based on breach of trust (whether common law or statutory), fraud, wilful misconduct or gross negligence; or (5) claims against directors referred to in section 5.1(2) of the CCAA.

[40] For the above reasons, I find that Plan is fair, reasonable and consistent with the CCAA's remedial purpose.

B. Stay Extension Application

1. Legal Framework for Stay Extension Application

[41] The Court may make an order extending a stay, restraint and prohibition of proceedings for any period the Court considers necessary, provided the applicant satisfies the Court that circumstances exist that make the order appropriate, and the applicant has acted (and is acting) in good faith and with due diligence: CCAA, sections 11.02(2) and (3). The burden of proof is on the applicant: *Mantle Materials Group, Ltd (Re)*, 2024 ABKB 19 at para 35. Appropriateness of an extension is assessed by inquiring into whether the order sought advances the policy objectives underlying the CCAA: *Re Canada North Group Inc*, 2017 ABQB 508 at para 34, citing *Century Services* at paras 15, 70, 71.

2. Should the Court Grant the Stay Extension?

[42] No party opposed the further Stay extension application. I am satisfied that Delta 9 and the Plan Sponsor have, since my last extension order, acted in good faith and with due diligence. This finding is supported by the Monitor's reports. Further, having found that the Plan is fair, reasonable and consistent with the CCAA's remedial purposes, I find that an extension is necessary in the circumstances to allow for Plan implementation and the determination of the SNDL Dispute in February 2025, among other things.

[43] The form of proposed stay extension order, extending the Stay until February 28, 2025, is granted.

C. Application to Approve the 659 Transaction

1. Legal Framework for Approval of Asset Sale

[44] A debtor company under CCAA protection may not sell or dispose of assets outside the ordinary course of business without court authorization: CCAA, section 36(1).

[45] Whether to grant authorization to sell assets is a matter of judicial discretion. It is not a rubber-stamp exercise; it involves the balancing of the interests of stakeholders: **Bellatrix Exploration Ltd (Re)**, 2020 ABQB 332 at para 30.

[46] The non-exhaustive statutory factors in sections 36(3)-(5) of the CCAA that the Court must consider, as well as additional or overlapping factors developed in the common law, do not form a rigid checklist of factors that must be present in every transaction: **Target Canada Co (Re)**, 2015 ONSC 1487 at paras 14-17; **Royal Bank v Soundair Corp**, 1991 CanLII 2727 (ON CA), 1991 CarswellOnt 205 [**Soundair**]; **Long Run Exploration Ltd (Re)**, 2024 ABKB 710 at paras 11-12; **Sanjel Corporation (Re)**, 2016 ABQB 257 at paras 54-55; **Acerus Pharmaceuticals Corporation (Re)**, 2023 ONSC 3314 at paras 10-11.

[47] The statutory factors under section 36(3) of the CCAA, as augmented by recognized common law factors, are:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances. Common law factors include whether there was sufficient effort made to get the price at issue, whether the debtor or court-appointed officer acted improvidently, whether the process had integrity and was fair, reasonable, transparent and efficient; and whether the interests of all parties were considered: **Sanjel Corporation (Re)** at para 56; **Soundair** at para 16;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy. Common law factors include the weight to be given to the recommendation of the monitor and the business judgment rule, in that the Court will not lightly interfere with the exercise of the commercial and business judgment

of the debtor company and a monitor where the process was fair, reasonable, transparent and efficient: ***Sanjel Corporation (Re)*** at para 57; ***Re AbitibiBowater*** at paras 70-72;

- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, accounting for their market value.

[48] I consider the 659 Transaction under this framework.

2. Should the Court Approve the 659 Transaction?

[49] The 659 Transaction involves the sale of the Bio-Tech Facility to 659, an arm's length party. It is conditional upon court approval of the proposed SAVO and the execution of a lease for the Facility between 659 (as landlord), SSCL (as tenant) and the Plan sponsor (as indemnifier).

[50] No party opposed the authorization of the 659 Transaction.

[51] Based on the evidence and the factors outlined above, I find it is appropriate to authorize the 659 Transaction, for these reasons:

- (a) Sales Process. The sales process followed the court-approved Bio-Tech SISP Order. There was an extensive marketing process, assisted by a professional sales advisor, in which the Monitor solicited offers from many prospective bidders. There was interest from several parties, but only 659 (an arm's length party and previous owner of the land) made an offer. The APA was the result of good faith arm's length negotiations;
- (b) Monitor's Recommendation. The Monitor is of the view that the 659 APA is commercially reasonable;
- (c) Creditor Consultation. Creditors were provided notice of the application to approve the Bio-Tech SISP;
- (d) Effect of the Sale. The effect of the 659 Transaction and the proposed SAVO is, among other things, to vest the Bio-Tech Facility in 659 and replace it with the proceeds for sale, preserving claims and their priority in the proceeds. Under the proposed SAVO, the Monitor shall not make distributions of the net proceeds without further court order;

The Plan Sponsor is the fulcrum creditor in respect of the priority of charges against the Bio-Tech Facility and it supports the sale. Bio-Tech owes significant amounts to CRA for unremitted GST (\$657,056 as of July 12, 2024) and unremitted excise tax (\$7,831,515 as of July 12, 2024) (together, **Arrears**) – CRA does not oppose authorization of the APA or the proposed SAVO; and

- (e) Consideration. The only evidence of the value of the Bio-Tech Facility is the amount in the APA, which followed the extensive marketing process noted above.

[52] I am concerned with the definition of “Excluded Liabilities” and “Liabilities” in the APA as potentially overreaching and affecting future reclamation or remediation obligations which Manitoba Ministry of the Environment and Climate Change (**Ministry**) may later seek to enforce under *The Environment Act*, CCSM c E125 in respect of the Bio-Tech Facility. The Ministry was not served with or provided notice of the Applications. In response to that concern, Delta 9 (with the concurrence of the Plan Sponsor, the Monitor and 659) proposed that the SAVO be amended to give the Ministry the right to file a comeback application to vary the terms of the SAVO in respect of environmental obligations. That is appropriate in the circumstances.

[53] For these reasons, I grant the proposed form of SAVO (as amended).

D. Application to Approve the SSCL Transaction

[54] The application for authorization of the SPA involves the same general legal framework under section 36 of the CCAA as discussed above. However, its RVO structure warrants further discussion and analysis.

1. Legal Framework for Reverse Vesting Orders (RVO)

[55] The general structure of RVOs has been explained in J. Sarra, “Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions”, 2022 CanLIIDocs 43 as follows (footnotes omitted) [*Sarra - RVO*]:

RVO usually involve the sale of an insolvent debtor company’s shares to a purchaser in a transaction where unwanted assets and liabilities are excluded in the purchase transaction and are transferred, assigned and vested in a newly-incorporated company (‘newco’) as part of a pre-closing reorganization, allowing the debtor company to shed liabilities and retain the most valuable assets.

The result of an RVO is to expunge the existing corporate structure of the debtor company of anything the purchaser does not want. The newco is added to the insolvency proceeding and continues in that process while the debtor company exits the insolvency proceeding with broad liability releases; then the newco is liquidated or placed in bankruptcy to be liquidated. The transaction takes place outside of a negotiated and court-approved plan of arrangement or compromise.

[56] See also: *Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al*, 2022 ONSC 6354 at para 27.

[57] While not expressly contemplated in the CCAA, it is now well established that courts have discretionary jurisdiction to authorize transactions involving RVOs, including pursuant to sections 11 and 36 of the CCAA: *Long Run Exploration* at para 17; *Invico Diversified Income Limited Partnership v NewGrange Energy Inc*, 2024 ABKB 214 at para 18; *Southern Star Developments Ltd v Quest University Canada*, 2020 BCCA 364 at para 11; *Just Energy* at para 29; *Fresh City Farms and Mama Earth Organics*, 2024 ONSC 2016 at para 35; *Harte Gold Corp (Re)*, 2022

ONSC 653 at paras 24-37; **Rambler Metals and Mining Limited, Re CCAA**, 2023 NLSC 134 at paras 39-61;

[58] Concerns arise because RVOs lack the claims and creditor voting process contemplated by the CCAA, and releases included as part of the transaction may be overly broad, both of which may negatively impact negotiations which could otherwise lead to a more favourable compromise or arrangement: *Sarra-RVO* at 17; 24; **Invico Diversified** at para 19.

[59] Therefore, in the CCAA context, RVOs should not be routinely granted, must be justified by “compelling”, “extraordinary” or “exceptional” circumstances, and should invite “close scrutiny” because they can lead to unfairness or prejudice to creditors or other stakeholders: **Long Run** at para 18; **Harte Gold** at para 38; **Invico Diversified** at para 19; *Sarra-RVO* at 25-31; **Atlas Global Brands Inc**, 2024 ONSC 5570 at para 35; **MCAP Financial Corporation v QRD (Willoughby) Holdings Inc**, 2024 BCSC 1654 at para 11; **Arrangement relatif à Blackrock Metals Inc**, 2022 QCCS 2828 at para 96 [**Blackrock Metals**].

[60] An RVO is not granted merely because it may be more convenient or beneficial for the purchaser; there must be an evidence-based rationale for value in the proposed RVO transaction: **MCAP Financial** at paras 11, 18; **Harte Gold** at para 38; **Blackrock Metals** at paras 114-116; **Just Energy** at para 33.

[61] Interrelated, non-exhaustive relevant factors to consider in approving a transaction involving an RVO include:

- (a) the statutory basis for an RVO, which in my view includes consideration of whether the RVO furthers the CCAA’s remedial purposes (as set out **Callidus** at paras 40-42 and **Century Services** at para 59);
- (b) the factors outlined in section 36(3) of the CCAA (as noted above), as adjusted for the unique aspects of a reverse vesting transaction, including:
 - (i) the reasonableness of the sales process / sales effort;
 - (ii) any monitor recommendation;
 - (iii) creditor consultation;
 - (iv) the effect of the transaction on creditors and other stakeholders; and
 - (v) the consideration for the transaction;
- (c) the reason why an RVO is necessary;
- (d) whether the reverse vesting structure produces an economic result at least as favourable as any other viable alternative;
- (e) the interests of all stakeholders, including whether any stakeholders are worse off under the reverse vesting structure than they would have been under any other viable alternative; and

- (f) whether the consideration being paid reflects the value of the assets preserved under the reverse vesting structure.

See: *Harte Gold* at paras 23, 38; *Long Run Exploration* at paras 17-19; *Fresh City Farms* at paras 35-39; *Rambler Metals* at para 62; *PricewaterhouseCoopers Inc v Canada Fluorspar (NL) Inc*, 2023 NLSC 88 at para 60; *Blackrock Metals* at paras 87-95; *MCAP Financial* at paras 11-12; *Atlas Global* at paras 50-53.

[62] Where releases are part of an RVO, then the factors noted above are also relevant (as adjusted for this context), namely:

- (a) whether the released claims are rationally connected to the purpose of the plan / transaction;
- (b) whether the plan / transaction can succeed without the releases;
- (c) whether the parties being released contributed to the plan / transaction;
- (d) whether the releases benefit the debtors as well as the creditors generally;
- (e) whether the creditors have knowledge of the nature and the effect of the releases; and
- (f) whether the releases are fair, reasonable and not overly broad. In my view, as illustrated by this case, when considering whether releases are fair it may be appropriate for the Court to consider the conduct of proposed releasees and any potential benefit a proposed releasee may obtain from the restructuring or transaction as a whole. I also find it is appropriate to consider the timelines and nature of the objection to the proposed release, and the effect on stakeholders if the RVO structure (with the proposed releases) is not approved.

[63] I now consider the SSCL Transaction under this framework.

2. Should the Court Approve the SSCL Transaction?

a. The SSCL Transaction

[64] The SSCL Transaction encompasses the SPA and the ARVO, which together involve (among other things):

- (a) SSCL acquiring all the shares of Bio-Tech;
- (b) the cancellation of any other securities in the capital of Bio-Tech, without consideration;
- (c) the payment by SSCL of a deposit and the balance of the purchase price, which will be held by the Monitor for the benefit of Bio-Tech's stakeholders pending further court order;

- (d) the potential termination (without compensation) of some Bio-Tech employees that SSCL may identify it does not wish to continue to employ;
- (e) the creation of a residual company (**ResidualCo**) to which certain “Excluded Assets”, “Excluded Contracts” and “Excluded Liabilities” will be transferred. Among other things, all taxes owing or accrued due by BioTech for the period prior to the CCAA filing date will be transferred to or vested in or assumed by ResidualCo;
- (f) the release (**RVO Releases**) in favour of releasees (**RVO Releasees**), including Bio-Tech and its current and former directors and officers, legal counsel and advisors; the Monitor and its legal counsel; SSCL and its legal counsel, directors, officers, partners, employees, consultants, advisors and assignees; and any directors or officers of ResidualCo; and
- (g) Bio-Tech’s retention of all its other assets other than the Excluded Assets and Bio-Tech’s cessation as applicant in the CCAA proceedings under the court’s purview (other than the ARVO).

[65] Although the SSCL Transaction is distinct and requires its own separate authorization and approval, it must be considered in proper context. It is interrelated with the Plan and the 659 Transaction, the sanction, authorization and approval of which were sought at the same time as the SSCL Transaction as part of the overall restructuring of the Delta 9 group.

[66] Only CRA expressed any concern with the SSCL Transaction. Specifically, as noted above, it objects to the release of Bio-Tech’s directors, with specific focus on Arbuthnot, from being assessed for personal liability for Bio-Tech’s Arrears under the *Excise Tax Act*, RSC 1985 c E-15 and the *Excise Act, 2001*, SC 2002 c 22 (*Excise Act, 2001*). In my view, the RVO Releases must be viewed in context of their role in the SSCL Transaction and, in turn, the overall restructuring of the Delta 9 group.

[67] I turn to relevant factors below, with special attention paid to CRA’s objection to the release of Bio-Tech’s directors.

b. The Need for an RVO

[68] Reverse vesting transactions have been recognized as appropriate in cases where there are valuable assets which cannot be transferred to a purchaser, including where the debtor operates in a highly-regulated environment in which its existing permits, licences or other rights are difficult or impossible to transfer to a purchaser: *Harte Gold* at para 71; *Just Energy* at para 34; *Xplore Inc (Re)*, 2024 ONSC 5250 at para 59; *PaySlate Inc (Re)*, 2023 BCSC 608 at para 80; *Peakhill Capital Inc v Southview Gardens Limited Partnership*, 2023 BCSC 1476 at para 39 aff’d 2024 BCCA 246; *Atlas Global* at para 51.

[69] The cannabis industry is one such environment. The Court was advised of numerous examples where RVOs have been approved by courts in cannabis restructurings.¹ As noted in *Atlas Global* at para 36:

It is fair to observe that the setbacks besetting the cannabis industry have in fact in large measure provided the impetus for the recently increased use of the reverse vesting structure. That is because in a highly regulated industry, like the cannabis industry, there are significant implications, for the transfer of a business, if a purchaser would have to start “from scratch” to obtain regulatory approval to operate the business in question rather than assuming the relevant licenses as part of the transaction.

[70] The Monitor’s view is that an RVO structure is necessary to maximize value in this case due to the highly regulated nature of the cannabis business, the value of which is dependant on maintaining two non-transferrable licences: a licence with Health Canada under the *Cannabis Act*, SC 2018, c16 that permits BioTech to cultivate, process and sell cannabis and a licence with CRA requiring it to apply cannabis excise stamps to its cannabis products in accordance with the *Excise Act, 2001*.

[71] No party suggested that an RVO was unnecessary in this case or that the justification for an RVO was unreasonable.

[72] I find that there is a legitimate need for an RVO structure for Bio-Tech.

c. The Bio-Tech SISP Process

[73] As noted above, the Bio-Tech SISP process was court-approved in the July 24, 2024 Bio-Tech SISP Order, on notice to interested stakeholders including CRA.

[74] The approved Bio-Tech SISP process provided potential interested purchasers an opportunity to propose a wide range of transaction structures, including “one or more of a restructuring, recapitalization or other form of reorganization of the business and affairs of [Bio-Tech] as a going concern, or a sale of all, substantially all, or one or more component’s of [Bio-Tech]’s assets ... and business operations ... as a going concern or otherwise”.²

[75] Despite the extensive marketing process, SSCL (an arm’s length cannabis producer) made the only offer for Bio-Tech’s business or shares (whether by a reverse vesting structure or otherwise).

¹ Delta 9’s Brief cited the following, not all of which have reported decisions: *Atlas Global Approval and Reverse Vesting Order* granted on October 29, 2024, Court File No. CV-24-00722386-00CL (ONSC); *Indiva Limited, et al, Approval and Reverse Vesting Order* granted October 21, 2024, Court File No. CV-24-00722044-00CL (ONSC); *BZAM Ltd, et al, Approval and Vesting Order*, granted October 15, 2024, Court File No. CV-24-00715773-00CL (ONSC); *Phoena Holdings Inc, et al, Reverse Vesting Order* granted March 21, 2024, Court File No.: CV-23-0069728500CL (ONSC); *Fire & Flower, Reverse Vesting Order* granted August 29, 2023, Court File No.: CV-23-0070058100CL (ONSC); *Aleafia Health Inc., Reverse Vesting Order* granted October 30, 2023, Court File No.: CV-2300703350-00CL (ONSC); *Trees Corporation, Reverse Vesting Order* granted April 5, 2024, Court File No.: CV-2300711935-00CL (ONSC); *Eve & Co et al, Reverse Vesting Order* granted October 7, 2022, Court File No.: CV-2200678884-00CL (ONSC).

² Bio-Tech SISP Order, Schedule A (clause 7).

[76] I find the Bio-Tech SISP process was fair and reasonable.

d. Monitor Recommendation

[77] The Monitor's view is that an RVO is necessary to maximize value in this case. It is of the view that the ARVO, including the proposed releases, is a condition precedent in the SPA which allows Bio-Tech to continue its operations as a going concern. With respect to the RVO Releases, the Monitor is of the view that their inclusion is an "important element to ensure the orderly transaction and transition of the business of Bio-Tech and is supported by the Monitor".

e. Creditor Consultation

[78] Creditors have been on notice about the potential need for an RVO transaction in respect of Bio-Tech, together with releases of Bio-Tech directors, since early in and throughout these CCAA proceedings.³

[79] In Arbuthnot's second affidavit sworn July 18, 2024, he deposed that Delta 9 had entered into a July 12, 2024 Restructuring Term Sheet with the Plan Sponsor, which provided:

The Plan Sponsor shall support any request of the Delta 9 Group for the Court to approve third party releases in favour of the board of directors of [Bio-Tech] as part of any approval and reverse vesting order sought in the CCAA Proceedings.

[80] In that same affidavit, Arbuthnot explained the terms of a proposed key employee retention plan (**KERP**) for which Delta 9 sought Court approval. Arbuthnot was one of the key employees. He stated (emphasis added):

The Key Employees also include directors and officers that are necessary and integral to the business and operations of Delta 9 continuing to operate in the normal course. **A key component, and part of the intended consideration under the KERP, is that releases be sought for the directors and officers as part of any sales transaction and in conjunction with any plan of arrangement that is approved.** I am Bio-Tech's only director and the only person with the necessary security clearance to allow Bio-Tech to operate in compliance with its Health Canada Licence. It would be very difficult, if not impossible, to successfully complete the SISP for Bio-Tech without my continued involvement in the operation of the business and in the SISP.

[81] The Monitor included the proposed KERP terms in its first report dated July 22, 2024 (**First Monitor's Report**). The Monitor noted that "certain Key Employees have indicated that they are considering alternative employment opportunities should the consideration in the KERP not be provided, including both the material retention payment amounts and the traditional director and officer releases in the specified circumstances".⁴ The KERP was developed to incentivize and retain the defined "Key Employees" including Arbuthnot.⁵

³ Arbuthnot's Seventh Affidavit, para 52.

⁴ First Monitor's Report, para 104(e).

⁵ First Monitor's Report, para 100.

[82] The proposed KERP was attached as Appendix E to the First Monitor Report. It provided (emphasis added):

As part of the enticement and compensation to the D&Os for continuing to provide services and maintain their roles as directors and officers of the D9 Group during their CCAA proceedings, the D9 Group agrees to seek and obtain a release of all **liability as a director and officer of any member of the D9 Group that is subject to a sale of its business and operations by way of a reverse vesting order** and/or a release of all liability as a director and officer of each member of D9 Group that is subject to a plan of arrangement or compromise in the CCAA Proceedings.⁶

[83] Schedule A of the KERP provided further specific references to releases as part of a reverse vesting order process with other specific key employee entitlements.

[84] On July 24, 2024, the Court granted the ARIO (which approved the KERP), and the Bio-Tech SISP. Nobody sought permission to appeal those orders.

[85] On October 22, 2024, the Plan Sponsor applied for an order for a creditor's meeting with respect to its then proposed plan. The evidence and Monitor's report at that time further contemplated the release of the Bio-Tech directors.⁷

[86] As noted above, on December 30, 2024, Delta 9 served unfiled copies of its Applications and Arbuthnot's Sixth and Seventh Affidavits on the parties in the service list, including CRA. These materials include a redacted copy of the SPA for the SSCL Transaction, the specific terms of the RVO Releases, and the form of ARVO for the SSCL Transaction.

[87] CRA argues that it only received relevant details of the benefit Arbuthnot is obtaining from the restructuring process when it received the Sixth Monitor's Report in early January 2025 and the Monitor's Supplement on January 9, 2025.

[88] CRA is correct that the Court is not necessarily bound by the previous disclosed intention of Delta 9 and the Plan Sponsor to seek releases for Bio-Tech directors, or the Court's approval of the KERP which expressly contemplated them. However, they are relevant and important factors. Creditor consultation is a two-way street. By necessity, CCAA processes often move quickly and require diligent engagement by the Court and all stakeholders, including creditors. CRA chose to wait and see "how the CCAA process unfolded". It never questioned Arbuthnot on any of his affidavits. CRA allowed significant effort and resources to be expended or invested, while awaiting the outcome of the Bio-Tech SISP process, without apparently making it known to all stakeholders that it might object to a director's release if CRA was later of the view the director obtained an unjustified personal benefit out of the restructuring process.

[89] I find that there was reasonable consultation with creditors in respect of the SSCL Transaction. The possibility of an RVO structure, coupled with a requested release for Bio-Tech directors, was flagged very early on in these proceedings. The specific SSCL Transaction could not be proposed until the Bio-Tech SISP process had run its course, and the overall terms of the

⁶ First Monitor's Report, Appendix E (clause 13).

⁷ Affidavit of Mark Townsend sworn October 21, 2024, paras 42-43; Third Report of the Monitor dated October 29, 2024 (filed October 30, 2024), para 47; Sixth Monitor's Report, para 64.

interrelated restructuring involving the Plan, the 659 Transaction, and the SSCL Transaction were finalized. Although time was compressed, as it often is in CCAA proceedings, there was sufficient time for creditors, including CRA, to respond.

f. Effect on Creditors and Other Stakeholders

i. General Effect on Creditors

[90] Bio-Tech creditors have not had the benefit of a creditor vote with respect to the proposed RVO structure, as contemplated by the CCAA.

[91] The proposed transactions, including the SSCL Transaction, will not provide sufficient proceeds to pay Bio-Tech's unsecured creditors, including CRA's significant claims against Bio-Tech for the Arrears. The Monitor noted that the lack of proceeds to pay CRA "is a function of the value of Bio-Tech's business, as fully tested under the SISF, and the priority of the CRA claims relative to the claims of the priority creditors".⁸ Delta 9 pointed to other cannabis restructurings where releases were approved notwithstanding significant amounts owing to CRA for excise tax and/or GST/HST.

[92] Zero recovery for unsecured creditors is often a function of the financial state of the debtor, not the RVO process: *Long Run Exploration* at para 19, citing *Acerus Pharmaceuticals* at para 32; *Just Energy* at para 57, *Blackrock Metals* at para 109; *CCAA Plan of Arrangement – Clearbeach and Forbes*, 2021 ONSC 5564 at para 27(k). Further, there is no requirement that creditors be treated equally: *Clearbeach and Forbes* at para 27(k), citing *Grafton-Fraser v Cadillac*, 2017 ONSC 2496 at paras 23-24.

[93] The Monitor is not aware of any stakeholder in the CCAA proceedings that would be worse off under the RVO structure.

[94] On the other hand, approval of the SSCL Transaction (which includes the RVO Releases) will allow the Bio-Tech business to continue as a going concern under the new ownership of SSCL, for the future benefit of all stakeholders including CRA.

ii. Effect on Future Application of the Income Tax Act

[95] CRA raised an issue with the potential effect of approving clause 4.3 of the SPA, which provides (with the language of concern emphasized):

Pursuant to the Implementation Steps and the Approval and Vesting Order, at the Closing Time, all Taxes owed or owing or accrued due by Bio-Tech in respect of the period prior to the Filing Date shall be transferred to, vested in and assumed by ResidualCo, **including any Taxes related to debt forgiveness arising from or in connection with the consummation of the Transaction and the transfer of the Excluded Assets and Excluded Liabilities to ResidualCo**; provided, however, that the foregoing shall not: (a) relieve the Purchaser from Liability for Taxes arising during and in respect of the period from and after the Filing Date and relating to Retained Liabilities, or arising from audits or reassessments that relate

⁸ Sixth Monitor's Report, para 54.

to Retained Liabilities; or (b) relieve the Purchaser from any obligation to pay Taxes exigible by a purchaser in respect of a transaction like the Transaction in the same or similar circumstances. Any and all obligations and Liabilities arising from any audits or reassessments with respect to any Taxes that relate to a time period occurring, or facts arising, prior to the Closing Date, regardless of when such audit was commenced or completed, shall be transferred to and vest in ResidualCo.

[96] CRA argued that, if applicable, section 80 of the *Income Tax Act*, RSC 1985 c 1 (5th Supp) (*ITA*) operates to include certain forgiven debt amounts as income in the future and the Court cannot approve a provision in a transaction contract that requires the Minister not to apply the *ITA*. CRA relies on **R v Beach**, 2001 BCCA 7 and **Proposal of Sail Plein Air inc**, 2024 QCCS 1689 (under appeal) to say that such a court approval would be illegal. Such a provision prohibiting the Minister from including income would be unenforceable: **Canadian Red Cross Society, Re**, 2006 CanLII 22141 (ON SC) at para 45.

[97] Counsel for the Plan Sponsor provided some proposed language to include in the ARVO to attempt to address CRA's concern, as CRA made it clear it did not intend this "technical issue" (as CRA's counsel described it) to derail the Delta 9 restructuring process. The proposed language, in my view, assists by ensuring that CRA's position is not intended to bind the Minister. However, the proposed language effectively defers the matter in the same way that was rejected as inappropriate by the British Columbia Court of Appeal in **Beach**. In **Beach**, at para 18, the Court held that a court could not sanction a bankruptcy proposal that exempts a debtor from section 80 of the *ITA* and imposes that exemption on Revenue Canada. In my view, I must consider whether the SPA can be approved in its current form.

[98] An important rule of contractual interpretation is that if there are two apparently viable interpretations and one of them would result in illegality, the other interpretation should be preferred: **Calgary (City) v International Association of Fire Fighters (Local 255)**, 2008 ABCA 77 at para 32. I interpret clause 4.3 of the SPA such that it was not objectively intended by the parties to the SPA to include a provision that would be illegal for the Court to approve.

[99] Accordingly, and based on the specific wording used by the parties to the SPA, I do not interpret any inclusion of *income* based on the operation of section 80 of the *ITA* to be part of "Taxes related to debt forgiveness arising from or in connection with the consummation of the Transaction" which are transferred to and vest in ResidualCo, under clause 4.3. At this time, it is unknown exactly how or whether section 80 of the *ITA* may be engaged or, if it is engaged, whether it would necessarily lead to taxes payable in any event.

[100] The proposed ARVO must be amended to include the language proposed by the Plan Sponsor in argument, as well as language that makes it clear that clause 4.3 does not apply to any future inclusion of income to Bio-Tech pursuant to section 80 of the *ITA*. As this matter was only briefly argued at the Hearing, I leave it to counsel to draft appropriate agreeable language based on these reasons. If issues arise in doing so, or if my decision has unintended consequences not raised in argument, counsel may seek my further direction.

iii. Effect on Future Environmental Obligations

[101] Although it was not raised by any party, it is incumbent on the Court to be vigilant about attempts to shed environmental remediation and reclamation obligations in an RVO: *Sarra-RVO* at para 24. RVO structures that retain environmental remediation and reclamation obligations, and which avoid attempting to usurp the regulatory enforcement of environment remediation and reclamation obligations, are factors cited in support of (or required for) the approval of RVOs: *Long Run Exploration* at para 23; *Re Mantle Materials Group, Ltd*, 2023 ABKB 488 at paras 10-11; *Rambler Metals* at para 105; *Harte Gold* at para 83.

[102] It is also incumbent for applicants seeking approval of RVOs to ensure that all parties interested in or affected by the RVO are served and given notice: *Validus Power Corp et al and Macquarie Equipment Finance Limited*, 2023 ONSC 6367 at para 119. Whenever real property is involved in a transaction, it is best practice to ensure that the applicable Crown office or environmental regulatory agency is given notice.

[103] I raised a concern with the definition of “Excluded Liabilities” in the SPA as potentially overreaching and affecting future reclamation or remediation obligations the Ministry may seek to enforce in the future in respect of the Bio-Tech Facility. Section 2.2 of the SPA provides (emphasis added):

2.2 Excluded Liabilities

- (a) Pursuant to the Approval and Vesting Order, save and except for the Retained Liabilities, **all debts, obligations, Liabilities, Encumbrances, indebtedness, Excluded Contracts, leases, agreements, undertakings, Claims, rights and entitlements of any kind or nature whatsoever** (whether direct or indirect, **known or unknown, absolute or contingent, accrued or unaccrued**, liquidated or unliquidated, **matured or unmatured or due or not yet due, in law or in equity and whether based in statute or otherwise**) **of or against Bio-Tech**, the Bio-Tech Shares, or against, **relating to or affecting any of the Retained Assets**, or any Excluded Assets or Excluded Contracts, including, *inter alia*, the non-exhaustive list of Liabilities set forth in Schedule “C” (collectively, the “**Excluded Liabilities**”) **shall be excluded and will no longer be binding on Bio-Tech**, the Bio-Tech Shares (or the holders thereof), Retained Assets, Employees, Permits and Licenses or Books and Records following the Closing Time.

[104] In argument, I was advised that there are no known environmental concerns with the Bio-Tech Facility, although that was not in evidence. I understood the position of Delta 9 to be that the definition of Excluded Liabilities was not intended to include the Ministry’s right to take steps to protect the environment (including to issue environmental protection orders) in the future (which I took to mean whether any adverse environmental conditions arose before or after the CCAA filing). SSCL did not participate in the Hearing.

[105] As it did with the SAVO, following the Hearing, Delta 9 (with the concurrence of the Plan Sponsor, the Monitor and SSCL) proposed an additional term to the ARVO which would provide

the Ministry 21 days upon service of a granted ARVO to apply to come back to vary its terms in respect of environmental liabilities. That is appropriate in the circumstances, if necessary, to allow appropriate language to be included to ensure that the ARVO does not have unintended consequences related to the future statutory discretion of the Ministry.

g. Viable Alternatives and Recovery Under Liquidation

[106] I find that there are no viable alternatives to the SSCL Transaction. According to the Monitor, if the SSCL Transaction were not to close and the ARVO is not granted, this would result in an immediate shut-down and liquidation of Bio-Tech. The Monitor is not aware of any viable alternative that would produce a more favourable result in the proceedings.⁹ I accept the Monitor's unchallenged evidence.

[107] CRA is potentially worse off if the RVO Releases are included in the ARVO. CRA has not adduced evidence of what, if any, likely recovery it might obtain from Arbuthnot or former Bio-Tech directors if the RVO Releases are not approved.

[108] There is no specific evidence of what the liquidation of Bio-Tech alone would likely generate, however, given that the only interest in the Bio-Tech business was from SSCL based on the assumption that required licences would be available and operations would continue, it can be inferred that recovery for creditors overall would be materially less.

[109] Further, as noted elsewhere in these Reasons, the SSCL Transaction is intertwined with the 659 Transaction and the Plan (both of which CRA agrees with or did not oppose). A liquidation of the Delta 9 businesses would result in Affected Creditors receiving no recovery, reduced recovery for the priority secured creditor SNDL, the shut-down of retail outlets and the Bio-Tech manufacturing business, the loss of jobs, and increased fees and bankruptcy costs.

[110] Based on the evidence before me, I find that the proposed RVO structure produces an overall economic result better than liquidation.

h. Consideration

[111] The consideration to be paid by SSCL in the SSCL Transaction is the only evidence of value of the assets preserved under the RVO structure. SSCL negotiated at arm's length pursuant to the Bio-Tech SISP. There is no evidence that the consideration is unreasonable. CRA appears to acknowledge that "the market has spoken".

i. The RVO Releases

[112] As noted, CRA's objection is not to the SSCL Transaction, *per se*, but the Bio-Tech directors or former directors being included in the RVO Releasees relating to the Arrears.

[113] I consider relevant factors below.

⁹ Sixth Monitor's Report, paras 49-52.

i. Rational Connection?

[114] I find that the RVO Releases, including the release of Arbuthnot, are rationally connected to the SSCL Transaction. Arbuthnot will be involved in the implementation of the SSCL Transaction and is the only person with the necessary security clearance to allow Bio-Tech to operate in compliance with its Health Canada Licence. Releasing Arbuthnot is part of the *quid pro quo* for his continued participation in the implementation of the SSCL Transaction, the 659 Transaction and the Plan. Further, the releases may avoid director indemnity claims or future litigation about director indemnity claims.

[115] CRA's argument that the release of Arbuthnot and former Bio-Tech directors in respect of the Arrears is not rationally connected to the SSCL Transaction or the Plan is based, at least in part, on its premise that their release is not necessary to the SSCL Transaction. I address that argument below.

ii. Can the SSCL Transaction or the Plan Succeed without the Releases?

[116] CRA stated that "mere assessing of directors does not impact the plan going forward". Unfortunately, CRA's statement is based on speculation and not evidence and I must base my decision on evidence. CRA has not contradicted the evidence filed by Delta 9, including Arbuthnot's affidavits, or the opinion and advice of the Monitor.

[117] I find that, based on the undisputed evidence, the release of Arbuthnot is integral to the success of the SSCL Transaction. CRA acknowledged that he was the "lynchpin" for the Health Canada licence. If that licence is not available to Bio-Tech, its business would be immediately disrupted and would likely result in an immediate shut-down and liquidation of Bio-Tech, which would garner a lower purchaser price.¹⁰

[118] As noted above, in the early phases of these proceedings, Arbuthnot and other directors were considering their options and the KERP, which contemplated their later release, was approved by the Court to incentivize their retention. It can be reasonably inferred that the contemplated releases, now coming to fruition, were important for Arbuthnot to continue to be involved.

[119] Without approval of the RVO Releases, one of the conditions to the SSCL Transaction would not be fulfilled. I agree with CRA that the Court should not accept releases simply because they have been packaged together as a condition precedent to a transaction or restructuring, and that "strong-arm tactics" of incumbent directors should be resisted: **Green Relief** at para 52. Success of the transaction or plan should be assessed with regard to factors other than potential strong-arming: **Green Relief** at para 53.

[120] However, in my view, the Court's assessment of whether requiring releases even constitutes director "strong-arming" in the CCAA process must be based on the evidence available. In this case, the concept of proposed releases was in the Restructuring Term Sheet and supported by the Plan Sponsor before the CCAA process even began.

¹⁰ Sixth Monitor's Report, para 50.

[121] CRA speculates that, without the releases, SSCL would nonetheless proceed with the transaction. In my view, without the protection of the RVO Releases, there would be considerable uncertainty for SSCL as to whether Arbuthnot would agree to stay involved or on what terms. Without Arbuthnot's involvement, the entire nature of the SPA would be different and whether SSCL would waive the release condition or renegotiate another transaction is unknown. For example, if SSCL had to indemnify Arbuthnot or former Bio-Tech directors for their potential personal liability for the Arrears, it would materially change the economics of the SSCL Transaction. The best evidence I have is that the RVO Releases were made a condition of the SPA and the RVO structure because they were required and important, and that without them the closing of the SSCL Transaction would be at serious risk.

[122] If the SSCL Transaction were not to close, I find there would likely be a harmful ripple impact on the overall Delta 9 restructuring. In that event, the lease required for the 659 Transaction to close would not be signed, and the conditions of the 659 Transaction would be unfulfilled. It is unlikely that 659 would close the 659 Transaction at the same price, if at all, without a locked-in and operating tenant. In turn, then, conditions of the Plan would be unfulfilled, and the implementation of the Plan would be at risk. The Plan Sponsor may withdraw the Plan if the Plan's conditions, including the approval of the SSCL Transaction, are not met.¹¹ The Plan Sponsor explained that the SSCL Transaction, with the RVO Releases, is critical to the Plan Sponsor because it is legally unable to acquire Bio-Tech due to its own regulatory restrictions.

[123] The best evidence before me is that the loss of Arbuthnot's cooperation and involvement could potentially cause the entire restructuring of Delta 9 to fail, or to have to restart the process over again, all of which would likely lead to less recovery, increased costs, and the loss of time and expense incurred to date by the Plan Sponsor and other stakeholders.

[124] It is fully open to creditors, like CRA, to argue that director's releases, that are made a condition precedent to transactions in restructurings, are not actually necessary for the transaction or plan to succeed, but they must provide the Court the evidentiary foundation to support those arguments. CRA did not do that, and, on balance, I find that the evidentiary record does not support CRA's position.

iii. Releasee Contribution

[125] The undisputed evidence is that the RVO Releasees, including Arbuthnot, contributed significantly to the SSCL Transaction, and they will continue to do so until the transaction closes and is implemented as part of the overall Delta 9 restructuring. CRA's argument that Arbuthnot was not the only one that contributed is true but is not a persuasive reason to reject the RVO Releases in this case.

iv. Benefit to Debtors and Creditors

[126] CRA argues that the RVO Releases do not benefit the creditors, but rather simply prevent CRA from potentially collecting against Bio-Tech's directors for amounts that Bio-Tech misappropriated when it failed to pay for excise duties and GST.

¹¹ Fifth Monitor's Report dated November 26, 2024, paras 36-37.

[127] CRA's position is again based on the premise that the RVO Releases are not necessary for the success of the SSCL Transaction or the Plan. For the reasons above, I find that premise to be unsupported and find that the RVO Releases benefit Bio-Tech and creditors generally.

v. Creditor Knowledge of the Nature and Effect of the Releases

[128] For the reasons above, including under the heading "creditor consultation", the creditors (including CRA) have had knowledge of the nature and effect of the proposed RVO Releases.

vi. Fair, Reasonable and Not Overly Broad?

[129] The proposed ARVO provides the RVO Releasees a broad release of all present future claims, liabilities and other matters based on any act, omission transaction, dealing or other occurrence existing or taking place prior to the "Closing Time" or arising in connection with or relating in any manner whatsoever to the SPA, the SSCL Transaction, or the conduct of these CCAA proceedings.

[130] However, there are exceptions: the RVO Releases as treated under the proposed ARVO:

- (a) do not release any claim not permitted to be released pursuant to section 5.1(2) of the CCAA, namely claims that relate to contractual rights of creditors or are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors;
- (b) do not release any claim or liability arising out of any gross negligence or wilful misconduct on the part of the released directors and officers of Bio-Tech and ResidualCo;
- (c) do not apply to or prevent any person from commencing or continuing actions for an "Insured Claim" under any insurance policy maintained by Bio-Tech, which can be a mitigating factor to the loss of claims: *Atlas Global* at paras 92-93;
- (d) do not apply to performance of obligations under the SSCL Transaction; and
- (e) do not affect certain CRA set-off rights against Bio-Tech for pre and post CCAA filing amounts owed.

[131] Other than CRA, no creditor or stakeholder opposed the releases as being unfair or overly broad.

[132] CRA's core position is that the release of Arbuthnot from assessment for the Arrears renders the RVO Releases unfair. CRA appears to suggest that Arbuthnot has intentionally and by design orchestrated the Delta 9 restructuring to his personal benefit, and that Arbuthnot has already received benefits that more than compensate him for his involvement and continued involvement in the restructuring. CRA describes the further release related to assessment for Arrears as a "gratuitous benefit".

[133] CRA argues the following:

- (a) although Arbuthnot was integral to Bio-Tech due to his security clearance related to Health Canada licence, that should not excuse his mismanagement and his causing the effective misappropriation of funds owed to CRA for GST and Excise remittances;
- (b) Arbuthnot obtained the benefit of the KERP program. CRA argues that this already compensated him for remaining involved and assisting the restructuring process and that he does not need the further benefit of the RVO Release for staying involved;
- (c) Arbuthnot will remain employed by Bio-Tech moving forward, after SSCL becomes its owner;
- (d) Arbuthnot and his father (Bill Arbuthnot) created for themselves an employment agreement which provided them each a right to \$5,000,000 upon a change of control of Bio-Tech, for which they both filed claims in the CCAA proceedings in August 2024 (**Arbuthnot Claims**). CRA argues that the Arbuthnot Claims, which have been accepted as contingent claims, inflated the creditor pool which decreased potential recovery for other creditors and, further, gave those claims significant voting power on the Plan; and
- (e) Arbuthnot and Bill Arbuthnot assigned the Arbuthnot Claims to another creditor (Uncle Sam's Cannabis Ltd), in return for a release of their personal liabilities to that creditor. CRA argues that Arbuthnot should not be able to obtain the benefit of those releases and then also release from potentially liability for the Arrears.

[134] CRA asserts that many of these details were not previously available and, therefore, CRA did not have an opportunity to provide comments earlier. I reject that notion. The Arbuthnot proofs of claims based on their employment agreements were filed in August 2024 as part of the claims process. The proposed release of Bio-Tech directors was known before and since that time. The quantum of claims was reported in the Fifth Report of the Monitor's dated November 26, 2024. It was open to CRA to seek more information about the claims of directors, or to question Arbuthnot on his affidavits, if CRA wanted to know more information about their claims or how they are affected by Delta 9's financial situation or its restructuring.

[135] Arbuthnot's employment agreement was executed in 2021, by a different director on behalf of Delta 9, long before the CCAA proceedings. There is no evidentiary basis to suggest it was improper when executed. Delta 9 Parent is a public company and Arbuthnot and others owed fiduciary obligations to ensure they acted in the best interest of the corporations. Delta 9 Parent had public reporting obligations that likely disclosed terms of his employment agreement. In my view, without more, Arbuthnot cannot be blamed for advancing claims in the CCAA proceedings he is contractually entitled to claim, or from assigning those claims to another party.

[136] Further, Arbuthnot cannot be blamed for the creation or use of the regulatory regime which makes his participation integral to a restructuring.

[137] I agree with CRA that, in appropriate cases, as part of considering the fairness of a release, other benefits connected to a restructuring obtained by a proposed releasee, and the proposed releasee's circumstances and conduct in the context of a restructuring, may be relevant in

approving releases within an RVO structure. This could include whether the proposed releasee has acted in good faith: CCAA, section 18.6; *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809 at para 105; *Razor Energy Corp, Razor Holdings Gp Corp, and Blade Energy Services Corp (Re)*, 2025 ABKB 30 at paras 49-51.

[138] In my view, however, a party seeking to oppose a release on these grounds should engage and advise of its position early in the process and build an evidentiary record to allow the Court to reasonably assess those factors. That might include (among other things) evidence about the alleged net benefits already received by the proposed releasee, the economic benefits of the transaction overall, the potential value of the release to the releasee, the potential economic impact of not approving the release, the actual prejudice to the creditor, and whether the proposed releasee is acting in good faith.

[139] CRA has not done these things. While it is true that Delta 9 misused funds owed to CRA for other purposes, it appears to have been to attempt to maintain the business as a going concern during tumultuous times in a new industry. This is not an excuse but is a relevant factor, particularly given that the Arrears appear to have accumulated over an extended period and CRA did not strictly enforce its rights. In the CCAA proceedings, CRA waited to see how things unfolded, including whether the Bio-Tech SISP process might garner a qualifying bid that would generate CRA better recovery. Then, at the last possible moment, CRA asked the Court to reject the Bio-Tech directors' release and lift the Stay in its favour without a filed application or supporting evidence. CRA has not proven, on this record, that Arbuthnot or former directors did not act in good faith contrary to section 18.6 of the CCAA. The evidence and arguments from other Hearing participants, including the Monitor as court officer, suggests Arbuthnot has been acting in good faith.

[140] A creditor's approach and timeliness in advancing its position against a proposed release is also a relevant factor in assessing whether to approve an RVO structure with releases. I find that if I were to accede to CRA's position and grant the relief it seeks, it would be inconsistent with this Court's supervisory role to ensure that the CCAA process unfolds in a fair and transparent manner: *Delta 9* at para 64, citing *Target Canada 2016* at para 72. It would be unfair to the other CCAA stakeholders, particularly the Plan Sponsor (who has provided significant funding to Delta 9 for this CCAA process), SNDL (the priority secured creditor that stands to lose its full recovery if the restructuring is frustrated), and Arbuthnot (whose personal intentions and conduct is the target of CRA's assertions).

[141] Ultimately, in addition to these concerns, CRA essentially asks the Court to deny the proposed release of Bio-Tech's directors as unfair, on the speculative assertion or hope that doing so will allow CRA to collect more of the Arrears while not destroying the hard-earned benefits of the overall complex Delta 9 restructuring (which CRA otherwise supports). I am not satisfied it is appropriate to take that risk on the evidentiary record before me.

[142] In the circumstances, I am unable to agree with CRA that RVO Releases are unfair based on Arbuthnot's conduct or due to other benefits he may or may not have received. I find that, based on the record before me, that the RVO Releases are fair, reasonable and not overly broad.

j. Effect of Not Approving the RVO

[143] As noted above, I find that the effect of not approving the RVO, with the RVO Releases, at this juncture puts the benefits of the SSCL Transaction, the 659 Transaction and the Plan at serious risk.

k. Remedial Purpose of CCAA

[144] The remedial purpose of the CCAA favours approving the SSCL Transaction for the benefit of allowing Bio-Tech to continue as a going concern for the general benefit of stakeholders, including the Plan Sponsor, SNDL, Bio-Tech employees and others (including CRA). This is not overridden in this case by CRA's position, or the fact that Arbuthnot and other Bio-Tech Directors are released from being assessed for the Arrears.

l. Conclusion re SSCL Transaction

[145] For the reasons set out above, I find that the approval of the SSCL Transaction, including the RVO Releases is appropriate. I grant the form of proposed ARVO with the noted amendments noted above.

IV. Conclusion

[146] I grant the proposed "Order – Sanction of Plan and Stay Extension", the proposed SAVO and the proposed ARVO, as amended as noted above.

Heard on the 10th day of January 2025.

Dated at the City of Calgary, Alberta this 29th day of January 2025.

M.A. Marion
J.C.K.B.A.

Appearances:

Ryan Zahara, Molly McIntosh and Chris Nyberg, MLT Aikins LLP
for Delta 9 Cannabis Inc., Delta 9 Logistics Inc., Delta 9 Bio-Tech Inc., Delta 9 Lifestyle
Cannabis Clinic Inc. and Delta 9 Cannabis Store Inc.

James Reid and Matthew Cressatti, Miller Thomson LLP
for 2759054 Ontario Inc. operating as Fika Herbal Goods

Ashley Bowron, McCarthy Tetrault LLP
for SNDL Inc.

David LeGeyt, Burnet, Duckworth & Palmer LLP
for the Monitor, Alvarez & Marsal Canada Inc.

Howard A. Gorman, K.C., Norton Rose Fulbright Canada LLP
for the directors and officers of Delta 9 and Bio-Tech

Daniel Segal and David Smith, Department of Justice Canada
for the Canada Revenue Agency

**Corrigendum of the Reasons for Decision
of
The Honourable Justice M.A. Marion**

Docket number corrected on cover page.

TAB 28

CITATION: Re Green Relief Inc.
2020 ONSC 6837
COURT FILE NO.: CV-20-00639217-00CL
DATE: 20201109

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
 ARRANGEMENT OF **GREEN RELIEF INC.** (the “**Applicant**”)

BEFORE: Koehnen J.

COUNSEL: C Robert I. Thornton, Rebecca L. Kennedy, Mitchell Grossell, for the Applicant
 Peter Osborne, Christopher Yung for the directors Neilank Jha, Tony Battaglia, Brian Ranson,
 Christopher McNamara and Stephen Massel.

Mark Abradjian for Tony Battaglia in his capacity as shareholder and creditor

David Ward for 2650064 Ontario Inc.

Alex Henderson for Susan Basmaji

Gavin Finlayson for Auxley Cannabis Group Inc. and Kolab Project Inc.

Anton Granic on his own behalf

Rory McGovern, for Steve LeBlanc

Alan Dick and Adrienne Boudreau for Thomas Saunders

Steven Weisz and Amanda McInnis for Lyn Mary Bravo

Brian Duxbury for Warren Bravo

Alex Henderson for Susan Basmaji

Robert Kennaley, Joshua W. Winter for Henry Schilthuis and Mark Lloyd

Danny Nunes, for the Monitor

HEARD: November 2 and 3, 2020

ENDORSEMENT

- [1] The Applicant, Green Relief Inc., seeks an order approving a transaction for the sale of its assets in the course of a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"). The sale transaction is generally not contested. Certain stakeholders do however, take issue with the release that the approval and vesting order purports to grant in favour of certain releasees as a condition precedent to the sale. For ease of reference, I refer to Green Relief alternatively by its name, as the Applicant or as the Company in these reasons.
- [2] For the reasons set out below, I:
- a. Approve the sales transaction as Green Relief seeks, including the release. There is substantial difference of opinion on the proper interpretation of the release. It is not appropriate to interpret the release in a vacuum. It is preferable to do so on the basis of concrete circumstances which might present themselves if and when any claim is brought that implicates the release. I will however remain seized of the interpretation of the release. If any claim arises that calls for interpretation of the release, including an interpretation of any available insurance coverage, that issue must be brought before me for determination.
 - b. Temporarily lift the stay of proceedings until 12:01 a.m. November 27, 2020 to permit the filing of claims that might attract insurance coverage the that the release refers to.
 - c. Decline to extend the benefit of the release to Susan Basmaji.

I. The Sale Transaction

- [3] Green Relief seeks approval of the sale of certain assets to 2650064 Ontario Inc. (265 Co.) (the "Transaction"). As a result of the proposed transaction, 265 Co. will acquire new common shares of Green Relief in a sufficient quantity to reduce the holdings of existing shareholders to fractional shares which would be cancelled on the close of the transaction. On closing, Residual Co. will be established and added as an applicant to the CCAA proceeding. In effect, all obligations and liabilities of Green Relief will be transferred to Residual Co.
- [4] 265 Co. will pay \$5,000,000 for the common shares. Approximately \$1,500,000 of that is an operating loan with the balance being available for creditors. In addition, 265 Co. will

pay Residual Co. up to \$7,000,000 as an earn out during the first two fiscal years following closing. The earn out is based on a payment of 25% of annual EBITDA above \$5,000,000.

- [5] Section 36(3) of the CCAA provides that, when deciding whether to authorize a sale of assets, the court should consider, among other things:
- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the Monitor approved the process leading to the proposed sale;
 - (c) whether the Monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which creditors were consulted;
 - (e) the effects of the proposed sale or distribution on the creditors and other interested parties; and
 - (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
- [6] These factors are consistent with the principles set out in *Royal Bank v. Soundair Corp.* 1991 CanLII 2727 (ON CA) at para. 16 for the approval of a sales transaction.
- [7] I am satisfied that the principles of *Soundair* and the factors set out in section 36 (3) of the CCAA have been met here.
- [8] The process leading to the Transaction was reasonable in the circumstances. While there was no formal sale and investor solicitation process, the transaction was the culmination of a seven-month long Notice of Intention and CCAA proceeding. The proceeding involved vigorously competing stakeholders and a competitive bidding process between interested purchasers. The competing stakeholder groups had ample opportunity to bring the business to the attention of potential purchasers. I am satisfied that there was ample information available and ample time for stakeholders to participate in the purchase process or bring the purchase to the attention of market players who may be interested in acquiring Green Relief. The Monitor approved the process and the Transaction. The Monitor notes that its liquidation analysis demonstrates that the Transaction is preferable to a bankruptcy. While creditors were not formally consulted on the process, they had ample information about it as a result of the ongoing CCAA proceeding. Creditors appeared at the various hearings. At times they made submissions in favour of an alternative bid, which submissions I gave effect to. The creditors who have made submissions before me on this motion approve of the Transaction and the release. No creditors ever objected to the process that was being followed. The Transaction makes funds available for creditors and is the best transaction available.

- [9] No one opposes the Transaction. Those who spoke in opposition on the motion did not oppose the Transaction but opposed only the release.

II. The Release

- [10] The release is opposed by the founders of Green Relief, Steven Leblanc, Warren Bravo and Lynn Bravo. They are supported on this motion by three other shareholders, Thomas Saunders, Henry Schilthuis and Mark Lloyd. For ease of reference, I will refer to those who oppose the release as the Objectors.
- [11] There is a long, bitter history of litigation and threats of litigation between the founders, the existing board and Green Relief's approximately 700 other shareholders.
- [12] The Objectors argue that I should reject the release because:
- (i) It was improper to include it as a condition precedent to the Transaction.
 - (ii) I have no jurisdiction to approve the release.
 - (iii) The release fails to meet the test set out in case law concerning releases.
 - (iv) The release is too broad in scope.

(i) Release as a Condition Precedent

- [13] The Objectors note that the term sheet that preceded this motion and that I approved, did not contain any releases, let alone as a condition precedent to a transaction. Mr. Leblanc says he did not oppose the term sheet because it did not refer to releases. As negotiations towards a final agreement developed, the Company and the Monitor advised that Green Relief would be bringing a motion to approve releases. When the issue of a motion to approve releases arose, 265 Co. advised that it was agnostic about releases and that the releases were not theirs to give or ask for. The Objectors note that, instead of a motion to approve a release, Green Relief presented a transaction that contains a release as a condition precedent. The Objectors submit that the court should not be strong-armed in this fashion.
- [14] Both Green Relief and the Monitor did advise the court they would be bringing a motion to seek permission to include a release in the Transaction. It is certainly preferable for parties to live by representations they make to the court rather than represent one thing and do another. There is no evidence before me about how the release came to be a condition precedent in the transaction. 265 Co. made no representations in support of the release although it wants the Transaction to be approved. I infer from 265 Co.'s submissions that it does not care about the release and that the release was inserted at the insistence of others.

- [15] That certain parties have characterized the release as a condition precedent, is irrelevant to my analysis. Given that Green Relief and the Monitor represented to the court that they would be seeking the court's approval for any release, I will hold them to that representation. I do not feel in any way constrained to accept or reject the release simply because it has been included as a condition precedent. I consider myself free to approve the Transaction with or without the release.

(ii) Jurisdiction to Grant Release

- [16] The Objectors submit that I have no jurisdiction to grant the release because the wording of the CCAA does not permit it on the facts of this case.
- [17] The Objectors begin their analysis with section 5.1 (1) of the CCAA which provides:
- 5.1 (1) **A compromise or arrangement** made in respect of a debtor company **may include** in its terms provision for the **compromise of claims against directors** of the company **that arose before the commencement of proceedings under this Act** and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations (emphasis added).
- [18] The Objectors note that the section contains two qualifications. First it provides that a compromise or arrangement may include a release. Second, it limits the release to pre-filing claims
- [19] The Objectors note that the cases to which Green Relief points for the authority to grant a release address the release at the same time as the plan is being approved. Here, there is no plan to approve yet.
- [20] The Objectors submit that the distinction is significant because a plan is only approved after a claims process, negotiation for a plan, a meeting approving the plan and a two thirds majority vote in favour of the plan. Those steps are important in their view because they refine the claims against the company and ascertain the value of those claims.
- [21] Green Relief has not yet conducted a claims process or proposed a plan. Instead, the objective is to complete the Transaction, put \$3,500,000 into Residual Co. and conduct a claims process once Residual Co. has been funded.
- [22] Green Relief has not yet decided whether it will address litigation claims inside or outside the CCAA claims process.

- [23] While the presence of a plan is relevant to the approval of releases for the reasons the Objectors cite, I do not agree that the absence of a plan deprives the court of jurisdiction to approve a release.
- [24] The primary advantage of approving a release on a plan approval is that it gives creditors better insight into the parameters of the plan they are being asked to approve. The interests of creditors are a prime consideration in any step of a CCAA proceeding. While the creditors have not approved a plan here, they have had the opportunity to make submissions throughout the process. They availed themselves of that opportunity. In large part I acceded to their requests as the primary beneficiaries of any plan. When certain creditors asked me to allow the Company to pursue a transaction other than one that 265 Co. was proposing at the time, I did so. When that possibility did not materialize, they spoke in favour of newer 265 Co. proposals and now speak in favour of Transaction and the proposed release. They favour the release because it maximizes the size of the estate available for distribution amongst creditors.
- [25] Returning the language of s. 5.1 (1), it is drafted permissively. It does not limit the overall jurisdiction of the court under section 11 of the CCAA to make any order that it considers appropriate in the circumstances.
- [26] At least one other court has approved a release in the absence of a plan and in the face of opposition to the release: *Re Nemaska Lithium Inc.* 2020 QCCS 3218 where Gouin J. noted that the carveout provided by s. 5.1 (2) of the CCAA adequately protected the shareholders who opposed the release.

(iii) The Test for a Release

- [27] In *Lydian International Limited (Re)* 2020 ONSC 4006 at paragraph 54, Morawetz J. (as he then was) summarized the factors relevant to the approval of releases in CCAA proceedings as including the following:
- (a) Whether the claims to be released are rationally connected to the purpose of the plan;
 - (b) Whether the plan can succeed without the releases;
 - (c) Whether the parties being released contributed to the plan;
 - (d) Whether the releases benefit the debtors as well as the creditors generally;
 - (e) Whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and
 - (f) Whether the releases are fair, reasonable and not overly-broad.

- [28] As in most discretionary exercises, it is not necessary for each of the factors to apply in order for the release to be granted: *Target Canada Co., Re*, endorsement of Morawetz J. (as he then was) at p. 14. Some factors may assume greater weight in one case than another.
- [29] In this case, I would add to these factors an additional factor, the quality of the claims the Objectors wish to maintain. While this may already be implicit in some of the considerations set out in *Lydian*, it warrants separate identification on the facts of the case before me.
- [30] The Objectors argue vigorously that this is not the stage to assess the strength of any potential action against proposed defendants or the size of damage claims available against them. I agree. At the same time, however, the court should not entirely ignore the nature of the proposed claim. If the court is being asked to release claims, it is helpful to know what is being released. The court's impression of the nature of the claim is a relevant factor to consider when determining whether releases should be granted. I do not think it would be advisable to lay down a precise definition of the quality of claim required to determine whether releases should or should not be granted nor would I described this as a threshold test to grant or deny the release. It is more of a directional or qualitative factor to consider in deciding whether to grant a release rather than a precise legal test. The stronger a claim appears, the less likely a court may be to grant a release. The thinner and more speculative a claim, the more likely a court may be to grant a release.

The Quality of the Claims being Released

- [31] As noted earlier, the principal Objectors are the founders of Green Relief Steven Leblanc, Warren Bravo and Lynn Bravo. Relations between the founders on the one hand and the existing board and other shareholders are poisoned.
- [32] On the motion before me, shareholders spoke out against the founders and made submissions to the effect that the release should not preclude any claims by shareholders against the founders. Those shareholders see themselves as having been deprived of their entire investment, in some cases their life savings, because of alleged misrepresentations or improper transactions by the founders. None of those allegations are before me. I raise them only to set the highly litigious context in which the release arises. The release does not propose to release claims against the founders but only releases claims against current directors, Green Relief's legal counsel, the Monitor and its legal counsel.
- [33] This proceeding has been highly litigious from the outset, particularly in light of the relatively modest size of the estate at issue. It has been marred by litigation over who is a shareholder, who is or should be a director and who is a creditor.
- [34] This follows on a highly contentious corporate history involving struggles between shareholder groups, allegations of misrepresentation and allegations of fraud.

- [35] The Objectors' primary opposition to the release is based on their desire to bring an action against the current directors, the Company's legal advisors during the CCAA proceedings, the Monitor and its counsel for their conduct during the CCAA proceedings. The Objectors submit that the current Board, the Monitor and their legal counsel misled the court by suggesting that they had a transaction in the offing that would have injected \$20,000,000 into Green Relief. The Objectors say that the releasees did insufficient due diligence to determine whether the proposed purchaser in fact had \$20,000,000 available.
- [36] The Objectors submit that the Company has incurred needless professional fees because of the fruitless pursuit of the \$20,000,000 transaction and that Green Relief suffered a loss of chance in that it was deprived of the ability to pursue alternative transactions.
- [37] If anything, the proposed action demonstrates the need for a release. In the overall circumstances of the case, the threat of litigation against the current board, the Company's counsel, the Monitor and its counsel is unfounded and disproportionate. To demonstrate this requires some context and background.
- [38] At the outset of the proceeding, 265 Co. proposed to extend a \$5,000,000 operating loan to Green Relief. The loan provided no money for creditors. The board feared that accepting the loan would inevitably put Green Relief further into debt and ultimately end up with 265 Co. having ownership of Green Relief without having provided anything for other stakeholders. Mr. Leblanc supported the 265 Co. proposal and urged that I adopt it.
- [39] The board urged me to allow them to pursue a proposal from another investor, Mr. Vercouteren. The Vercouteren proposal would have injected \$20,000,000 into Green Relief. As it turns out, the Vercouteren proposal did not materialize. Initially the court was advised that the Vercouteren proposal was being delayed because of administrative holdups attributable to the Covid 19 pandemic. A few months later it was discovered that the delays were attributable to the fact that the Vercouteren proposal was contingent upon the completion of another transaction in Europe. The nature of that transaction, its status, closing date, likelihood of closing and reason for not closing to date were never revealed.
- [40] It is fair to say that when I discovered this, I expressed frustration to the Applicant for having failed to disclose the true status of the Vercouteren proposal from the outset. The Applicant assured me that they had done due diligence on Mr. Vercouteren and had been assured by his counsel, a reputable law firm, that he was a person of financial substance with the means to complete a transaction of the sort he had proposed.
- [41] With the benefit of hindsight one can debate whether the board acted perfectly, their conduct, however, ultimately led to the situation we find ourselves in now which is one that has 265 Co. offering more money to creditors and potentially other stakeholders than its initial proposal did. The proposal I am being asked to approve would see 265 Co. inject \$5,000,000 of which \$1,500,000 would be for operating purposes and \$3,500,000 would be for distribution to creditors. In addition, the 265 Co. proposal contains an earn out of up to an additional \$7,000,000 for distribution to creditors. While I agree that it does not offer \$20,000,000, the reality is that \$20,000,000 was not on the table.

- [42] Mr. McGovern, on behalf of Mr. Leblanc submits that the fact that the current offer of 265 Co. is superior to the prior offer does not end the analysis because the board and its advisors got that superior offer by engaging in questionable conduct. According to Mr. McGovern, this introduces moral hazard into the equation which is undesirable.
- [43] On that analysis, if anyone has been damaged by the alleged moral hazard, it is 265 Co. which has been led to improve its previous offers based on allegedly misleading information. However, 265 Co. does not complain. It wishes to close the Transaction.
- [44] Mr. Dick on behalf of Mr. Saunders and Mr. Kennaley on behalf of Messrs. Schilthuis and Lloyd submit that the Objectors should be able to pursue their loss of chance claim. They argue that there were no other bids for Green Relief because the size of the Vercouteren proposal inhibited others from bidding. While perhaps initially appealing as a basis to speculate about what other bids may have been available, I do not accept the submission for three reasons.
- [45] First, the Vercouteren proposal did not stop 265 Co. from making its \$5,000,000 operating loan proposal. It also did not stop 265 Co. from making a significantly more superior offer later subject to an exit right based on what its due diligence revealed. Anyone who was seriously interested in the business could have made an offer with a due diligence exit right. There is nothing unusual in that type of proposal
- [46] Second, the founders supported 265 Co.'s initial inferior proposal. Had they truly believed Green Relief was worth \$20,000,000, it is unlikely they would have done so. In addition, the founders were ideally placed to find other financial solutions preferable to the one on offer. They did not do so. Even when they learned that the current proposal was conditional on the release, the Objectors did not suggest that the company return to the drawing board to search for another transaction. The Objectors want me to approve the Transaction but with the release removed.
- [47] Third, no creditor objects to the Transaction. Any hope of a transaction that would offer more funds for creditors, let alone shareholders, than the Transaction does is illusory. At an earlier stage in this proceeding, Mr. Weisz stated that "Green Relief is hopelessly insolvent": see my endorsement of April 20, 2020 at para. 6. At the time, Green Relief was in default of leases, had tax arrears of over \$100,000 and was over five months in arrears on a mortgage in favour of Rescom. Hopelessly insolvent companies do not have enough money to pay off creditors, let alone provide value to shareholders. This particular hopelessly insolvent company is a cannabis business. The entire cannabis industry is undergoing a fundamental shakeup. There is no shortage of CCAA proceedings involving players in the cannabis industry. The harsh business reality is that creditors, let alone shareholders, will come out short in these restructurings. If anyone stands to gain from a superior offer, it is creditors. Yet no creditor, apart from Ms. Bravo who asserts that she is a creditor, wants to pursue a claim against anyone for their conduct of the CCAA proceeding.

- [48] In those circumstances, I am satisfied that whatever right of action is being removed by the release is so insubstantial that the court need not be concerned about depriving anyone of a cause of action that has even a remote chance of success. At best, it is a cause of action that is entirely without legal merit but which might have some economic value if a defendant were prepared to settle on the basis of the claim's nuisance value. Permitting unmeritorious claims to proceed so that the founders can try to extract a nuisance value settlement arising from steps that were approved by the court at each stage would amount to legally authorized extortion which I am not inclined to permit.
- [49] In the circumstances described above, the quality of the claims released would incline me to approve the release.

Application of the Lydian Factors

- [50] **Releasees necessary and essential:** The released parties here were necessary and essential to the restructuring. A CCAA proceeding quite obviously cannot proceed without a Monitor, Monitor's counsel or company counsel. Similarly, a restructuring cannot proceed without the other releasees like directors, officers and employees.
- [51] **Rational connection between claims released and the purpose of the plan:** The claims released are rationally connected to the purpose of the plan. The object of the release is to diminish indemnity claims by the releasees against Residual Co. and the pool of cash that is being created in its hands to satisfy creditor claims. Given that one purpose of a CCAA proceeding is to maximize creditor recovery, a release which helps do that is rationally connected to the purpose of the plan.
- [52] **Whether the plan can succeed without the releases** is unknown. The directors have made the releases a condition precedent to the plan. The court should not accept the release simply because it is said to be a condition precedent. In the circumstances of this case, the condition precedent strikes me as more of a strong-arm tactic that courts should resist. I feel myself at liberty to call the directors' bluff and approve the Transaction without the release.
- [53] Success of the plan without releases should, however, also be assessed with regard to factors other than potential strong-arming by incumbent directors. Here, the pool of assets immediately available for distribution of creditors is approximately \$3,500,000. As noted, the releasees may have a claim on those funds to satisfy any indemnity claims arising out of the litigation. Mr. McGovern's announced desire to sue the Monitor, its counsel, the directors and Green Relief's counsel for their conduct during the restructuring may give rise to indemnity claims of a size that would make a significant dent in the cash available for creditors. That diminution would make the plan significantly less successful and, depending on circumstances, could eliminate assets available for creditors.

- [54] **Did the releasees contribute to the plan:** While there is not yet a plan, the releasees have clearly contributed to get the Company to this stage. The Monitor, its counsel, the directors and Company counsel dedicated time and effort to the CCAA proceedings. Professional advisors contributed further by deferring billing and collection. Messrs. Jha and Battaglia contributed \$1,500,000 of their personal funds to provide DIP financing at relatively modest interest rates. Mr. Battaglia contributed \$220,000. Dr. Jha initially contributed \$500,000 and then increased his contribution to \$1,250,000 in June 2020.
- [55] **Does the release benefit the debtor as well as creditors:** The release benefits the debtor in that it helps facilitate a transaction that will make funds available to creditors. In the absence of the release, the funds available to creditors could be significantly diminished because of indemnity claims by the releasees. Those indemnity claims would include claims for advancement of defence costs. The advancement of defence costs would be claimed in relation to an action that questions the conduct of the releasees during a court supervised and court approved the process. As noted above, the nature of those claims is highly tenuous.
- [56] **Creditors knowledge of the nature and effect of the release:** All creditors on the service list were served with materials relating to this motion. Creditors were free to attend the hearing, several did. Those creditors who made submissions on the motion supported the release.
- [57] A consideration of the foregoing *Lydian* factors would also incline me to approve the release. If I balance the right to the Objectors to pursue the releasees for their conduct during the CCAA proceeding against the right of creditors to maximize recovery against the Green Relief estate, there is simply no contest. The creditors with proven claims have legitimate, verified demands against the corporate estate. The Objectors have tenuous claims based on objections to a court supervised process that would in effect amount to a collateral attack on court orders. In those circumstances I am satisfied that the release benefits the debtor and creditors generally.

Scope of the Releases

- [58] Although the scope of the releases is captured by the factor that Lydian describes as whether the releases are fair, reasonable and not overly broad, I consider the scope of the release here in a standalone section because of the prominence given to it during argument.
- [59] The release is found in paragraph 24 of the proposed order. Its material language provides:
- ...the current directors, officers, employees, independent contractors that have provided legal or financial services to the Applicant, legal counsel and advisors of the Applicant, and (ii) the Monitor and its legal counsel (collectively, the “Released Parties”) shall be ... released ... from ...all ... claims ...of any nature or

kind whatsoever ... based in whole or in part on any act or omission, ... taking place prior to the filing of the Monitor's Certificate and that relate in any manner whatsoever to the Applicant or any of its assets (current or historical), obligations, business or affairs or this CCAA Proceeding, ... provided that nothing in this paragraph shall ... release... any claim: (i) that is not permitted to be released pursuant to section 5.1(2) of the CCAA, (ii) against the former directors and officers of the Applicant for breach of trust arising from acts or omissions occurring before the date of the Initial Order, (iii) that may be made against any applicable insurance policy of the Applicant prior to the date of the Initial Order, or (iv) that may be made against the current directors and officers that would be covered by the Directors' Charge granted pursuant to the Initial Order.

- [60] While the release appears broad at first blush, a closer reading narrows its scope considerably. The parties being released are by and large parties who provided services to the company during the CCAA process. Given that the incremental steps in the CCAA process were approved by the court and were subject to submission by a wide variety of parties, the release is not, *prima facie*, unreasonable. In addition, while current directors are also released, the longest-serving of those are Messrs. Jha and Battaglia who became directors on March 7, 2019, approximately one year before the Notice of Intention was filed. The time period for which they are being released outside of the court proceedings is therefore relatively limited. On the motion, no one advanced any basis for a claim against them for pre-Notice of Intention conduct.
- [61] The release then goes on to carve out certain types of claims that are not being released even as against the limited population of releasees. The carveouts include claims not permitted to be released under section 5.1 (2) of the CCAA and claims that may be made against any applicable insurance policy.
- [62] Section 5.1 (2) of the CCAA prohibits releases for, among other things, "wrongful or oppressive conduct by directors." Just what that means was the subject of much argument on the motion.
- [63] On behalf of Green Relief, Mr. Thornton submitted that the carveout for "wrongful or oppressive conduct" is broad and would include negligence claims. In other words, in the Company's view, negligence claims are not being released. Mr. Thornton submitted that the language of section 5.1 (2) of the CCAA effectively releases the directors from statutory liabilities for which they may be liable because the corporation failed to do something even though that failure is not attributable to any wrongdoing by directors. By way of example, directors' statutory liability for unpaid wages would fall into this category and would be captured by the release.
- [64] In *BlueStar Battery Systems International Corp., Re*, 2000 CanLII 22 678 (ON SC) Farley J. said the following about the scope of section 5.1 (2) at para 14:

“However it seems to me that the directors of any corporation in difficulty and contemplating a CCAA plan would be unwise to engage in a game of hide and go seek since the language of s. 5.1 (2)(b) appears wide enough to encompass those situations where the directors stand idly by and do nothing to correct any misstatements or other wrongful or oppressive conduct of others in the corporation (either other directors acting qua directors, or officers or underlings). There was no evidence presented that the directors here had knowledge or ought to have had knowledge of such here. One may have the greatest of suspicion that they did or ought to have had such knowledge. This could have been crystallized if RevCan had put the directors on notice of the promises to pay GST. It would seem to me at first glance that the oppression claims cases which arise pursuant to corporate legislation such as the Canada Business Corporations Act and the Business Corporations Act (Ontario) would be of assistance in defining “oppressive conduct”. Similarly it would appear that “wrongful conduct” would be conduct which would be tortious (or akin thereto) as well as any conduct which was illegal.”

- [65] This passage would appear to support Mr. Thornton’s submission.
- [66] Mr. Osborne, on behalf of the current directors took a narrower view of the meaning of “wrongful or oppressive” conduct and described it as referring to “active but not “passive torts”. In Mr. Osborne’s submission, the release covers claims in respect of which the corporation can indemnify directors, including negligence, but does not include intentional conduct like fraud.
- [67] Given the difference of views, some counsel asked me to define specifically what was or was not excluded by section 5.1 (2) while others urged me not to define the scope of the section at this stage.
- [68] My inclination is to not to define the scope of the section or the release in a vacuum. Both the release and section 5.1 (2) are better interpreted in light of a specific claim in the context of the circumstances existing if and when any such claim arises.
- [69] In that regard I would urge a heavy dose of restraint on all parties. There has been no shortage of animosity and litigation between the parties. Temperatures have run high throughout. Before continuing any existing litigation or commencing new litigation, I would urge all parties to consider whether they are proceeding out of anger and frustration, however justified it may be, or are they proceeding on a rational economic basis because there is a cogent basis for a claim that will lead to recovery considerably in excess of the costs of litigating. This is a situation where suing “out of principle” warrants considerable restraint.

- [70] The release also carves out claims “that may be made against any applicable insurance policy of the Applicant prior to the date of the initial order.” I was advised during the motion that the directors were unable to obtain insurance after the Notice of Intention was filed in March 2020 but that the company purchased tail coverage that extended coverage for past conduct of directors. The tail coverage expires on November 26, 2020. That still provides plaintiffs with a period of time to commence an action for which there might be insurance coverage and to which the release might therefore not apply. The tail coverage may for example, cover current and former directors for conduct that arose before the Notice of Intention was filed.
- [71] To permit such claims to be filed, I am temporarily lifting the stay of proceedings against officers and directors of Green Relief solely for the purpose of initiating claims that would potentially obtain the benefit of the carveouts under the release.
- [72] Given my preference for interpreting the release in light of actual circumstances rather than in a vacuum and given my temporary lift of the stay of proceedings against officers and directors, there is considerable benefit to the parties and considerable judicial efficiency in having the release interpreted by the same judicial officer who approved it and who had oversight of the CCAA proceedings. I will therefore remain seized of this issue and order that any issue about whether the release applies (including the issue of insurance coverage) will be determined by me.
- [73] To be clear, if any actions are commenced because of the temporary lift stay, the parties will still have to agree that such actions are carved out of the release by virtue of insurance coverage or I will have to determine that issue. The actions will not proceed and need not be defended until such agreement is reached or until I have determined whether the release applies.

Relief requested by Susan Basmaji

- [74] Susan Basmaji is a shareholder who asks that I extend the coverage of the release to her. Ms. Basmaji says she motivated a large number of other shareholders to cooperate with the Monitor and the Company to support the Transaction. She says that as a result of those efforts, Mr. Leblanc has commenced a defamation action against her.
- [75] I am not inclined to extend the release to Ms. Basmaji. The release was the product of negotiations between various stakeholders. It is not for the court to rewrite the release and bring other parties into the negotiation. I have extremely limited knowledge of the dispute between Mr. Leblanc and Ms. Basmaji and have no basis for concluding whether Ms. Basmaji was essential to the success of the Transaction as Lydian suggests nor do I have enough information about the defamation action to determine whether Ms. Basmaji should benefit from a release. That that said, it strikes me that the litigation between Mr. Leblanc and Ms. Basmaji a dispute to which the exhortation in paragraph 69 above is particularly relevant.

Disposition

[76] For the reasons set out above, I

- a. approve the Transaction;
- b. approve the release;
- c. will remain seized of all issues concerning the interpretation of the release and the insurance coverage referred to in it;
- d. lift the stay of proceedings solely to permit actions to be brought up to and including November 26, 2020 in order to capture the benefit of insurance coverage referred to in the release;
- e. reimpose the stay of proceedings effective at 12:01 AM on November 27, 2020; and
- f. decline to extend the benefit of the release to Susan Basmaji.

Koehnen J.

Date: November 9, 2020

TAB 29

**9354-9186 Québec inc. and
9354-9178 Québec inc. *Appellants***

v.

**Callidus Capital Corporation,
International Game Technology,
Deloitte LLP, Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx and François Pelletier
*Respondents***

and

**Ernst & Young Inc.,
IMF Bentham Limited (now known as
Omni Bridgeway Limited),
Bentham IMF Capital Limited (now known
as Omni Bridgeway Capital (Canada)
Limited), Insolvency Institute of Canada and
Canadian Association of Insolvency and
Restructuring Professionals *Interveners***

- and -

**IMF Bentham Limited (now known as Omni
Bridgeway Limited) and
Bentham IMF Capital Limited (now known
as Omni Bridgeway Capital (Canada)
Limited) *Appellants***

v.

**Callidus Capital Corporation,
International Game Technology,
Deloitte LLP, Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx and François Pelletier
*Respondents***

and

**9354-9186 Québec inc. et
9354-9178 Québec inc. *Appelantes***

c.

**Callidus Capital Corporation,
International Game Technology,
Deloitte S.E.N.C.R.L., Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx et François Pelletier *Intimés***

et

**Ernst & Young Inc.,
IMF Bentham Limited (maintenant
connue sous le nom d'Omni Bridgeway
Limited), Corporation Bentham IMF
Capital (maintenant connue sous le nom de
Corporation Omni Bridgeway Capital
(Canada)), Institut d'insolvabilité du Canada
et Association canadienne des professionnels
de l'insolvabilité et de la réorganisation
*Intervenants***

- et -

**IMF Bentham Limited (maintenant
connue sous le nom d'Omni Bridgeway
Limited) et Corporation Bentham IMF
Capital (maintenant connue sous le nom de
Corporation Omni Bridgeway Capital
(Canada)) *Appelantes***

c.

**Callidus Capital Corporation,
International Game Technology,
Deloitte S.E.N.C.R.L., Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx et François Pelletier *Intimés***

et

**Ernst & Young Inc.,
9354-9186 Québec inc.,
9354-9178 Québec inc.,
Insolvency Institute of Canada and
Canadian Association of Insolvency
and Restructuring Professionals** *Interveniers*

**INDEXED AS: 9354-9186 QUÉBEC INC. v.
CALLIDUS CAPITAL CORP.**

2020 SCC 10

File No.: 38594.

Hearing and judgment: January 23, 2020.

Reasons delivered: May 8, 2020.

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

**ON APPEAL FROM THE COURT OF APPEAL
FOR QUEBEC**

Bankruptcy and insolvency — Discretionary authority of supervising judge in proceedings under Companies' Creditors Arrangement Act — Appellate review of decisions of supervising judge — Whether supervising judge has discretion to bar creditor from voting on plan of arrangement where creditor is acting for improper purpose — Whether supervising judge can approve third party litigation funding as interim financing — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2.

The debtor companies filed a petition for the issuance of an initial order under the *Companies' Creditors Arrangement Act* ("CCAA") in November 2015. The petition succeeded, and the initial order was issued by a supervising judge, who became responsible for overseeing the proceedings. Since then, substantially all of the assets of the debtor companies have been liquidated, with the notable exception of retained claims for damages against the companies' only secured creditor. In September 2017, the secured creditor proposed a plan of arrangement, which later failed to receive sufficient creditor support. In February 2018, the secured creditor proposed another, virtually identical, plan of arrangement. It also sought the supervising judge's permission to vote on this new plan in the same class as the debtor companies' unsecured creditors, on the basis that its security was worth nil. Around the

**Ernst & Young Inc.,
9354-9186 Québec inc.,
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Institut d'insolvabilité du Canada et
Association canadienne des professionnels
de l'insolvabilité et de la réorganisation** *Intervenants*

**RÉPERTORIÉ : 9354-9186 QUÉBEC INC. c.
CALLIDUS CAPITAL CORP.**

2020 CSC 10

N° du greffe : 38594.

Audition et jugement : 23 janvier 2020.

Motifs déposés : 8 mai 2020.

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

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Pouvoir discrétionnaire du juge surveillant dans une instance introduite sous le régime de la Loi sur les arrangements avec les créanciers des compagnies — Contrôle en appel des décisions du juge surveillant — Le juge surveillant a-t-il le pouvoir discrétionnaire d'empêcher un créancier de voter sur un plan d'arrangement si ce créancier agit dans un but illégitime? — Le juge surveillant peut-il approuver le financement de litige par un tiers à titre de financement temporaire? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 11, 11.2.

En novembre 2015, les compagnies débitrices déposent une requête en délivrance d'une ordonnance initiale sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« LACC »). La requête est accueillie, et l'ordonnance initiale est rendue par un juge surveillant, qui est chargé de surveiller le déroulement de l'instance. Depuis, la quasi-totalité des éléments d'actif de la compagnie débitrice ont été liquidés, à l'exception notable des réclamations réservées en dommages-intérêts contre le seul créancier garanti des compagnies. En septembre 2017, le créancier garanti propose un plan d'arrangement, qui n'obtient pas subséquemment l'appui nécessaire des créanciers. En février 2018, le créancier garanti propose un autre plan d'arrangement, presque identique au premier. Il demande aussi au juge surveillant la permission de voter sur ce nouveau plan dans la même catégorie que

same time, the debtor companies sought interim financing in the form of a proposed third party litigation funding agreement, which would permit them to pursue litigation of the retained claims. They also sought the approval of a related super-priority litigation financing charge.

The supervising judge determined that the secured creditor should not be permitted to vote on the new plan because it was acting with an improper purpose. As a result, the new plan had no reasonable prospect of success and was not put to a creditors' vote. The supervising judge allowed the debtor companies' application, authorizing them to enter into a third party litigation funding agreement. On appeal by the secured creditor and certain of the unsecured creditors, the Court of Appeal set aside the supervising judge's order, holding that he had erred in reaching the foregoing conclusions.

Held: The appeal should be allowed and the supervising judge's order reinstated.

The supervising judge made no error in barring the secured creditor from voting or in authorizing the third party litigating funding agreement. A supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. A supervising judge can also approve third party litigation funding as interim financing, pursuant to s. 11.2 of the CCAA. The Court of Appeal was not justified in interfering with the supervising judge's discretionary decisions in this regard, having failed to treat them with the appropriate degree of deference.

The CCAA is one of three principal insolvency statutes in Canada. It pursues an array of overarching remedial objectives that reflect the wide ranging and potentially catastrophic impacts insolvency can have. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. The architecture of the CCAA leaves the case-specific assessment and balancing of these objectives to the supervising judge.

les créanciers non garantis des compagnies débitrices, au motif que sa sûreté ne vaut rien. À peu près au même moment, les compagnies débitrices demandent un financement temporaire sous forme d'un accord de financement de litige par un tiers qui leur permettrait de poursuivre l'instruction des réclamations réservées. Elles sollicitent également l'approbation d'une charge super-prioritaire pour financer le litige.

Le juge surveillant décide que le créancier garanti ne peut voter sur le nouveau plan parce qu'il agit dans un but illégitime. En conséquence, le nouveau plan n'a aucune possibilité raisonnable d'être avalisé et il n'est pas soumis au vote des créanciers. Le juge surveillant accueille la demande des compagnies débitrices et les autorise à conclure un accord de financement de litige par un tiers. À l'issue d'un appel formé par le créancier garanti et certains des créanciers non garantis, la Cour d'appel annule l'ordonnance du juge surveillant, estimant qu'il est parvenu à tort aux conclusions qui précèdent.

Arrêt : Le pourvoi est accueilli et l'ordonnance du juge surveillant est rétablie.

Le juge surveillant n'a commis aucune erreur en empêchant le créancier garanti de voter ou en approuvant l'accord de financement de litige par un tiers. Un juge surveillant a le pouvoir discrétionnaire d'empêcher un créancier de voter sur un plan d'arrangement s'il décide que le créancier agit dans un but illégitime. Un juge surveillant peut aussi approuver le financement de litige par un tiers à titre de financement temporaire, en vertu de l'art. 11.2 de la LACC. La Cour d'appel n'était pas justifiée de modifier les décisions discrétionnaires du juge surveillant à cet égard et n'a pas fait preuve de la déférence à laquelle elle était tenue par rapport à ces décisions.

La LACC est l'une des trois principales lois canadiennes en matière d'insolvabilité. Elle poursuit un grand nombre d'objectifs réparateurs généraux qui témoignent de la vaste gamme des conséquences potentiellement catastrophiques qui peuvent découler de l'insolvabilité. Ces objectifs incluent les suivants : régler de façon rapide, efficace et impartiale l'insolvabilité d'un débiteur; préserver et maximiser la valeur des actifs d'un débiteur; assurer un traitement juste et équitable des réclamations déposées contre un débiteur; protéger l'intérêt public; et, dans le contexte d'une insolvabilité commerciale, établir un équilibre entre les coûts et les bénéfices découlant de la restructuration ou de la liquidation d'une compagnie. La structure de la LACC laisse au juge surveillant le soin de procéder à un examen et à une mise en balance au cas par cas de ces objectifs.

From beginning to end, each proceeding under the CCAA is overseen by a single supervising judge, who has broad discretion to make a variety of orders that respond to the circumstances of each case. The anchor of this discretionary authority is s. 11 of the CCAA, which empowers a judge to make any order that they consider appropriate in the circumstances. This discretionary authority is broad, but not boundless. It must be exercised in furtherance of the remedial objectives of the CCAA and with three baseline considerations in mind: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence. The due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage. A high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings and, as such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the CCAA that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. Given that the CCAA regime contemplates creditor participation in decision-making as an integral facet of the workout regime, the discretion to bar a creditor from voting should only be exercised where the circumstances demand such an outcome. Where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the remedial objectives of the CCAA — that is, acting for an improper purpose — s. 11 of the CCAA supplies the supervising judge with the discretion to bar that creditor from voting. This discretion parallels the similar discretion that exists under the *Bankruptcy and Insolvency Act* and advances the basic fairness that permeates Canadian insolvency law and practice. Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that the supervising judge is best-positioned to undertake.

In the instant case, the supervising judge's decision to bar the secured creditor from voting on the new plan discloses no error justifying appellate intervention. When he made this decision, the supervising judge was intimately

Chaque procédure fondée sur la LACC est supervisée du début à la fin par un seul juge surveillant, qui a le vaste pouvoir discrétionnaire de rendre toute une gamme d'ordonnances susceptibles de répondre aux circonstances de chaque cas. Le point d'ancrage de ce pouvoir discrétionnaire est l'art. 11 de la LACC, lequel confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée. Quoique vaste, ce pouvoir discrétionnaire n'est pas sans limites. Son exercice doit tendre à la réalisation des objectifs réparateurs de la LACC et tenir compte de trois considérations de base : (1) que l'ordonnance demandée est indiquée, et (2) que le demandeur a agi de bonne foi et (3) avec la diligence voulue. La considération de diligence décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage. Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la LACC commandent un degré élevé de déférence. En conséquence, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable.

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la LACC qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Étant donné que le régime de la LACC, dont l'un des aspects essentiels tient à la participation du créancier au processus décisionnel, les créanciers ne devraient être empêchés de voter que si les circonstances l'exigent. Lorsqu'un créancier cherche à exercer ses droits de vote de manière à contrecarrer ou à miner les objectifs réparateurs de la LACC ou à aller à l'encontre de ceux-ci — c'est-à-dire à agir dans un but illégitime — l'art. 11 de la LACC confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter. Ce pouvoir discrétionnaire s'apparente au pouvoir discrétionnaire semblable qui existe en vertu de la *Loi sur la faillite et l'insolvabilité* et favorise l'équité fondamentale qui imprègne le droit et la pratique en matière d'insolvabilité au Canada. La question de savoir s'il y a lieu d'exercer le pouvoir discrétionnaire dans une situation donnée appelle une analyse fondée sur les circonstances propres à chaque situation que le juge surveillant est le mieux placé pour effectuer.

En l'espèce, la décision du juge surveillant d'empêcher le créancier garanti de voter sur le nouveau plan ne révèle aucune erreur justifiant l'intervention d'une cour d'appel. Lorsqu'il a rendu sa décision, le juge surveillant

familiar with these proceedings, having presided over them for over 2 years, received 15 reports from the monitor, and issued approximately 25 orders. He considered the whole of the circumstances and concluded that the secured creditor's vote would serve an improper purpose. He was aware that the secured creditor had chosen not to value any of its claim as unsecured prior to the vote on the first plan and did not attempt to vote on that plan, which ultimately failed to receive the other creditors' approval. Between the failure of the first plan and the proposal of the (essentially identical) new plan, none of the factual circumstances relating to the debtor companies' financial or business affairs had materially changed. However, the secured creditor sought to value the entirety of its security at nil and, on that basis, sought leave to vote on the new plan as an unsecured creditor. If the secured creditor were permitted to vote in this way, the new plan would certainly have met the double majority threshold for approval under s. 6(1) of the CCAA. The inescapable inference was that the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the CCAA protects. The secured creditor's course of action was also plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding, which includes acting with due diligence in valuing their claims and security. The secured creditor was therefore properly barred from voting on the new plan.

Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 of the CCAA and the remedial objectives of the CCAA more generally. Interim financing is a flexible tool that may take on a range of forms. This is apparent from the wording of s. 11.2(1), which is broad and does not mandate any standard form or terms. At its core, interim financing enables the preservation and realization of the value of a debtor's assets. In some circumstances, like the instant case, litigation funding furthers this basic purpose. Third party litigation funding agreements may therefore be approved as interim financing in CCAA proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the CCAA. These factors need not be mechanically applied or individually reviewed by the supervising judge, as not all of them will be significant in every case, nor are they exhaustive.

connaissait très bien les procédures en cause, car il les avait présidées pendant plus de 2 ans, avait reçu 15 rapports du contrôleur et avait délivré environ 25 ordonnances. Il a tenu compte de l'ensemble des circonstances et a conclu que le vote du créancier garanti viserait un but illégitime. Il savait qu'avant le vote sur le premier plan, le créancier garanti avait choisi de n'évaluer aucune partie de sa réclamation à titre de créancier non garanti et n'avait pas tenté de voter sur ce plan, qui n'a finalement pas reçu l'aval des autres créanciers. Entre l'insuccès du premier plan et la proposition du nouveau plan (identique pour l'essentiel au premier plan), les circonstances factuelles se rapportant aux affaires financières ou commerciales des compagnies débitrices n'avaient pas réellement changé. Pourtant, le créancier garanti a tenté d'évaluer la totalité de sa sûreté à zéro et, sur cette base, a demandé l'autorisation de voter sur le nouveau plan à titre de créancier non garanti. Si le créancier garanti avait été autorisé à voter de cette façon, le nouveau plan aurait certainement satisfait au critère d'approbation à double majorité prévu par le par. 6(1) de la LACC. La seule conclusion possible était que le créancier garanti tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la LACC. La façon d'agir du créancier garanti était manifestement contraire à l'attente selon laquelle les parties agissent avec diligence dans une procédure d'insolvabilité, ce qui comprend le fait de faire preuve de diligence raisonnable dans l'évaluation de leurs réclamations et sûretés. Le créancier garanti a donc été empêché à bon droit de voter sur le nouveau plan.

La question de savoir s'il y a lieu d'approuver le financement d'un litige par un tiers à titre de financement temporaire commande une analyse fondée sur les faits de l'espèce qui doit tenir compte du libellé de l'art. 11.2 de la LACC et des objectifs réparateurs de la LACC de façon plus générale. Le financement temporaire est un outil souple qui peut revêtir différentes formes. Cela ressort du libellé du par. 11.2(1), qui est large et ne prescrit aucune forme ou condition type. Le financement temporaire permet essentiellement de préserver et de réaliser la valeur des éléments d'actif du débiteur. Dans certaines circonstances, comme en l'espèce, le financement de litige favorise la réalisation de cet objectif fondamental. Les accords de financement de litige par un tiers peuvent être approuvés à titre de financement temporaire dans le cadre des procédures fondées sur la LACC lorsque le juge surveillant estime qu'il serait juste et approprié de le faire, compte tenu de l'ensemble des circonstances et des objectifs de la Loi. Cela implique la prise en considération des facteurs précis énoncés au par. 11.2(4) de la LACC. Ces facteurs

Additionally, in order for a third party litigation funding agreement to be approved as interim financing, the agreement must not contain terms that effectively convert it into a plan of arrangement.

In the instant case, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the litigation funding agreement as interim financing. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with the debtor companies' CCAA proceedings, leads to the conclusion that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It is apparent that he was focussed on the fairness at stake to all parties, the specific objectives of the CCAA, and the particular circumstances of this case when he approved the litigation funding agreement as interim financing. Further, the litigation funding agreement is not a plan of arrangement because it does not propose any compromise of the creditors' rights. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the funds generated from the debtor companies' assets, nor can it be said to compromise those rights. Finally, the litigation financing charge does not convert the litigation funding agreement into a plan of arrangement. Holding otherwise would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote, which is expressly provided for in s. 11.2 of the CCAA.

Cases Cited

By Wagner C.J. and Moldaver J.

Applied: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; **considered:** *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102; *Laserworks Computer Services Inc. (Bankruptcy)*, *Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296; **referred to:** *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150; *Hayes v. The City of Saint John*, 2016 NBQB 125; *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332; *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *Ernst & Young Inc. v. Essar Global Fund*

ne doivent pas être appliqués machinalement ou examinés individuellement par le juge surveillant, car ils ne seront pas tous importants dans tous les cas, et ils ne sont pas non plus exhaustifs. En outre, pour qu'un accord de financement de litige par un tiers soit approuvé à titre de financement temporaire, il ne doit pas comporter des conditions qui le convertissent effectivement en plan d'arrangement.

En l'espèce, il n'y a aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'accord de financement de litige à titre de financement temporaire. L'examen des motifs du juge surveillant dans leur ensemble, conjugué à la reconnaissance de son expérience évidente des procédures intentées par les compagnies débitrices sous le régime de la LACC, mène à la conclusion que les facteurs énumérés au par. 11.2(4) concernent des questions qui n'auraient pu échapper à son attention et à son examen adéquat. Il est manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la LACC et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'accord de financement de litige à titre de financement temporaire. De plus, l'accord de financement de litige ne constitue pas un plan d'arrangement parce qu'il ne propose aucune transaction visant les droits des créanciers. Le fait que les créanciers puissent en fin de compte remporter plus ou moins d'argent ne modifie en rien la nature ou l'existence de leurs droits d'avoir accès aux fonds provenant des actifs des compagnies débitrices, pas plus qu'on ne saurait dire qu'il s'agit d'une transaction à l'égard de leurs droits. Enfin, la charge relative au financement de litige ne convertit pas l'accord de financement de litige en plan d'arrangement. Une conclusion contraire aurait pour effet d'annihiler le pouvoir du juge surveillant d'approuver ces charges sans un vote des créanciers, un résultat qui est expressément prévu par l'art. 11.2 de la LACC.

Jurisprudence

Citée par le juge en chef Wagner et le juge Moldaver

Arrêt appliqué : *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379; **arrêts examinés :** *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102; *Laserworks Computer Services Inc. (Bankruptcy)*, *Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296; **arrêts mentionnés :** *Bayens c. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150; *Hayes c. The City of Saint John*, 2016 NBQB 125; *Schenk c. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332; *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199; *Sun Indalex Finance, LLC c. Syndicat des Métallurgistes*, 2013 CSC 6, [2013] 1 R.C.S. 271; *Ernst*

Ltd., 2017 ONCA 1014, 139 O.R. (3d) 1; *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416; *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299; *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323; *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, aff'd 1999 ABQB 379, 11 C.B.R. (4th) 204; *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150; *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24; *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701; *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175; *New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338; *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339; *Metcalf & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *Re 1078385 Ontario Ltd.* (2004), 206 O.A.C. 17; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283; *Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314; *Boutiques San Francisco Inc. v. Richter & Associés Inc.*, 2003 CanLII 36955; *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Montgrain v. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; *Langtry v. Dumoulin* (1884), 7 O.R. 644; *McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193; *Marcotte v. Banque de Montréal*, 2015 QCCS 1915; *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739; *Stanway v. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192; *Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169; *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577.

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APPEALS from a judgment of the Quebec Court of Appeal (Dutil, Schrager and Dumas J.J.A.), 2019 QCCA 171, [2019] AZ-51566416, [2019] Q.J. No. 670 (QL), 2019 CarswellQue 94 (WL Can.), setting aside a decision of Michaud J., 2018 QCCS 1040, [2018] AZ-51477967, [2018] Q.J. No. 1986 (QL), 2018 CarswellQue 1923 (WL Can.). Appeals allowed.

Jean-Philippe Groleau, Christian Lachance, Gabriel Lavery Lepage and Hannah Toledano, for the appellants/intervenors 9354-9186 Québec inc. and 9354-9178 Québec inc.

Neil A. Peden, for the appellants/intervenors IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited).

Geneviève Cloutier and Clifton P. Prophet, for the respondent Callidus Capital Corporation.

Jocelyn Perreault, Noah Zucker and François Alexandre Toupin, for the respondents International

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POURVOIS contre un arrêt de la Cour d’appel du Québec (les juges Dutil, Schrager et Dumas), 2019 QCCA 171, [2019] AZ-51566416, [2019] Q.J. No. 670 (QL), 2019 CarswellQue 94 (WL Can.), qui a infirmé une décision du juge Michaud, 2018 QCCS 1040, [2018] AZ-51477967, [2018] Q.J. No. 1986 (QL), 2018 CarswellQue 1923 (WL Can.). Pourvois accueillis.

Jean-Philippe Groleau, Christian Lachance, Gabriel Lavery Lepage et Hannah Toledano, pour les appelantes/intervenantes 9354-9186 Québec inc. et 9354-9178 Québec inc.

Neil A. Peden, pour les appelantes/intervenantes IMF Bentham Limited (maintenant connue sous le nom d’Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)).

Geneviève Cloutier et Clifton P. Prophet, pour l’intimée Callidus Capital Corporation.

Jocelyn Perreault, Noah Zucker et François Alexandre Toupin, pour les intimés International

Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier.

Joseph Reynaud and Nathalie Nouvet, for the interveners Ernst & Young Inc.

Sylvain Rigaud, Arad Mojtahedi and Saam Pousht-Mashhad, for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals.

The reasons for judgment of the Court were delivered by

THE CHIEF JUSTICE AND MOLDAVER J.—

I. Overview

[1] These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), in which substantially all of the assets of the debtor companies have been liquidated. The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

[2] Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in CCAA proceedings. The first is whether a supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. The second is whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the CCAA.

[3] For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed

Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier.

Joseph Reynaud et Nathalie Nouvet, pour l'intervenante Ernst & Young Inc.

Sylvain Rigaud, Arad Mojtahedi et Saam Pousht-Mashhad, pour les intervenants l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation.

Version française des motifs de jugement de la Cour rendus par

LE JUGE EN CHEF ET LE JUGE MOLDAVER —

I. Aperçu

[1] Ces pourvois s'inscrivent dans le contexte d'une instance toujours en cours introduite sous le régime de la *Loi sur les arrangements avec les créanciers de compagnies*, L.R.C. 1985, c. C-36 (« LACC »), dans le cadre de laquelle la quasi-totalité des éléments d'actif des compagnies débitrices ont été liquidés. L'instance a été introduite il y a plus de quatre ans. Depuis, un seul juge surveillant a été chargé de sa supervision. À ce titre, il a rendu de nombreuses décisions discrétionnaires.

[2] Deux de ces décisions du juge surveillant font l'objet du présent pourvoi. Chacune d'elles soulève une question exigeant de notre Cour qu'elle précise la nature et la portée du pouvoir discrétionnaire exercé par les tribunaux dans les instances relevant de la LACC. La première est de savoir si le juge surveillant dispose du pouvoir discrétionnaire d'interdire à un créancier de voter sur un plan d'arrangement s'il estime que ce créancier agit dans un but illégitime. La deuxième porte sur le pouvoir du juge surveillant d'approuver le financement du litige par un tiers à titre de financement temporaire, en vertu de l'art. 11.2 de la LACC.

[3] Pour les motifs qui suivent, nous sommes d'avis de répondre à ces deux questions par l'affirmative, à l'instar du juge surveillant. Dans la mesure où la

and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

II. Facts

[4] In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, “Bluberi”).

[5] In 2012, Bluberi sought financing from the respondent, Callidus Capital Corporation (“Callidus”), which describes itself as an “asset-based or distressed lender” (R.F., at para. 26). Callidus extended a credit facility of approximately \$24 million to Bluberi. This debt was secured in part by a share pledge agreement.

[6] Over the next three years, Bluberi lost significant amounts of money, and Callidus continued to extend credit. By 2015, Bluberi owed approximately \$86 million to Callidus — close to half of which Bluberi asserts is comprised of interest and fees.

A. *Bluberi's Institution of CCAA Proceedings and Initial Sale of Assets*

[7] On November 11, 2015, Bluberi filed a petition for the issuance of an initial order under the CCAA. In its petition, Bluberi alleged that its liquidity issues

Cour d'appel s'est dite d'avis contraire et a modifié les décisions discrétionnaires du juge surveillant, nous concluons qu'elle n'était pas justifiée de le faire. Avec égards, la Cour d'appel n'a pas fait preuve de la déférence à laquelle elle était tenue par rapport aux décisions du juge surveillant. C'est pourquoi, comme nous l'avons ordonné à l'issue de l'audience, les pourvois sont accueillis et l'ordonnance du juge surveillant est rétablie.

II. Les faits

[4] En 1994, M. Gérald Duhamel fonde Bluberi Gaming Technologies Inc., qui est devenue l'une des appelantes, 9354-9186 Québec inc. L'entreprise fabriquait, distribuait, installait et entretenait des appareils de jeux électroniques pour casino. Elle offrait aussi des systèmes de gestion dans le domaine des jeux d'argent. Pendant toute la période pertinente, son unique actionnaire était Bluberi Group Inc., qui est devenue une autre des appelantes, 9354-9178 Québec inc. Par l'entremise d'une fiducie familiale, M. Duhamel contrôlait Bluberi Group inc. et, de ce fait, Bluberi Gaming (collectivement, « Bluberi »).

[5] En 2012, Bluberi demande du financement à l'intimée Callidus Capital Corporation (« Callidus »), qui se décrit comme un [TRADUCTION] « prêteur offrant du financement garanti par des actifs ou du financement à des entreprises en difficulté financière » (m.i., par. 26). Callidus lui consent une facilité de crédit d'environ 24 millions de dollars, que Bluberi garantit partiellement en signant une entente par laquelle elle met en gage ses actions.

[6] Au cours des trois années suivantes, Bluberi perd d'importantes sommes d'argent et Callidus continue de lui consentir du crédit. En 2015, Bluberi doit environ 86 millions de dollars à Callidus — Bluberi affirme que près de la moitié de cette somme est composée d'intérêts et de frais.

A. *L'introduction des procédures sous le régime de la LACC par Bluberi et la vente initiale d'actifs*

[7] Le 11 novembre 2015, Bluberi dépose une requête en délivrance d'une ordonnance initiale sous le régime de la LACC. Dans sa requête, Bluberi allègue

were the result of Callidus taking *de facto* control of the corporation and dictating a number of purposefully detrimental business decisions. Bluberi alleged that Callidus engaged in this conduct in order to deplete the corporation's equity value with a view to owning Bluberi and, ultimately, selling it.

[8] Over Callidus's objection, Bluberi's petition succeeded. The supervising judge, Michaud J., issued an initial order under the CCAA. Among other things, the initial order confirmed that Bluberi was a "debtor company" within the meaning of s. 2(1) of the Act; stayed any proceedings against Bluberi or any director or officer of Bluberi; and appointed Ernst & Young Inc. as monitor ("Monitor").

[9] Working with the Monitor, Bluberi determined that a sale of its assets was necessary. On January 28, 2016, it proposed a sale solicitation process, which the supervising judge approved. That process led to Bluberi entering into an asset purchase agreement with Callidus. The agreement contemplated that Callidus would obtain all of Bluberi's assets in exchange for extinguishing almost the entirety of its secured claim against Bluberi, which had ballooned to approximately \$135.7 million. Callidus would maintain an undischarged secured claim of \$3 million against Bluberi. The agreement would also permit Bluberi to retain claims for damages against Callidus arising from its alleged involvement in Bluberi's financial difficulties ("Retained Claims").¹ Throughout these proceedings, Bluberi has asserted that the Retained Claims should amount to over \$200 million in damages.

[10] The supervising judge approved the asset purchase agreement, and the sale of Bluberi's assets to Callidus closed in February 2017. As a result, Callidus effectively acquired Bluberi's business, and has continued to operate it as a going concern.

que ses problèmes de liquidité découlent du fait que Callidus exerce un contrôle de facto à l'égard de son entreprise et lui dicte un certain nombre de décisions d'affaires dans l'intention de lui nuire. Bluberi prétend que Callidus agit ainsi afin de réduire la valeur des actions dans le but de devenir propriétaire de Bluberi et ultimement de la vendre.

[8] Malgré l'objection de Callidus, la requête de Bluberi est accueillie. Le juge surveillant, le juge Michaud, rend une ordonnance initiale sous le régime de la LACC. Celle-ci confirme entre autres que Bluberi est une « compagnie débitrice » au sens du par. 2(1) de la Loi, suspend toute procédure introduite à l'encontre de Bluberi, de ses administrateurs ou dirigeants, et désigne Ernst & Young Inc. pour agir à titre de contrôleur (« contrôleur »).

[9] Travaillant en collaboration avec le contrôleur, Bluberi décide que la vente de ses actifs est nécessaire. Le 28 janvier 2016, elle propose un processus de mise en vente que le juge surveillant approuve. Ce processus débouche sur la conclusion d'une convention d'achat d'actifs entre Bluberi et Callidus. Cette convention prévoit que Callidus obtient l'ensemble des actifs de Bluberi en échange de l'extinction de la presque totalité de la créance garantie qu'elle détient à l'encontre de Bluberi, qui s'élevait à environ 135,7 millions de dollars. Callidus conserve une créance garantie non libérée de 3 millions de dollars contre Bluberi. La convention prévoit aussi que Bluberi se réserve le droit de réclamer des dommages-intérêts à Callidus en raison de l'implication alléguée de celle-ci dans ses difficultés financières (les « réclamations réservées »)¹. Tout au long de ces procédures, Bluberi affirme que la valeur des réclamations ainsi réservées représente plus de 200 millions de dollars en dommages-intérêts.

[10] Le juge surveillant approuve la convention d'achat d'actifs, et la vente des actifs de Bluberi à Callidus est conclue en février 2017. En conséquence, Callidus acquiert l'entreprise de Bluberi et en poursuit l'exploitation.

¹ Bluberi does not appear to have filed this claim yet (see 2018 QCCS 1040, at para. 10 (CanLII)).

¹ Bluberi semble ne pas avoir encore déposé cette action (voir 2018 QCCS 1040, par. 10 (CanLII)).

[11] Since the sale, the Retained Claims have been Bluberi's sole remaining asset and thus the sole security for Callidus's \$3 million claim.

B. The Initial Competing Plans of Arrangement

[12] On September 11, 2017, Bluberi filed an application seeking the approval of a \$2 million interim financing credit facility to fund the litigation of the Retained Claims and other related relief. The lender was a joint venture numbered company incorporated as 9364-9739 Québec inc. This interim financing application was set to be heard on September 19, 2017.

[13] However, one day before the hearing, Callidus proposed a plan of arrangement ("First Plan") and applied for an order convening a creditors' meeting to vote on that plan. The First Plan proposed that Callidus would fund a \$2.5 million (later increased to \$2.63 million) distribution to Bluberi's creditors, except itself, in exchange for a release from the Retained Claims. This would have fully satisfied the claims of Bluberi's former employees and those creditors with claims worth less than \$3000; creditors with larger claims were to receive, on average, 31 percent of their respective claims.

[14] The supervising judge adjourned the hearing of both applications to October 5, 2017. In the meantime, Bluberi filed its own plan of arrangement. Among other things, the plan proposed that half of any proceeds resulting from the Retained Claims, after payment of expenses and Bluberi's creditors' claims, would be distributed to the unsecured creditors, as long as the net proceeds exceeded \$20 million.

[15] On October 5, 2017, the supervising judge ordered that the parties' plans of arrangement could be put to a creditors' vote. He ordered that both parties share the fees and expenses related to the

[11] Depuis la vente, les réclamations réservées sont le seul élément d'actif de Bluberi et représentent donc la seule garantie que possède Callidus pour sa créance de 3 millions de dollars.

B. Les premiers plans d'arrangement concurrents

[12] Le 11 septembre 2017, Bluberi dépose une demande par laquelle elle sollicite l'approbation d'un financement provisoire de 2 millions de dollars sous forme de facilité de crédit afin de financer le coût des procédures liées aux réclamations réservées ainsi que d'autres mesures de réparation accessoires. Le prêteur est une coentreprise constituée sous le numéro 9364-9739 Québec inc. Cette demande de financement provisoire devait être instruite le 19 septembre 2017.

[13] Toutefois, la veille de l'audience, Callidus propose un plan d'arrangement (« premier plan ») et demande une ordonnance pour convoquer les créanciers à une assemblée afin qu'ils votent sur ce plan. Le premier plan proposait que Callidus avance la somme de 2,5 millions de dollars (puis plus tard 2,63 millions de dollars) aux fins de distribution aux créanciers de Bluberi, sauf elle-même, en échange de quoi elle serait libérée des réclamations réservées. Cette somme aurait permis d'acquitter entièrement les créances des anciens employés de Bluberi et toutes celles de moins de 3 000 \$; les créanciers dont la créance était plus élevée devaient recevoir chacun en moyenne 31 pour 100 du montant de leur réclamation.

[14] Le juge surveillant ajourne donc l'audition des deux demandes au 5 octobre 2017. Entre-temps, Bluberi dépose son propre plan d'arrangement dans lequel elle propose notamment que la moitié de toute somme provenant des réclamations réservées, après paiement des dépenses et acquittement des réclamations des créanciers de Bluberi, soit distribuée aux créanciers non garantis, pourvu que la somme nette ainsi obtenue soit supérieure à 20 millions de dollars.

[15] Le 5 octobre 2017, le juge surveillant ordonne que les plans d'arrangement des parties soient soumis au vote des créanciers. Il ordonne que les honoraires et dépenses découlant de la présentation des

presentation of the plans of arrangement at a creditors' meeting, and that a party's failure to deposit those funds with the Monitor would bar the presentation of that party's plan of arrangement. Bluberi elected not to deposit the necessary funds, and, as a result, only Callidus's First Plan was put to the creditors.

C. Creditors' Vote on Callidus's First Plan

[16] On December 15, 2017, Callidus submitted its First Plan to a creditors' vote. The plan failed to receive sufficient support. Section 6(1) of the CCAA provides that, to be approved, a plan must receive a "double majority" vote in each class of creditors — that is, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims. All of Bluberi's creditors, besides Callidus, formed a single voting class of unsecured creditors. Of the 100 voting unsecured creditors, 92 creditors (representing \$3,450,882 of debt) voted in favour, and 8 voted against (representing \$2,375,913 of debt). The First Plan failed because the creditors voting in favour only held 59.22 percent of the total value being voted, which did not meet the s. 6(1) threshold. Most notably, SMT Hautes Technologies ("SMT"), which held 36.7 percent of Bluberi's debt, voted against the plan.

[17] Callidus did not vote on the First Plan — despite the Monitor explicitly stating that Callidus could have "vote[d] . . . the portion of its claim, assessed by Callidus, to be an unsecured claim" (Joint R.R., vol. III, at p.188).

D. Bluberi's Interim Financing Application and Callidus's New Plan

[18] On February 6, 2018, Bluberi filed one of the applications underlying these appeals, seeking authorization of a proposed third party litigation funding agreement ("LFA") with a publicly traded

plans d'arrangement à l'assemblée des créanciers soient partagés entre les parties et qu'il soit interdit à toute partie qui ne dépose pas les fonds nécessaires auprès du contrôleur de présenter son plan d'arrangement. Bluberi choisit de ne pas déposer les fonds nécessaires et, en conséquence, seul le premier plan de Callidus est présenté aux créanciers.

C. Le vote des créanciers sur le premier plan de Callidus

[16] Le 15 décembre 2017, Callidus soumet son premier plan au vote des créanciers. Le plan n'obtient pas l'appui nécessaire. Le paragraphe 6(1) de la LACC prévoit que, pour être approuvé, le plan doit obtenir la « double majorité » de chaque catégorie de créanciers — c'est-à-dire, la majorité en *nombre* d'une catégorie de créanciers, qui représente aussi les deux tiers en *valeur* des réclamations de cette catégorie de créanciers. Tous les créanciers de Bluberi, hormis Callidus, forment une seule catégorie de créanciers non garantis ayant droit de vote. Des 100 créanciers non garantis, 92 (qui ont ensemble une créance de 3 450 882 \$) votent en faveur du plan, et 8 votent contre (qui ont ensemble une créance de 2 375 913 \$). Le premier plan échoue parce que les réclamations des créanciers ayant voté en sa faveur ne détiennent que 59,22 p. 100 en valeur des réclamations de ceux ayant voté, ce qui ne respectait pas le seuil établi au par. 6(1). Plus particulièrement, SMT Hautes Technologies (« SMT »), qui détient 36,7 p. 100 de la dette de Bluberi, vote contre le plan.

[17] Callidus ne vote pas sur le premier plan — malgré les propos explicites du contrôleur, selon qui Callidus pouvait [TRADUCTION] « voter [. . .] selon le pourcentage de sa créance qui, de l'avis de Callidus, était non garantie » (dossier conjoint des intimés, vol. III, p. 188).

D. La demande de financement provisoire de Bluberi et le nouveau plan de Callidus

[18] Le 6 février 2018, Bluberi dépose une des demandes à l'origine des présents pourvois. Elle demande au tribunal l'autorisation de conclure un accord de financement du litige par un tiers (« AFL »)

litigation funder, IMF Bentham Limited or its Canadian subsidiary, Bentham IMF Capital Limited (collectively, “Bentham”). Bluberi’s application also sought the placement of a \$20 million super-priority charge in favour of Bentham on Bluberi’s assets (“Litigation Financing Charge”).

[19] The LFA contemplated that Bentham would fund Bluberi’s litigation of the Retained Claims in exchange for receiving a portion of any settlement or award after trial. However, were Bluberi’s litigation to fail, Bentham would lose all of its invested funds. The LFA also provided that Bentham could terminate the litigation of the Retained Claims if, acting reasonably, it were no longer satisfied of the merits or commercial viability of the litigation.

[20] Callidus and certain unsecured creditors who voted in favour of its plan (who are now respondents and style themselves the “Creditors’ Group”) contested Bluberi’s application on the ground that the LFA was a plan of arrangement and, as such, had to be submitted to a creditors’ vote.²

[21] On February 12, 2018, Callidus filed the other application underlying these appeals, seeking to put another plan of arrangement to a creditors’ vote (“New Plan”). The New Plan was essentially identical to the First Plan, except that Callidus increased the proposed distribution by \$250,000 (from \$2.63 million to \$2.88 million). Further, Callidus filed an amended proof of claim, which purported to value the security attached to its \$3 million claim at *nil*. Callidus was of the view that this valuation was proper because Bluberi had no assets other than the Retained Claims. On this basis, Callidus asserted that it stood in the position of an unsecured creditor, and sought the supervising judge’s permission to vote on the New Plan with the other unsecured creditors.

avec un bailleur de fonds de litiges coté en bourse, IMF Bentham Limited ou sa filiale canadienne, Corporation Bentham IMF Capital (collectivement, « Bentham »). Bluberi demande également l’autorisation de grever son actif d’une charge super-prioritaire de 20 millions de dollars en faveur de Bentham (« charge liée au financement du litige »).

[19] L’AFL prévoit que Bentham financera le litige relatif aux réclamations réservées de Bluberi et qu’en retour elle recevra un pourcentage de toute somme convenue par règlement ou accordée à l’issue d’un procès. Toutefois, dans l’éventualité où Bluberi serait déboutée, Bentham perdra la totalité des fonds investis. L’AFL prévoit aussi que Bentham peut mettre fin au recours si, agissant de façon raisonnable, elle n’est plus convaincue du bien-fondé du litige ou de sa viabilité commerciale.

[20] Callidus et certains créanciers non garantis qui ont voté en faveur de son plan (qui sont maintenant intimés au présent pourvoi et se font appeler le « groupe de créanciers ») contestent la demande de Bluberi au motif que l’AFL est un plan d’arrangement et qu’à ce titre, il doit être soumis au vote des créanciers².

[21] Le 12 février 2018, Callidus dépose l’autre demande qui est à l’origine des présents pourvois, laquelle vise à soumettre un autre plan d’arrangement au vote des créanciers (« nouveau plan »). Le nouveau plan est pour l’essentiel identique au premier plan, sauf que Callidus propose que la somme à distribuer soit augmentée de 250 000 \$ (passant de 2,63 millions à 2,88 millions de dollars). Callidus a en outre déposé une preuve de réclamation modifiée qui ramène à *zéro* la valeur de la garantie liée à sa créance de 3 millions de dollars. Callidus considère que cette évaluation est juste parce que Bluberi n’a aucun autre élément d’actif que les revendications réservées. Sur cette base, elle fait valoir qu’elle se trouve dans la situation d’un créancier non garanti et

² Notably, the Creditors’ Group advised Callidus that it would lend its support to the New Plan. It also asked Callidus to reimburse any legal fees incurred in association with that support. At the same time, the Creditors’ Group did not undertake to vote in any particular way, and confirmed that each of its members would assess all available alternatives individually.

² Fait à remarquer, le groupe de créanciers a informé Callidus qu’il appuierait le nouveau plan. Il lui a aussi demandé de rembourser tous les frais juridiques découlant de cet appui. Par ailleurs, le groupe de créanciers ne s’est pas engagé à voter d’une certaine façon, et a confirmé que chacun de ses membres évaluerait toutes les possibilités qui s’offraient à lui.

Given the size of its claim, if Callidus were permitted to vote on the New Plan, the plan would necessarily pass a creditors' vote. Bluberi opposed Callidus's application.

[22] The supervising judge heard Bluberi's interim financing application and Callidus's application regarding its New Plan together. Notably, the Monitor supported Bluberi's position.

III. Decisions Below

A. *Quebec Superior Court, 2018 QCCS 1040 (Michaud J.)*

[23] The supervising judge dismissed Callidus's application, declining to submit the New Plan to a creditors' vote. He granted Bluberi's application, authorizing Bluberi to enter into a litigation funding agreement with Bentham on the terms set forth in the LFA and imposing the Litigation Financing Charge on Bluberi's assets.

[24] With respect to Callidus's application, the supervising judge determined Callidus should not be permitted to vote on the New Plan because it was acting with an "improper purpose" (para. 48 (CanLII)). He acknowledged that creditors are generally entitled to vote in their own self-interest. However, given that the First Plan — which was almost identical to the New Plan — had been defeated by a creditors' vote, the supervising judge concluded that Callidus's attempt to vote on the New Plan was an attempt to override the result of the first vote. In particular, he wrote:

Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when its vote would very likely result in

demande au juge surveillant la permission de voter sur le nouveau plan avec les autres créanciers non garantis. Vu l'importance de sa réclamation, le plan serait nécessairement adopté par les créanciers si Callidus était autorisée à voter. Bluberi s'oppose à la demande de Callidus.

[22] Le juge surveillant instruit ensemble la demande de financement provisoire de Bluberi ainsi que la demande présentée par Callidus concernant son nouveau plan. Il est à souligner que le contrôleur appuie la position de Bluberi.

III. Historique judiciaire

A. *Cour supérieure du Québec, 2018 QCCS 1040 (le juge Michaud)*

[23] Le juge surveillant rejette la demande de Callidus et refuse de soumettre le nouveau plan au vote des créanciers. Il accueille la demande de Bluberi, l'autorisant ainsi à conclure un accord de financement du litige avec Bentham aux conditions énoncées dans l'AFL et ordonne que les actifs de Bluberi soient grevés de la charge liée au financement du litige.

[24] En ce qui a trait à la demande de Callidus, le juge surveillant décide que cette dernière ne peut voter sur le nouveau plan parce qu'elle agit dans un [TRADUCTION] « but illégitime » (par. 48 (CanLII)). Il reconnaît que les créanciers ont habituellement le droit de voter dans leur propre intérêt. Or, étant donné que le premier plan — qui était presque identique au nouveau plan — a été rejeté par les créanciers, le juge surveillant conclut qu'en demandant à voter sur le nouveau plan, Callidus tentait de contourner le résultat du premier vote. Il écrit notamment :

[TRADUCTION] Tenant compte de leur intérêt, la Cour a accepté à l'automne 2017 que le plan de Callidus soit soumis au vote des créanciers, étant entendu que, en tant que créancière garantie, celle-ci ne voterait pas. Toutefois, si, dans les circonstances actuelles, Callidus était autorisée à voter sur son propre plan, elle le ferait dans un but illégitime d'autant plus qu'il est probable que son vote

the New Plan meeting the two thirds threshold for approval under the CCAA.

As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.

It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

[25] The supervising judge concluded that, in these circumstances, allowing Callidus to vote would be both “unfair and unreasonable” (para. 47). He also observed that Callidus's conduct throughout the CCAA proceedings “lacked transparency” (at para. 41) and that Callidus was “solely motivated by the [pending] litigation” (para. 44). In sum, he found that Callidus's conduct was contrary to the “requirements of appropriateness, good faith, and due diligence”, and ordered that Callidus would not be permitted to vote on the New Plan (para. 48, citing *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 70).

[26] Because Callidus was not permitted to vote on the New Plan and SMT had unequivocally stated its intention to vote against it, the supervising judge concluded that the plan had no reasonable prospect of success. He therefore declined to submit it to a creditors' vote.

[27] With respect to Bluberi's application, the supervising judge considered three issues relevant to these appeals: (1) whether the LFA should be submitted to a creditors' vote; (2) if not, whether the LFA ought to be approved by the court; and (3) if so, whether the \$20 million Litigation Financing Charge should be imposed on Bluberi's assets.

[28] The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. He considered a plan of arrangement to involve “an arrangement

permettrait d'atteindre le seuil de deux tiers nécessaire pour que le nouveau plan soit approuvé en vertu de la LACC.

Comme l'a souligné SMT, la principale créancière non garantie, Callidus souhaite voter afin d'annuler le vote de SMT, qui a empêché que son plan soit approuvé lors de l'assemblée des créanciers.

C'est une chose de laisser les créanciers voter sur un plan présenté par un créancier garanti, c'en est une autre de laisser ce créancier garanti voter sur son propre plan et exercer ainsi un contrôle sur le vote à seule fin d'être libéré de toute responsabilité. [par. 45-47]

[25] Le juge surveillant conclut que, dans les circonstances, permettre à Callidus de voter serait à la fois [TRADUCTION] « injuste et déraisonnable » (par. 47). Il note aussi que, tout au long de la procédure introduite en vertu de la LACC, Callidus a « manqué de transparence » (par. 41) et qu'elle « n'est motivée que par le litige [en cours] » (par. 44). En somme, il conclut que la conduite de Callidus est contraire à « l'opportunité, [à] la bonne foi et [à] la diligence » requises, et il ordonne que Callidus ne puisse pas voter sur le nouveau plan (par. 48, citant *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, par. 70).

[26] Puisque Callidus n'a pas été autorisée à voter sur le nouveau plan et que SMT a manifesté sans équivoque son intention de voter contre celui-ci, le juge surveillant conclut que le plan n'a aucune possibilité raisonnable de recevoir l'aval des créanciers. Il refuse donc de le soumettre au vote des créanciers.

[27] Pour ce qui est de la demande de Bluberi, le juge surveillant examine trois questions qui sont pertinentes pour les présents pourvois : (1) si l'AFL devait être soumis au vote des créanciers; (2) dans la négative, si l'AFL devait être approuvé par le tribunal; et (3) le cas échéant, s'il devait ordonner que la charge liée au financement du litige de 20 millions de dollars grève les actifs de Bluberi.

[28] Le juge surveillant décide qu'il n'est pas nécessaire de soumettre l'AFL au vote des créanciers parce qu'il ne s'agit pas d'un plan d'arrangement. Il considère qu'un tel plan suppose [TRADUCTION] « un

or compromise between a debtor and its creditors” (para. 71, citing *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102, at para. 92 (“*Crystallex*”). In his view, the LFA lacked this essential feature. He also concluded that the LFA did not need to be accompanied by a plan, as Bluberi had stated its intention to file a plan in the future.

[29] After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third party litigation funding set out in *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150, at para. 41, and *Hayes v. The City of Saint John*, 2016 NBQB 125, at para. 4 (CanLII). In particular, he considered Bentham’s percentage of return to be reasonable in light of its level of investment and risk. Further, the supervising judge rejected Callidus and the Creditors’ Group’s argument that the LFA gave too much discretion to Bentham. He found that the LFA did not allow Bentham to exert undue influence on the litigation of the Retained Claims, noting similarly broad clauses had been approved in the CCAA context (para. 82, citing *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332, at para. 23).

[30] Finally, the supervising judge imposed the Litigation Financing Charge on Bluberi’s assets. While significant, the supervising judge considered the amount to be reasonable given: the amount of damages that would be claimed from Callidus; Bentham’s financial commitment to the litigation; and the fact that Bentham was not charging any interim fees or interest (i.e., it would only profit in the event of successful litigation or settlement). Put simply, Bentham was taking substantial risks, and it was reasonable that it obtain certain guarantees in exchange.

[31] Callidus, again supported by the Creditors’ Group, appealed the supervising judge’s order, impleading Bentham in the process.

arrangement ou une transaction entre un débiteur et ses créanciers » (par. 71, citant *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102, par. 92 (« *Crystallex* »)). À son avis, l’AFL est dépourvu de cette caractéristique essentielle. Il conclut aussi qu’il n’est pas nécessaire que l’AFL soit assorti d’un plan étant donné que Bluberi a exprimé l’intention d’en déposer un plus tard.

[29] Après en avoir examiné les modalités, le juge surveillant conclut que l’AFL respecte le critère d’approbation applicable en matière de financement d’un litige par un tiers qui est établi dans les décisions *Bayens c. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150, par. 41, et *Hayes c. The City of Saint John*, 2016 NBQB 125, par. 4 (CanLII). Plus particulièrement, il considère que le taux de retour de Bentham est raisonnable eu égard à son niveau d’investissement et de risque. Il rejette en outre l’argument avancé par Callidus et le groupe de créanciers, qui soutenaient que l’AFL donne trop de latitude à Bentham. Il conclut que l’AFL ne permet pas à Bentham d’exercer une influence indue sur le déroulement du litige lié aux réclamations réservées et souligne que des clauses générales semblables à celles qu’il contient ont déjà été approuvées dans le contexte de la LACC (par. 82, citant *Schenk c. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332, par. 23).

[30] Enfin, le juge surveillant ordonne que les actifs de Bluberi soient grevés de la charge liée au financement du litige. Il juge que, même s’il est élevé, le montant en question est raisonnable étant donné : le montant des dommages-intérêts qui sont réclamés à Callidus; l’engagement financier de Bentham dans le litige; et le fait que Bentham n’exige aucune provision pour frais ou intérêts (c.-à-d. qu’elle ne tirera profit de l’accord que si le procès ou le règlement est couronné de succès). En termes simples, Bentham prend des risques importants et il est raisonnable qu’elle obtienne certaines garanties en échange.

[31] Callidus, de nouveau appuyée par le groupe de créanciers, interjette appel de l’ordonnance du juge surveillant et met en cause Bentham.

B. *Quebec Court of Appeal, 2019 QCCA 171 (Dutil and Schrager J.J.A. and Dumas J. (ad hoc))*

[32] The Court of Appeal allowed the appeal, finding that “[t]he exercise of the judge’s discretion [was] not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention [was] justified” (para. 48 (CanLII)). In particular, the court identified two errors of relevance to these appeals.

[33] First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial discretion to preclude voting due to improper purpose should be reserved for the “clearest of cases” (para. 62, referring to *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199, at para. 45). The court was of the view that Callidus’s transparent attempt to obtain a release from Bluberi’s claims against it did not amount to an improper purpose. The court also considered Callidus’s conduct prior to and during the CCAA proceedings to be incapable of justifying a finding of improper purpose.

[34] Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi’s commercial operations. The court concluded that the supervising judge had both “misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case” (para. 78).

[35] In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted

B. *Cour d’appel du Québec, 2019 QCCA 171 (les juges Dutil et Schrager et le juge Dumas (ad hoc))*

[32] La Cour d’appel accueille l’appel et conclut que [TRADUCTION] « [l]’exercice par le juge de son pouvoir discrétionnaire [n’était] pas fondé en droit, non plus qu’il ne reposait sur un traitement approprié des faits, de sorte que, peu importe la norme de contrôle appliquée, il [était] justifié d’intervenir en appel » (par. 48 (CanLII)). En particulier, la cour relève deux erreurs qui sont pertinentes pour les présents pourvois.

[33] D’une part, la cour conclut que le juge surveillant a commis une erreur en concluant que Callidus a agi dans un but illégitime en demandant l’autorisation de voter sur son nouveau plan. À son avis, Callidus aurait dû être autorisée à voter. La cour s’appuie grandement sur l’idée que les créanciers ont le droit de voter en fonction de leur propre intérêt. Elle juge que l’exercice du pouvoir discrétionnaire qui consiste à empêcher un créancier de voter dans un but illégitime devrait être [TRADUCTION] « réservé aux cas les plus évidents » (par. 62, renvoyant à *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199, par. 45). Selon elle, en tentant de façon transparente d’être libérée des réclamations de Bluberi à son égard, Callidus ne pouvait être considérée comme ayant agi dans un but illégitime. La cour conclut également que la conduite de Callidus, avant et pendant la procédure introduite en vertu de la LACC, ne pouvait justifier la conclusion qu’il existe un but illégitime.

[34] D’autre part, la cour conclut que le juge surveillant a eu tort d’approuver l’AFL en tant qu’accord de financement provisoire parce qu’à son avis, il n’est pas lié aux opérations commerciales de Bluberi. Elle conclut que le juge surveillant a [TRADUCTION] « donné à la notion de financement provisoire une interprétation non fondée en droit et qu’il a mal appliqué cette notion aux circonstances factuelles de l’affaire » (par. 78).

[35] À la lumière de ce qu’elle percevait comme une erreur, la cour substitue son opinion selon laquelle l’AFL est un plan d’arrangement et que pour

to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

[36] Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

IV. Issues

[37] These appeals raise two issues:

- (1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?
- (2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the CCAA?

V. Analysis

A. *Preliminary Considerations*

[38] Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the CCAA regime. Accordingly, before turning to those issues, we review (1) the evolving nature of CCAA proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

cette raison, il aurait dû être soumis au vote des créanciers. Elle conclut [TRADUCTION] « [qu']un arrangement ou une proposition peut englober une transaction visant les réclamations des créanciers ainsi que le processus suivi pour y donner suite » (par. 85). La cour juge que l'AFL est un plan d'arrangement parce qu'il a une incidence sur la participation des créanciers à l'indemnité susceptible d'être accordée à la suite d'un litige, qu'il oblige ceux-ci à attendre l'issue de tout litige, et qu'il est possible que les créanciers se retrouvent les mains vides. De plus, la cour conclut que le projet de Bluberi « dans son entièreté », soit la poursuite des réclamations réservées et l'AFL, doit être soumis à l'approbation des créanciers (par. 89).

[36] Bluberi et Bentham (collectivement, les « appelantes »), encore une fois appuyées par le contrôleur, se pourvoient maintenant devant notre Cour.

IV. Questions en litige

[37] Les pourvois soulèvent deux questions :

- (1) Le juge surveillant a-t-il commis une erreur en empêchant Callidus de voter sur son nouveau plan au motif qu'elle agissait dans un but illégitime?
- (2) Le juge surveillant a-t-il commis une erreur en approuvant l'AFL en tant que plan de financement provisoire, selon les termes de l'art. 11.2 de la LACC?

V. Analyse

A. *Considérations préliminaires*

[38] Pour répondre aux questions ci-dessus, nous devons les situer dans le contexte contemporain de l'insolvabilité au Canada, et plus précisément du régime de la LACC. Ainsi, avant de passer à ces questions, nous examinons (1) la nature évolutive des procédures intentées sous le régime de la LACC; (2) le rôle que joue le juge surveillant dans ces procédures; et (3) la portée du contrôle, en appel, de l'exercice du pouvoir discrétionnaire du juge surveillant.

(1) The Evolving Nature of CCAA Proceedings

[39] The CCAA is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 (“WURA”), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (WURA, s. 6(1)). While both the CCAA and the BIA enable reorganizations of insolvent companies, access to the CCAA is restricted to debtor companies facing total claims in excess of \$5 million (CCAA, s. 3(1)).

[40] Together, Canada’s insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially “catastrophic” impacts insolvency can have (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor’s insolvency; preserving and maximizing the value of a debtor’s assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, “The Oscillating Pendulum: Canada’s Sesquicentennial and Finding the Equilibrium for Insolvency Law”, in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2nd ed. 2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies’ Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

(1) La nature évolutive des procédures intentées sous le régime de la LACC

[39] La LACC est l’une des trois principales lois canadiennes en matière d’insolvabilité. Les autres sont la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985 c. B-3 (« LFI »), qui traite de l’insolvabilité des personnes physiques et des sociétés, et la *Loi sur les liquidations et les restructurations*, L.R.C. 1985 c. W-11 (« LLR »), qui traite de l’insolvabilité des institutions financières et de certaines autres personnes morales, telles que les compagnies d’assurance (LLR, par. 6(1)). Bien que la LACC et la LFI permettent toutes deux la restructuration de compagnies insolvable, l’accès à la LACC est limité aux sociétés débitrices qui sont aux prises avec des réclamations dont le montant total est supérieur à 5 millions de dollars (LACC, par. 3(1)).

[40] Ensemble, les lois canadiennes sur l’insolvabilité poursuivent un grand nombre d’objectifs réparateurs généraux qui témoignent de la vaste gamme des conséquences potentiellement « catastrophiques » qui peuvent découler de l’insolvabilité (*Sun Indalex Finance, LLC c. Syndicat des Métallus*, 2013 CSC 6, [2013] 1 R.C.S. 271, par. 1). Ces objectifs incluent les suivants : régler de façon rapide, efficace et impartiale l’insolvabilité d’un débiteur; préserver et maximiser la valeur des actifs d’un débiteur; assurer un traitement juste et équitable des réclamations déposées contre un débiteur; protéger l’intérêt public; et, dans le contexte d’une insolvabilité commerciale, établir un équilibre entre les coûts et les bénéfices découlant de la restructuration ou de la liquidation d’une compagnie (J. P. Sarra, « The Oscillating Pendulum : Canada’s Sesquicentennial and Finding the Equilibrium for Insolvency Law », dans J. P. Sarra et B. Romaine, dir., *Annual Review of Insolvency Law 2016* (2017), 9, p. 9-10; J. P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2^e éd. 2013), p. 4-5 et 14; Comité sénatorial permanent des banques et du commerce, *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* (2003), p. 13-14; R. J. Wood, *Bankruptcy and Insolvency Law* (2^e éd. 2015), p. 4-5).

[41] Among these objectives, the CCAA generally prioritizes “avoiding the social and economic losses resulting from liquidation of an insolvent company” (*Century Services*, at para. 70). As a result, the typical CCAA case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the BIA regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

[42] That said, the CCAA is fundamentally insolvency legislation, and thus it also “has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm’s financial distress . . . and enhancement of the credit system generally” (Sarra, *Rescue! The Companies’ Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 (“*Essar*”), at para. 103). In pursuit of those objectives, CCAA proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor’s assets under the auspices of the Act itself (Sarra, “The Oscillating Pendulum: Canada’s Sesquicentennial and Finding the Equilibrium for Insolvency Law”, at pp. 19-21). Such scenarios are referred to as “liquidating CCAAs”, and they are now commonplace in the CCAA landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70).

[41] Parmi ces objectifs, la LACC priorise en général le fait d’« éviter les pertes sociales et économiques résultant de la liquidation d’une compagnie insolvable » (*Century Services*, par. 70). C’est pourquoi les affaires types qui relèvent de cette loi ont historiquement facilité la restructuration de l’entreprise débitrice qui n’a pas encore déposé de proposition en la maintenant dans un état opérationnel, c’est-à-dire en permettant qu’elle poursuive ses activités. Lorsqu’une telle restructuration n’était pas possible, on considérait qu’il fallait alors procéder à la liquidation par voie de mise sous séquestre ou sous le régime de la LFI. C’est précisément le résultat qui était recherché dans l’affaire *Century Services* (voir par. 14).

[42] Cela dit, la LACC est fondamentalement une loi sur l’insolvabilité, et à ce titre, elle a aussi [TRADUCTION] « comme objectifs simultanés de maximiser le recouvrement au profit des créanciers, de préserver la valeur d’exploitation dans la mesure du possible, de protéger les emplois et les collectivités touchées par les difficultés financières de l’entreprise [. . .] et d’améliorer le système de crédit de manière générale » (Sarra, *Rescue! The Companies’ Creditors Arrangement Act*, p. 14; voir aussi *Ernst & Young Inc. c. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 (« *Essar* »), par. 103). Afin d’atteindre ces objectifs, les procédures intentées sous le régime de la LACC ont évolué de telle sorte qu’elles permettent des solutions qui évitent l’émergence, sous une forme restructurée, de la société débitrice qui existait avant le début des procédures, mais qui impliquent plutôt une certaine forme de liquidation des actifs du débiteur sous le régime même de la Loi (Sarra, « The Oscillating Pendulum : Canada’s Sesquicentennial and Finding the Equilibrium for Insolvency Law », p. 19-21). Ces cas, qualifiés de [TRADUCTION] « procédures de liquidation sous le régime de la LACC », sont maintenant courants dans le contexte de la LACC (voir *Third Eye Capital Corporation c. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, par. 70).

[43] Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an “en bloc” sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, “Liquidating CCAAs: Discretion Gone Awry?”, in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

[44] CCAA courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the CCAA being a “restructuring statute” (see, e.g., *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, at paras. 15-16, aff’d 1999 ABQB 379, 11 C.B.R. (4th) 204, at paras. 40-43; A. Nocilla, “The History of the Companies’ Creditors Arrangement Act and the Future of Re-Structuring Law in Canada” (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

[45] However, since s. 36 of the CCAA came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor

[43] Les procédures de liquidation sous le régime de la LACC revêtent différentes formes et peuvent, entre autres, inclure la vente de la société débitrice à titre d’entreprise en activité; la vente « en bloc » des éléments d’actif susceptibles d’être exploités par un acquéreur; une liquidation partielle de l’entreprise ou une réduction de ses activités; ou encore une vente de ses actifs élément par élément (B. Kaplan, « Liquidating CCAAs : Discretion Gone Awry? » dans J. P. Sarra, dir., *Annual Review of Insolvency Law* (2008), 79, p. 87-89). Les résultats commerciaux ultimement obtenus à l’issue des procédures de liquidation introduites sous le régime de la LACC sont eux aussi variés. Certaines procédures peuvent avoir pour résultat la continuité des activités de la débitrice sous la forme d’une autre entité viable (p. ex., les sociétés liquidées dans *Indalex* et *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (C.J. Ont., Div. gén.)), alors que d’autres peuvent simplement aboutir à la vente des actifs et de l’inventaire sans donner naissance à une nouvelle entité (p. ex., la procédure en cause dans *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, par. 7 et 31). D’autres encore, comme dans le dossier qui nous occupe, peuvent donner lieu à la vente de la plupart des actifs de la débitrice en vue de la poursuite de son activité, laissant à la débitrice et aux parties intéressées le soin de s’occuper des actifs résiduels.

[44] Les tribunaux chargés de l’application de la LACC ont d’abord commencé à approuver ces formes de liquidation en exerçant le vaste pouvoir discrétionnaire que leur confère la Loi. L’émergence de cette pratique a fait l’objet de critiques, essentiellement parce qu’elle semblait incompatible avec l’objectif de « restructuration » de la LACC (voir, p. ex., *Uti Energy Corp. c. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, par. 15-16, conf. 1999 ABQB 379, 11 C.B.R. (4th) 204, par. 40-43; A. Nocilla, « The History of the Companies’ Creditors Arrangement Act and the Future of Re-Structuring Law in Canada » (2014), 56 *Rev. can. dr. comm.* 73, p. 88-92).

[45] Toutefois, depuis que l’art. 36 de la LACC est entré en vigueur en 2009, les tribunaux l’utilisent pour consentir à une liquidation sous le régime de la LACC. L’article 36 confère aux tribunaux le pouvoir

company's assets outside the ordinary course of business.³ Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the CCAA, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the CCAA in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

d'autoriser la vente ou la disposition des actifs d'une compagnie débitrice hors du cours ordinaire de ses affaires³. Fait important, lorsque le Comité sénatorial permanent des banques et du commerce a recommandé l'adoption de l'art. 36, il a fait observer que la liquidation n'est pas nécessairement incompatible avec les objectifs réparateurs de la LACC et qu'il pourrait s'agir d'un moyen « soit pour obtenir des capitaux [et faciliter la restructuration] ou éviter des pertes plus graves aux créanciers, soit pour se concentrer sur ses activités solvables » (p. 163). D'autres auteurs ont observé que la liquidation peut [TRADUCTION] « être un moyen de restructurer une entreprise » en lui permettant de survivre, quoique sous une forme corporative différente ou sous la gouverne de propriétaires différents (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 169; voir aussi K. P. McElcheran, *Commercial Insolvency in Canada* (4^e éd. 2019), p. 311). D'ailleurs, dans l'arrêt *Indalex*, la compagnie a vendu ses actifs sous le régime de la LACC afin de protéger les emplois de son personnel, même si elle ne pouvait demeurer leur employeur (voir par. 51).

[46] Ultimately, the relative weight that the different objectives of the CCAA take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the BIA context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court explained that, as a general matter, the BIA serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However,

[46] En définitive, le poids relatif attribué aux différents objectifs de la LACC dans une affaire donnée peut varier en fonction des circonstances factuelles, de l'étape des procédures ou des solutions qui sont présentées à la cour pour approbation. En l'espèce, il est possible d'établir un parallèle avec le contexte de la LFI. Dans l'arrêt *Orphan Well Association c. Grant Thornton Ltd.*, 2019 CSC 5, [2019] 1 R.C.S. 150, par. 67, notre Cour a expliqué que, de façon générale, la LFI vise deux objectifs : (1) la réhabilitation financière du failli, et (2) le partage équitable des actifs du failli entre les créanciers. Or, dans les cas où

³ We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the CCAA as opposed to requiring the parties to proceed to liquidation under a receivership or the BIA regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167-68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.

³ Mentionnons que, bien que l'art. 36 codifie désormais le pouvoir du juge surveillant de rendre une ordonnance de vente et de dévolution, et qu'il énonce les facteurs devant orienter l'exercice de son pouvoir discrétionnaire d'accorder une telle ordonnance, il est muet quant aux circonstances dans lesquelles les tribunaux doivent approuver une liquidation sous le régime de la LACC plutôt que d'exiger des parties qu'elles procèdent à la liquidation par voie de mise sous séquestre ou sous le régime de la LFI (voir Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 167-168; A. Nocilla, « Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36 » (2012) 52 *Rev. can. dr. comm.* 226, p. 243-244 et 247). Cette question demeure ouverte et n'a pas été soumise à la Cour dans *Indalex* non plus que dans les présents pourvois.

in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the CCAA, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the CCAA leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) The Role of a Supervising Judge in CCAA Proceedings

[47] One of the principal means through which the CCAA achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each CCAA proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

[48] The CCAA capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and “meet contemporary business and social needs” (*Century Services*, at para. 58) in “real-time” (para. 58, citing R. B. Jones, “The Evolution of Canadian Restructuring: Challenges for the Rule of Law”, in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge “to make any order that [the judge] considers appropriate in the circumstances”. This section has been described as “the engine” driving the statutory scheme (*Stelco*

la société débitrice ne s’extirpera jamais de la faillite, seul le dernier objectif est pertinent (voir par. 67). Dans la même veine, sous le régime de la LACC, lorsque la restructuration d’une société débitrice qui n’a pas déposé de proposition est impossible, une liquidation visant à protéger sa valeur d’exploitation et à maintenir ses activités courantes peut devenir l’objectif réparateur principal. En outre, lorsque la restructuration ou la liquidation est terminée et que le tribunal doit décider du sort des actifs résiduels, l’objectif de maximiser le recouvrement des créanciers à partir de ces actifs peut passer au premier plan. Comme nous l’expliquerons, la structure de la LACC laisse au juge surveillant le soin de procéder à un examen et à une mise en balance au cas par cas de ces objectifs réparateurs.

(2) Le rôle du juge surveillant dans les procédures intentées sous le régime de la LACC

[47] Un des principaux moyens par lesquels la LACC atteint ses objectifs réside dans le rôle particulier de surveillance qu’elle réserve aux juges (voir Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 18-19). Chaque procédure fondée sur la LACC est supervisée du début à la fin par un seul juge surveillant. En raison de ses rapports continus avec les parties, ce dernier acquiert une connaissance approfondie de la dynamique entre les intéressés et des réalités commerciales entourant la procédure.

[48] La LACC mise sur la position avantageuse qu’occupe le juge surveillant en lui accordant le vaste pouvoir discrétionnaire de rendre toute une gamme d’ordonnances susceptibles de répondre aux circonstances de chaque cas et de « [s’adapter] aux besoins commerciaux et sociaux contemporains » (*Century Services*, par. 58) en « temps réel » (par. 58, citant R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 484). Le point d’ancrage de ce pouvoir discrétionnaire est l’art. 11, qui confère au juge le pouvoir de « rendre toute ordonnance qu’il estime indiquée ». Cette disposition a été décrite

Inc. (Re) (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

[49] The discretionary authority conferred by the CCAA, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the CCAA, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three “baseline considerations” (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

[50] The first two considerations of appropriateness and good faith are widely understood in the CCAA context. Appropriateness “is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA” (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the CCAA, which provides:

Good faith

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

Good faith — powers of court

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

(See also *BIA*, s. 4.2; *Budget Implementation Act*, 2019, No. 1, S.C. 2019, c. 29, ss. 133 and 140.)

[51] The third consideration of due diligence requires some elaboration. Consistent with the CCAA regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or

comme étant le « moteur » du régime législatif (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36).

[49] Quoique vaste, le pouvoir discrétionnaire conféré par la LACC n’est pas sans limites. Son exercice doit tendre à la réalisation des objectifs réparateurs de la LACC, que nous avons expliqués ci-dessus (voir *Century Services*, par. 59). En outre, la cour doit garder à l’esprit les trois « considérations de base » (par. 70) qu’il incombe au demandeur de démontrer : (1) que l’ordonnance demandée est indiquée, et (2) qu’il a agi de bonne foi et (3) avec la diligence voulue (par. 69).

[50] Les deux premières considérations, l’opportunité et la bonne foi, sont largement connues dans le contexte 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 » (par. 70). Par ailleurs, l’exigence bien établie selon laquelle les parties doivent agir de bonne foi dans les procédures d’insolvabilité est depuis peu mentionnée de façon expresse à l’art. 18.6 de la LACC, qui dispose :

Bonne foi

18.6 (1) Tout intéressé est tenu d’agir de bonne foi dans le cadre d’une procédure intentée au titre de la présente loi.

Bonne foi — pouvoirs du tribunal

(2) S’il est convaincu que l’intéressé n’agit pas de bonne foi, le tribunal peut, à la demande de tout intéressé, rendre toute ordonnance qu’il estime indiquée.

(Voir aussi *LFI*, art. 4.2; *Loi n° 1 d’exécution du budget de 2019*, L.C. 2019, c. 29, art. 133 et 140.)

[51] La troisième considération, celle de la diligence, requiert qu’on s’y attarde. Conformément au régime de la LACC en général, la considération de diligence décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n’usent

position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at p. 31). The procedures set out in the CCAA rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in CCAA proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the CCAA regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently).

[52] We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the CCAA (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as “the eyes and the ears of the court” throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see CCAA, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 566 and 569).

pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (C.J. Ont. (Div. gén.)), p. 31). La procédure prévue par la LACC se fonde sur les négociations et les transactions entre le débiteur et les intéressés, le tout étant supervisé par le juge surveillant et le contrôleur. Il faut donc nécessairement que, dans la mesure du possible, ceux qui participent au processus soient sur un pied d'égalité et aient une compréhension claire de leurs droits respectifs (voir McElcheran, p. 262). La partie qui, dans le cadre d'une procédure fondée sur la LACC, n'agit pas avec diligence et en temps utile risque de compromettre le processus et, de façon plus générale, de nuire à l'efficacité du régime de la Loi (voir, p. ex., *North American Tungsten Corp. c. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 par. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada c. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276 par. 11; *Caterpillar Financial Services Ltd. c. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, par. 51-52, où les tribunaux se sont penchés sur le manque de diligence d'une partie).

[52] Nous soulignons que les juges surveillants s'acquittent de leur rôle de supervision avec l'aide d'un contrôleur qui est nommé par le tribunal et dont les compétences et les attributions sont énoncées dans la LACC (voir art. 11.7, 11.8 et 23 à 25). Le contrôleur est un expert indépendant et impartial qui agit comme [TRADUCTION] « les yeux et les oreilles du tribunal » tout au long de la procédure (*Essar*, par. 109). Il a essentiellement pour rôle de donner au tribunal des avis consultatifs sur le caractère équitable de tout plan d'arrangement proposé et sur les ordonnances demandées par les parties, y compris celles portant sur la vente d'actifs et le financement provisoire (voir LACC, al. 23(1)d) et i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 566 et 569).

(3) Appellate Review of Exercises of Discretion by a Supervising Judge

[53] A high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 20).

[54] This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the CCAA proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339 (“*Re Edgewater Casino Inc.*”), at para. 20, are apt:

... one of the principal functions of the judge supervising the CCAA proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. ... CCAA proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

[55] With the foregoing in mind, we turn to the issues on appeal.

(3) Le contrôle en appel de l'exercice du pouvoir discrétionnaire du juge surveillant

[53] Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la LACC commandent un degré élevé de déférence. Ainsi, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable (voir *Grant Forest Products Inc. c. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, par. 98; *Bridging Finance Inc. c. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, par. 23). Elles doivent prendre garde de ne pas substituer leur propre pouvoir discrétionnaire à celui du juge surveillant (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, par. 20).

[54] Cette norme déférente de contrôle tient compte du fait que le juge surveillant possède une connaissance intime des procédures intentées sous le régime de la LACC dont il assure la supervision. À cet égard, les observations formulées par le juge Tysoe dans *Canadian Metropolitan Properties Corp. c. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339 (« *Re Edgewater Casino Inc.* »), par. 20, sont pertinentes :

[TRADUCTION] ... une des fonctions principales du juge chargé de la supervision de la procédure fondée sur la LACC est d'essayer d'établir un équilibre entre les intérêts des différents intéressés durant le processus de restructuration, et il sera bien souvent inopportun d'examiner une des décisions qu'il aura rendues à cet égard isolément des autres. [...] Les procédures intentées sous le régime de la LACC sont de nature dynamique et le juge surveillant a une connaissance intime du processus de restructuration. La nature du processus l'oblige souvent à prendre des décisions rapides dans des situations complexes.

[55] En gardant ce qui précède à l'esprit, nous passons maintenant aux questions soulevées par le présent pourvoi.

B. *Callidus Should Not Be Permitted to Vote on Its New Plan*

[56] A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights (e.g., s. 22(3)), or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. We conclude that one such constraint arises from s. 11 of the *CCAA*, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case. In our view, the supervising judge here made no error in exercising his discretion to bar Callidus from voting on the New Plan.

(1) Parameters of Creditors' Right to Vote on Plans of Arrangement

[57] Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 4, at §149). If the requisite "double majority" in each class of creditors — again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims — vote in favour of the plan, the supervising judge may sanction the plan (*Metcalf & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135, at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is

B. *Callidus ne devrait pas être autorisée à voter sur son nouveau plan*

[56] En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la *LACC* qui peuvent limiter son droit de voter (p. ex., par. 22(3)), ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Nous concluons qu'une telle limite découle de l'art. 11 de la *LACC*, qui confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter lorsqu'il agit dans un but illégitime. Le juge surveillant est mieux placé que quiconque pour déterminer s'il doit exercer ce pouvoir dans un cas donné. À notre avis, le juge surveillant n'a, en l'espèce, commis aucune erreur en exerçant son pouvoir discrétionnaire pour empêcher Callidus de voter sur le nouveau plan.

(1) Les paramètres du droit d'un créancier de voter sur un plan d'arrangement

[57] L'approbation par les créanciers d'un plan d'arrangement ou d'une transaction est l'une des principales caractéristiques de la *LACC*, tout comme la supervision du processus assurée par le juge surveillant. Lorsqu'un plan est proposé, le juge surveillant peut, sur demande, ordonner que soit convoquée une assemblée des créanciers pour que ceux-ci puissent voter sur le plan proposé (*LACC*, art. 4 et 5). Le juge surveillant a le pouvoir discrétionnaire de décider ou non d'ordonner qu'une assemblée soit convoquée. Pour les besoins du vote à l'assemblée des créanciers, la compagnie débitrice peut établir des catégories de créanciers, sous réserve de l'approbation du tribunal (*LACC*, par. 22(1)). Peuvent faire partie de la même catégorie les créanciers « ayant des droits ou intérêts à ce point semblables [...] qu'on peut en conclure qu'ils ont un intérêt commun » (*LACC*, par. 22(2); voir aussi L. W. Houlden, G. B. Morawetz, et J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4^e éd. (feuilles mobiles)), vol. 4, §149). Si la « double majorité » requise dans chaque catégorie de créanciers — rappelons qu'il s'agit de la majorité en *nombre* d'une catégorie, qui représente aussi les deux-tiers en *valeur* des réclamations de cette catégorie — vote

commonly referred to as a “fairness hearing” to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies’ Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at §45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (CCAA, s. 6(1)).

[58] Creditors with a provable claim against the debtor whose interests are affected by a proposed plan are usually entitled to vote on plans of arrangement (Wood, at p. 470). Indeed, there is no express provision in the CCAA barring such a creditor from voting on a plan of arrangement, including a plan it sponsors.

[59] Notwithstanding the foregoing, the appellants submit that a purposive interpretation of s. 22(3) of the CCAA reveals that, as a general matter, a creditor should be precluded from voting on its own plan. Section 22(3) provides:

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

The appellants note that s. 22(3) was meant to harmonize the CCAA scheme with s. 54(3) of the BIA, which provides that “[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal.” The appellants point out that, under s. 50(1) of the BIA, only debtors can sponsor plans; as a result, the reference to “debtor” in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the CCAA must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are “related to the company”, as the provision states, but to any

en faveur du plan, le juge surveillant peut homologuer celui-ci (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135, par. 34; voir la LACC, art. 6). Le juge surveillant tiendra ce qu’on appelle communément une [TRADUCTION] « audience d’équité » pour décider, entre autres choses, si le plan est juste et raisonnable (Wood, p. 490-492; Sarra, *Rescue! The Companies’ Creditors Arrangement Act*, p. 529; Houlden, Morawetz et Sarra, §45). Une fois homologué par le juge surveillant, le plan lie chaque catégorie de créanciers qui a participé au vote (LACC, par. 6(1)).

[58] Les créanciers qui ont une réclamation prouvable contre le débiteur et dont les intérêts sont touchés par un plan d’arrangement proposé ont habituellement le droit de voter sur un tel plan (Wood, p. 470). En fait, aucune disposition expresse de la LACC n’interdit à un créancier de voter sur un plan d’arrangement, y compris sur un plan dont il fait la promotion.

[59] Nonobstant ce qui précède, les appelantes soutiennent qu’une interprétation téléologique du par. 22(3) de la LACC révèle que, de façon générale, un créancier ne devrait pas pouvoir voter sur son propre plan. Le paragraphe 22(3) prévoit :

Créancier lié

(3) Le créancier lié à la compagnie peut voter contre, mais non pour, l’acceptation de la transaction ou de l’arrangement.

Les appelantes font remarquer que le par. 22(3) devait permettre d’harmoniser le régime de la LACC avec le par. 54(3) de la LFI, qui dispose que « [u]n créancier qui est lié au débiteur peut voter contre, mais non pour, l’acceptation de la proposition. » Elles soulignent que, en vertu du par. 50(1) de la LFI, seuls les débiteurs peuvent faire la promotion d’un plan; ainsi, le « débiteur » auquel renvoie le par. 54(3) s’entend de *tous* les promoteurs de plan. Elles soutiennent que, si le par. 54(3) vise tous les promoteurs de plan, le par. 22(3) de la LACC doit également les viser. Pour cette raison, les appelantes nous demandent d’étendre la restriction au droit de

creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot “dilute” or overtake the votes of other creditors.

[60] We would not accept this strained interpretation of s. 22(3). Section 22(3) makes no mention of conflicts of interest between creditors and plan sponsors generally. The wording of s. 22(3) only places voting restrictions on creditors who are “related to the [debtor] company”. These words are “precise and unequivocal” and, as such, must “play a dominant role in the interpretive process” (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10). In our view, the appellants’ analogy to the *BIA* is not sufficient to overcome the plain wording of this provision.

[61] While the appellants are correct that s. 22(3) was enacted to harmonize the treatment of related parties in the *CCAA* and *BIA*, its history demonstrates that it is not a general conflict of interest provision. Prior to the amendments incorporating s. 22(3) into the *CCAA*, the *CCAA* clearly allowed creditors to put forward a plan of arrangement (see Houlden, Morawetz and Sarra, at §33, *Red Cross; Re 1078385 Ontario Inc.* (2004), 206 O.A.C. 17). In contrast, under the *BIA*, only debtors could make proposals. Parliament is presumed to have been aware of this obvious difference between the two statutes (see *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 59; see also *Third Eye*, at para. 57). Despite this difference, Parliament imported, with necessary modification, the wording of the *BIA* related creditor provision into the *CCAA*. Going beyond this language entails accepting that Parliament failed to choose the right words to give effect to its intention, which we do not.

voter imposée par le par. 22(3) de manière à ce qu’elle s’applique non seulement aux créanciers « lié[s] à la compagnie », comme le prévoit la disposition, mais aussi à tous les créanciers qui font la promotion d’un plan. Elles soutiennent que cette interprétation donne effet à l’intention sous-jacente aux deux dispositions, intention qui, de dire les appelantes, est de faire en sorte qu’un créancier qui est en conflit d’intérêts ne puisse pas « diluer » ou supplanter le vote des autres créanciers.

[60] Nous n’acceptons pas cette interprétation forcée du par. 22(3). Il n’est nullement question dans cette disposition de conflit d’intérêts entre les créanciers et les promoteurs d’un plan en général. Les restrictions au droit de voter imposées par le par. 22(3) ne s’appliquent qu’aux créanciers qui sont « lié[s] à la compagnie [débitrice] ». Ce libellé est « précis et non équivoque », et il doit ainsi « jouer un rôle primordial dans le processus d’interprétation » (*Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601, par. 10). À notre avis, l’analogie que les appelantes font avec la *LFI* ne suffit pas à écarter le libellé clair de cette disposition.

[61] Bien que les appelantes aient raison de dire que l’adoption du par. 22(3) visait à harmoniser le traitement réservé aux parties liées par la *LACC* et la *LFI*, son historique montre qu’il ne s’agit pas d’une disposition générale relative aux conflits d’intérêts. Avant qu’elle soit modifiée et qu’on y incorpore le par. 22(3), la *LACC* permettait clairement aux créanciers de présenter un plan d’arrangement (voir Houlden, Morawetz et Sarra, §33, *Red Cross; Re 1078385 Ontario Inc.* (2004), 206 O.A.C. 17). À l’opposé, en vertu de la *LFI*, seuls les débiteurs pouvaient déposer une proposition. Il faut présumer que le législateur était au fait de cette différence évidente entre les deux lois (voir *ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140, par. 59; voir aussi *Third Eye*, par. 57). Le législateur a malgré tout importé dans la *LACC*, avec les adaptations nécessaires, le texte de la disposition de la *LFI* portant sur les créanciers liés. Aller au-delà de ce libellé suppose d’accepter que le législateur n’a pas choisi les bons mots pour donner effet à son intention, ce que nous ne ferons pas.

[62] Indeed, Parliament did not mindlessly reproduce s. 54(3) of the *BIA* in s. 22(3) of the *CCAA*. Rather, it made two modifications to the language of s. 54(3) to bring it into conformity with the language of the *CCAA*. First, it changed “proposal” (a defined term in the *BIA*) to “compromise or arrangement” (a term used throughout the *CCAA*). Second, it changed “debtor” to “company”, recognizing that companies are the only kind of debtor that exists in the *CCAA* context.

[63] Our view is further supported by Industry Canada’s explanation of the rationale for s. 22(3) as being to “reduce the ability of debtor companies to organize a restructuring plan that confers additional benefits to related parties” (Office of the Superintendent of Bankruptcy Canada, *Bill C-12: Clause by Clause Analysis* (online), cl. 71, s. 22 (emphasis added); see also Standing Senate Committee on Banking, Trade and Commerce, at p. 151).

[64] Finally, we note that the *CCAA* contains other mechanisms that attenuate the concern that a creditor with conflicting legal interests with respect to a plan it proposes may distort the creditors’ vote. Although we reject the appellants’ interpretation of s. 22(3), that section still bars creditors who are related to the debtor company from voting in favour of *any* plan. Additionally, creditors who do not share a sufficient commonality of interest may be forced to vote in separate classes (s. 22(1) and (2)), and, as we will explain, a supervising judge may bar a creditor from voting where the creditor is acting for an improper purpose.

(2) Discretion to Bar a Creditor From Voting in Furtherance of an Improper Purpose

[65] There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon “to sanction measures for which there is no explicit authority in the *CCAA*” (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed

[62] En fait, le législateur n’a pas reproduit de façon irréfléchie, au par. 22(3) de la *LACC*, le texte du par. 54(3) de la *LFI*. Au contraire, il a apporté deux modifications au libellé du par. 54(3) pour l’adapter à celui employé dans la *LACC*. Premièrement, il a remplacé le terme « proposition » (défini dans la *LFI*) par les mots « transaction ou arrangement » (employés tout au long dans la *LACC*). Deuxièmement, il a remplacé « débiteur » par « compagnie », reconnaissant ainsi que les compagnies sont les seuls débiteurs qui existent dans le contexte de la *LACC*.

[63] Notre opinion est en outre appuyée par Industrie Canada, selon qui l’adoption du par. 22(3) se justifie par la volonté de « réduire la capacité des compagnies débitrices d’établir un plan de restructuration apportant des avantages supplémentaires à des personnes qui leur sont liées » (Bureau du surintendant des faillites Canada, *Projet de loi C-12 : analyse article par article* (en ligne), cl. 71, art. 22 (nous soulignons); voir aussi Comité sénatorial permanent des banques et du commerce, p. 166).

[64] Enfin, nous soulignons que la *LACC* prévoit d’autres mécanismes qui réduisent le risque qu’un créancier en situation de conflit d’intérêts par rapport au plan qu’il propose puisse biaiser le vote des créanciers. Bien que nous rejetions l’interprétation donnée par les appelantes au par. 22(3), ce paragraphe interdit tout de même aux créanciers liés à la compagnie débitrice de voter en faveur de *tout* plan. De plus, les créanciers qui n’ont pas suffisamment d’intérêts en commun pourraient être contraints de voter dans des catégories distinctes (par. 22(1) et (2)); et, comme nous l’expliquerons, le juge surveillant peut empêcher un créancier de voter si ce dernier agit dans un but illégitime.

(2) Le pouvoir discrétionnaire d’interdire à un créancier de voter dans un but illégitime

[65] Il est acquis aux débats que la *LACC* ne contient aucune disposition énonçant les circonstances dans lesquelles un créancier, autrement admissible à voter sur un plan, peut être empêché de le faire. Toutefois, les juges chargés d’appliquer la *LACC* sont souvent appelés à « sanctionner des mesures non expressément prévues par la *LACC* »

a “hierarchical” approach to determining whether jurisdiction exists to sanction a proposed measure: “. . . courts [must] 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” (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the CCAA will be sufficient “to ground measures necessary to achieve its objectives” (para. 65).

[66] Applying this approach, we conclude that jurisdiction exists under s. 11 of the CCAA to bar a creditor from voting on a plan of arrangement or compromise where the creditor is acting for an improper purpose.

[67] Courts have long recognized that s. 11 of the CCAA signals legislative endorsement of the “broad reading of CCAA authority developed by the jurisprudence” (*Century Services*, at para. 68). Section 11 states:

General power of court

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.

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the CCAA itself, and the requirement that the order made be “appropriate in the circumstances”.

[68] Where a party seeks an order relating to a matter that falls within the supervising judge’s purview, and for which there is no CCAA provision conferring more specific jurisdiction, s. 11 necessarily is the

(*Century Services*, par. 61; voir aussi par. 62). Dans l’arrêt *Century Services*, notre Cour a souscrit à l’approche « hiérarchisée » qui vise à déterminer si le tribunal a compétence pour sanctionner une mesure proposée : « . . . les tribunaux procéderaient 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 » (par. 65). Dans la plupart des cas, une interprétation téléologique et large des dispositions de la LACC suffira à « justifier les mesures nécessaires à la réalisation de ses objectifs » (par. 65).

[66] Après avoir appliqué cette approche, nous concluons que l’art. 11 de la LACC confère au tribunal le pouvoir d’interdire à un créancier de voter sur un plan d’arrangement ou une transaction s’il agit dans un but illégitime.

[67] Les tribunaux reconnaissent depuis longtemps que le libellé de l’art. 11 de la LACC indique que le législateur a sanctionné « l’interprétation large du pouvoir conféré par la LACC qui a été élaborée par la jurisprudence » (*Century Services*, par. 68). L’article 11 est ainsi libellé :

Pouvoir général du tribunal

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.

Selon le libellé clair de la disposition, le pouvoir conféré par l’art. 11 n’est limité que par les restrictions imposées par la LACC elle-même, ainsi que par l’exigence que l’ordonnance soit « indiquée » dans les circonstances.

[68] Lorsqu’une partie sollicite une ordonnance relativement à une question qui entre dans le champ de compétence du juge surveillant, mais pour laquelle aucune disposition de la LACC ne confère plus

provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 “for the most part supplants the need to resort to inherent jurisdiction” in the CCAA context (para. 36).

[69] Oversight of the plan negotiation, voting, and approval process falls squarely within the supervising judge’s purview. As indicated, there are no specific provisions in the CCAA which govern when a creditor who is otherwise eligible to vote on a plan may nonetheless be barred from voting. Nor is there any provision in the CCAA which suggests that a creditor has an absolute right to vote on a plan that cannot be displaced by a proper exercise of judicial discretion. However, given that the CCAA regime contemplates creditor participation in decision-making as an integral facet of the workout regime, creditors should only be barred from voting where the circumstances demand such an outcome. In other words, it is necessarily a discretionary, circumstance-specific inquiry.

[70] Thus, it is apparent that s. 11 serves as the source of the supervising judge’s jurisdiction to issue a discretionary order barring a creditor from voting on a plan of arrangement. The exercise of this discretion must further the remedial objectives of the CCAA and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an “improper purpose” — the supervising judge has the discretion to bar that creditor from voting.

[71] The discretion to bar a creditor from voting in furtherance of an improper purpose under the CCAA parallels the similar discretion that exists under the BIA, which was recognized in *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296. In *Laserworks*, the Nova Scotia

précisément compétence, l’art. 11 est nécessairement la disposition à laquelle on peut recourir d’emblée pour fonder la compétence du tribunal. Comme l’a dit le juge Blair dans l’arrêt *Stelco*, l’art. 11 [TRA-DUCTION] « fait en sorte que la plupart du temps, il est inutile de recourir à la compétence inhérente » dans le contexte de la LACC (par. 36).

[69] La supervision des négociations entourant le plan, tout comme le vote et le processus d’approbation, relève nettement de la compétence du juge surveillant. Comme nous l’avons dit, aucune disposition de la LACC ne vise le cas où un créancier par ailleurs admissible à voter sur un plan peut néanmoins être empêché de le faire. Il n’existe non plus aucune disposition de la LACC selon laquelle le droit que possède un créancier de voter sur un plan est absolu et que ce droit ne peut pas être écarté par l’exercice légitime du pouvoir discrétionnaire du tribunal. Toutefois, étant donné le régime de la LACC, dont l’un des aspects essentiels tient à la participation du créancier au processus décisionnel, les créanciers ne devraient être empêchés de voter que si les circonstances l’exigent. Autrement dit, il faut nécessairement procéder à un examen discrétionnaire axé sur les circonstances propres à chaque situation.

[70] L’article 11 constitue donc manifestement la source de la compétence du juge surveillant pour rendre une ordonnance discrétionnaire empêchant un créancier de voter sur un plan d’arrangement. L’exercice du pouvoir discrétionnaire doit favoriser la réalisation des objets réparateurs de la LACC et être fondé sur les considérations de base que sont l’opportunité, la bonne foi et la diligence. Cela signifie que, lorsqu’un créancier cherche à exercer ses droits de vote de manière à contrecarrer, à miner ces objectifs ou à aller à l’encontre de ceux-ci — c’est-à-dire à agir dans un « but illégitime » — le juge surveillant a le pouvoir discrétionnaire d’empêcher le créancier de voter.

[71] Le pouvoir discrétionnaire d’empêcher un créancier de voter dans un but illégitime au sens de la LACC s’apparente au pouvoir discrétionnaire semblable qui existe en vertu de la LFI, lequel a été reconnu dans l’arrêt *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R.

Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise “[e]ach step in the bankruptcy process” (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a “substantial injustice”, which arises “when the *BIA* is used for an improper purpose” (para. 54). The court held that “[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament” (para. 54).

[72] While not determinative, the existence of this discretion under the *BIA* lends support to the existence of similar discretion under the *CCAA* for two reasons.

[73] First, this conclusion would be consistent with this Court's recognition that the *CCAA* “offers a more flexible mechanism with greater judicial discretion” than the *BIA* (*Century Services*, at para. 14 (emphasis added)).

[74] Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that “in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements” to those received under the *BIA* (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred “to avoid the ills that can arise from [insolvency] ‘statute-shopping’” (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of “improper purpose” set out in *Laserworks* — that is, any purpose collateral to the purpose of insolvency legislation — is entirely harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this

(2d) 296. Dans *Laserworks*, la Cour d'appel de la Nouvelle-Écosse a conclu que le pouvoir discrétionnaire d'empêcher un créancier de voter de cette façon découlait du pouvoir du tribunal, inhérent au régime établi par la *LFI*, de superviser [TRADUCTION] « [c]haque étape du processus de faillite » (par. 41), comme l'indiquent les par. 43(7), 108(3) et 187(9) de la Loi. La cour a expliqué que le par. 187(9) confère expressément le pouvoir de remédier à une « injustice grave », laquelle se produit « lorsque la *LFI* est utilisée dans un but illégitime » (par. 54). La cour a statué que « [l]e but illégitime est un but qui est accessoire à l'objet pour lequel la loi en matière de faillite et d'insolvabilité a été adoptée par le législateur » (par. 54).

[72] Bien qu'elle ne soit pas déterminante, l'existence de ce pouvoir discrétionnaire en vertu de la *LFI* étaye l'existence d'un pouvoir discrétionnaire semblable en vertu de la *LACC* pour deux raisons.

[73] D'abord, cette conclusion serait compatible avec le fait que la Cour a reconnu que la *LACC* « établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire » que sous le régime de la *LFI* (*Century Services*, par. 14 (nous soulignons)).

[74] Ensuite, la Cour a reconnu les bienfaits de l'harmonisation, dans la mesure du possible, des deux lois. À titre d'exemple, dans l'arrêt *Indalex*, la Cour a souligné que « pour éviter de précipiter une liquidation sous le régime de la *LFI*, les tribunaux privilégieront une interprétation de la *LACC* qui confère [. . .] aux créanciers [des droits analogues] » à ceux dont ils jouissent en vertu de la *LFI* (par. 51; voir également *Century Services*, par. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, par. 34-46). Ainsi, lorsque les lois permettent une interprétation harmonieuse, il y a lieu de retenir cette interprétation [TRADUCTION] « afin d'écarter les embûches pouvant découler du choix des créanciers de “recourir à la loi la plus favorable” [en matière d'insolvabilité] » (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, par. 78; voir aussi par. 73). À notre avis, la manière dont a été formulé le « but illégitime » dans l'arrêt *Laserworks* — c'est-à-dire un but accessoire à l'objet de la loi en

discretion is to be exercised in accordance with the CCAA's objectives as an insolvency statute.

[75] We also observe that the recognition of this discretion under the CCAA advances the basic fairness that “permeates Canadian insolvency law and practice” (Sarra, “The Oscillating Pendulum: Canada’s Sesquicentennial and Finding the Equilibrium for Insolvency Law”, at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation . . . If the CCAA is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute. [Emphasis added.]

(“The Oscillating Pendulum: Canada’s Sesquicentennial and Finding the Equilibrium for Insolvency Law”, at p. 30)

In this vein, the supervising judge’s oversight of the CCAA voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the CCAA necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

matière d’insolvabilité — s’harmonise parfaitement avec la nature et la portée du pouvoir discrétionnaire judiciaire que confère la LACC. En effet, comme nous l’avons expliqué, ce pouvoir discrétionnaire doit être exercé conformément aux objets de la LACC en tant que loi en matière d’insolvabilité.

[75] Nous soulignons également que la reconnaissance de l’existence de ce pouvoir discrétionnaire sous le régime de la LACC favorise l’équité fondamentale qui [TRADUCTION] « imprègne le droit et la pratique en matière d’insolvabilité au Canada » (Sarra, « The Oscillating Pendulum : Canada’s Sesquicentennial and Finding the Equilibrium for Insolvency Law », p. 27; voir également *Century Services*, par. 70 et 77). Comme le fait observer la professeure Sarra, l’équité commande que les juges surveillants soient en mesure de reconnaître les situations où les parties empêchent la réalisation des objectifs de la loi et de prendre des mesures utiles à leur égard :

[TRADUCTION] Le régime d’insolvabilité canadien repose sur la présomption que les créanciers et le débiteur ont pour objectif commun de maximiser les recouvrements. L’aspect substantiel de la justice dans le régime d’insolvabilité repose sur la présomption que toutes les parties concernées sont exposées à de réels risques économiques. L’injustice réside dans les situations où seules certaines personnes sont exposées aux risques, tandis que d’autres tirent en fait avantage de la situation. [. . .] Si l’on veut que la LACC reçoive une interprétation téléologique, les tribunaux doivent être en mesure de reconnaître les situations où les gens ont des intérêts opposés et s’emploient activement à contrecarrer les objectifs de la loi. [Nous soulignons.]

(« The Oscillating Pendulum : Canada’s Sesquicentennial and Finding the Equilibrium for Insolvency Law », p. 30)

Dans le même ordre d’idées, la surveillance du régime de droit de vote prévu par la LACC qu’exerce le juge surveillant ne doit pas seulement assurer une application stricte de la Loi, mais doit aussi favoriser la réalisation de ses objectifs. Nous estimons que la réalisation des objectifs de politique de la LACC nécessite la reconnaissance du pouvoir discrétionnaire d’empêcher un créancier de voter s’il agit dans un but illégitime.

[76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the CCAA. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

(3) The Supervising Judge Did Not Err in Prohibiting Callidus From Voting

[77] In our view, the supervising judge's decision to bar Callidus from voting on the New Plan discloses no error justifying appellate intervention. As we have explained, discretionary decisions like this one must be approached from the appropriate posture of deference. It bears mentioning that, when he made this decision, the supervising judge was intimately familiar with Bluberi's CCAA proceedings. He had presided over them for over 2 years, received 15 reports from the Monitor, and issued approximately 25 orders.

[78] The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly inviting it to do so.⁴ The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see CCAA, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of \$250,000 — none of the factual circumstances relating to Bluberi's financial or business

⁴ It bears noting that the Monitor's statement in this regard did not decide whether Callidus would ultimately have been entitled to vote on the First Plan. Because Callidus did not even attempt to vote on the First Plan, this question was never put to the supervising judge.

[76] La question de savoir s'il y a lieu d'exercer le pouvoir discrétionnaire dans une situation donnée appelle une analyse fondée sur les circonstances propres à chaque situation qui doit mettre en balance les divers objectifs de la LACC. Comme le démontre le présent dossier, le juge surveillant est le mieux placé pour procéder à cette analyse.

(3) Le juge surveillant n'a pas commis d'erreur en interdisant à Callidus de voter

[77] À notre avis, la décision du juge surveillant d'empêcher Callidus de voter sur le nouveau plan ne révèle aucune erreur justifiant l'intervention d'une cour d'appel. Comme nous l'avons expliqué, il faut adopter l'attitude de déférence appropriée à l'égard des décisions discrétionnaires de ce genre. Il convient de mentionner que, lorsqu'il a rendu sa décision, le juge surveillant connaissait très bien les procédures fondées sur la LACC relatives à Bluberi. Il les avait présidées pendant plus de 2 ans, avait reçu 15 rapports du contrôleur et avait délivré environ 25 ordonnances.

[78] Le juge surveillant a tenu compte de l'ensemble des circonstances et a conclu que le vote de Callidus viserait un but illégitime (par. 45 et 48). Nous sommes d'accord avec cette conclusion. Il savait qu'avant le vote sur le premier plan, Callidus avait choisi de n'évaluer *aucune partie* de sa réclamation à titre de créancier non garanti et s'était par la suite abstenue de voter — bien que le contrôleur l'ait expressément invité à le faire⁴. Le juge surveillant savait aussi que le premier plan de Callidus n'avait pas reçu l'aval des autres créanciers à l'assemblée des créanciers tenue le 15 décembre 2017, et que Callidus avait choisi de ne pas profiter de l'occasion pour modifier ou augmenter la valeur de son plan à ce moment-là, ce qu'elle était en droit de faire (voir LACC, art. 6 et 7; contrôleur, m.i., par. 17). Entre l'insuccès du premier plan et la proposition du nouveau plan — qui était identique au premier plan, hormis la modeste augmentation de 250 000 \$ — les

⁴ Il convient de souligner que la déclaration du contrôleur à cet égard ne permettait pas de décider si Callidus aurait finalement eu le droit de voter sur le premier plan. Comme Callidus n'a même pas essayé de voter sur le premier plan, cette question n'a jamais été soumise au juge surveillant.

affairs had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the CCAA protects. Put simply, Callidus was seeking to take a “second kick at the can” and manipulate the vote on the New Plan. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so.

[79] Indeed, as the Monitor observes, “[o]nce a plan of arrangement or proposal has been submitted to the creditors of a debtor for voting purposes, to order a second creditors’ meeting to vote on a substantially similar plan would not advance the policy objectives of the CCAA, nor would it serve and enhance the public’s confidence in the process or otherwise serve the ends of justice” (I.F., at para. 18). This is particularly the case given that the cost of having another meeting to vote on the New Plan would have been upwards of \$200,000 (see supervising judge’s reasons, at para. 72).

[80] We add that Callidus’s course of action was plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding — which, in our view, includes acting with due diligence in valuing their claims and security. At all material times, Bluberi’s Retained Claims have been the sole asset securing Callidus’s claim. Callidus has pointed to nothing in the record that indicates that the value of the Retained Claims has changed. Had Callidus been of the view that the Retained Claims had no value, one would have expected Callidus to have valued its security accordingly prior to the vote on the First Plan, if not earlier. Parenthetically, we note that, irrespective of the timing, an attempt at

circonstances factuelles se rapportant aux affaires financières ou commerciales de Bluberi n’avaient pas réellement changé. Pourtant, Callidus a tenté d’évaluer la *totalité* de sa sûreté à *zéro* et, sur cette base, a demandé l’autorisation de voter sur le nouveau plan à titre de créancier non garanti. Si Callidus avait été autorisée à voter de cette façon, le nouveau plan aurait certainement satisfait au critère d’approbation prévu par le par. 6(1). Dans ces circonstances, la seule conclusion possible était que Callidus tentait d’évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la LACC. En termes simples, Callidus cherchait à « se donner une seconde chance » et à manipuler le vote sur le nouveau plan. Le juge surveillant n’a pas commis d’erreur en exerçant son pouvoir discrétionnaire pour empêcher Callidus de le faire.

[79] En effet, comme le fait observer le contrôleur, [TRADUCTION] « [u]ne fois que le plan d’arrangement ou la proposition ont été présentés aux créanciers du débiteur aux fins d’un vote, le fait d’ordonner la tenue d’une seconde assemblée des créanciers pour voter sur un plan à peu près semblable ne favoriserait pas la réalisation des objectifs de politique de la LACC, pas plus qu’il ne servirait ou n’accroîtrait la confiance du public dans le processus ou ne servirait par ailleurs les fins de la justice » (m.i., par. 18). C’est particulièrement le cas en l’espèce étant donné que la tenue d’une autre assemblée pour voter sur le nouveau plan aurait coûté plus de 200 000 \$ (voir les motifs du juge surveillant, par. 72).

[80] Ajoutons que la façon d’agir de Callidus était manifestement contraire à l’attente selon laquelle les parties agissent avec diligence dans les procédures d’insolvabilité — ce qui, à notre avis, comprend le fait de faire preuve de diligence raisonnable dans l’évaluation de leurs réclamations et sûretés. Pendant toute la période pertinente, les réclamations retenues de Bluberi ont constitué les seuls éléments d’actif garantissant la réclamation de Callidus. Cette dernière n’a rien relevé dans le dossier qui indique que la valeur des réclamations retenues a changé. Si Callidus estimait que les réclamations retenues n’avaient aucune valeur, on se serait attendu à ce qu’elle ait évalué sa sûreté en conséquence avant

such a valuation may well have failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

[81] As we have indicated, discretionary decisions attract a highly deferential standard of review. Deference demands that review of a discretionary decision begin with a proper characterization of the basis for the decision. Respectfully, the Court of Appeal failed in this regard. The Court of Appeal seized on the supervising judge's somewhat critical comments relating to Callidus's goal of being released from the Retained Claims and its conduct throughout the proceedings as being incapable of grounding a finding of improper purpose. However, as we have explained, these considerations did not drive the supervising judge's conclusion. His conclusion was squarely based on Callidus' attempt to manipulate the creditors' vote to ensure that its New Plan would succeed where its First Plan had failed (see supervising judge's reasons, at paras. 45-48). We see nothing in the Court of Appeal's reasons that grapples with this decisive impropriety, which goes far beyond a creditor merely acting in its own self-interest.

[82] In sum, we see nothing in the supervising judge's reasons on this point that would justify appellate intervention. Callidus was properly barred from voting on the New Plan.

[83] Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to

le vote sur le premier plan, voire même plus tôt. Nous ouvrons une parenthèse pour souligner que, peu importe le moment, la tentative d'évaluer ainsi la sûreté aurait pu fort bien échouer. Cela aurait empêché Callidus de voter à titre de créancier non garanti même si elle ne poursuivait pas de but illégitime.

[81] Comme nous l'avons indiqué, les décisions discrétionnaires appellent une norme de contrôle empreinte d'une grande déférence. La déférence commande que l'examen d'une décision discrétionnaire commence par la qualification appropriée du fondement de la décision. Soit dit en tout respect, la Cour d'appel a échoué à cet égard. La Cour d'appel s'est saisie des commentaires quelque peu critiques formulés par le juge surveillant à l'égard de l'objectif de Callidus d'être libérée des réclamations retenues et de la conduite de celle-ci tout au long des procédures pour affirmer qu'il ne s'agissait pas de considérations pouvant donner lieu à une conclusion de but illégitime. Toutefois, comme nous l'avons expliqué, ce ne sont pas ces considérations qui ont amené le juge surveillant à tirer sa conclusion. Sa conclusion reposait nettement sur la tentative de Callidus de manipuler le vote des créanciers pour faire en sorte que son nouveau plan soit retenu alors que son premier plan ne l'avait pas été (voir les motifs du juge surveillant, par. 45-48). Nous ne voyons rien dans les motifs de la Cour d'appel qui s'attaque à cette irrégularité déterminante, qui va beaucoup plus loin que le simple fait pour un créancier d'agir dans son propre intérêt.

[82] En résumé, nous ne voyons rien dans les motifs du juge surveillant sur ce point qui justifie l'intervention d'une cour d'appel. Callidus a été à juste titre empêchée de voter sur le nouveau plan.

[83] Avant de passer au prochain point, soulignons que la Cour d'appel a abordé deux questions supplémentaires : Callidus est-elle « liée » à Bluberi au sens du par. 22(3) de la *LACC*? Si Callidus est autorisée à voter, convient-il de lui ordonner de voter dans une catégorie distincte des autres créanciers de Bluberi (voir la *LACC*, par. 22(1) et (2))? Vu notre conclusion que le juge surveillant n'a pas commis d'erreur en interdisant à Callidus de voter sur le nouveau plan au motif qu'elle avait agi dans un but illégitime, il n'est

address either of these issues. However, nothing in our reasons should be read as endorsing the Court of Appeal's analysis of them.

C. Bluberi's LFA Should Be Approved as Interim Financing

[84] In our view, the supervising judge made no error in approving the LFA as interim financing pursuant to s. 11.2 of the *CCAA*. Interim financing is a flexible tool that may take on a range of forms. As we will explain, third party litigation funding may be one such form. Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the *CCAA* more generally.

(1) Interim Financing and Section 11.2 of the *CCAA*

[85] Interim financing, despite being expressly provided for in s. 11.2 of the *CCAA*, is not defined in the Act. Professor Sarra has described it as “refer[ring] primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process” (*Rescue! The Companies' Creditors Arrangement Act*, at p. 197). Interim financing used in this way — sometimes referred to as “debtor-in-possession” financing — protects the going-concern value of the debtor company while it develops a workable solution to its insolvency issues (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. C.J. (Gen. Div.)), at paras. 7, 9 and 24; *Boutiques San Francisco Inc. v. Richter & Associés Inc.*, 2003 CanLII 36955 (Que. Sup. Ct.), at para. 32). That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing

pas nécessaire de se prononcer sur l'une ou l'autre de ces questions. Cependant, rien dans les présents motifs ne doit être interprété comme souscrivant à l'analyse que la Cour d'appel a faite de ces questions.

C. L'AFL de Bluberi devrait être approuvé à titre de financement temporaire

[84] À notre avis, le juge surveillant n'a commis aucune erreur en approuvant l'AFL à titre de financement temporaire en vertu de l'art. 11.2 de la *LACC*. Le financement temporaire est un outil souple qui peut revêtir différentes formes. Comme nous l'expliquerons, le financement d'un litige par un tiers peut constituer l'une de ces formes. La question de savoir s'il y a lieu d'approuver le financement d'un litige par un tiers à titre de financement temporaire commande une analyse fondée sur les faits de l'espèce qui doit tenir compte du libellé de l'art. 11.2 et des objectifs réparateurs de la *LACC* de façon plus générale.

(1) Le financement temporaire et l'art. 11.2 de la *LACC*

[85] Bien qu'il soit expressément prévu par l'art. 11.2 de la *LACC*, le financement temporaire n'est pas défini dans la Loi. La professeure Sarra l'a décrit comme [TRADUCTION] « vis[ant] principalement le fonds de roulement dont a besoin la société débitrice pour continuer de fonctionner pendant la restructuration ainsi que les fonds nécessaires pour payer les frais liés au processus de sauvetage » (*Rescue! The Companies' Creditors Arrangement Act*, p. 197). Utilisé de cette façon, le financement temporaire — parfois appelé financement de [TRADUCTION] « débiteur-exploitant » — protège la valeur d'exploitation de la compagnie débitrice pendant qu'elle met au point une solution viable à ses problèmes d'insolvabilité (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (C.J. Ont. (Div. gén.)), par. 7, 9 et 24; *Boutiques San Francisco Inc. c. Richter & Associés Inc.*, 2003 CanLII 36955 (C.S. Qc), par. 32). Cela dit, le financement temporaire ne se limite pas à fournir un fonds de roulement

at its core enables the preservation and realization of the value of a debtor's assets.

[86] Since 2009, s. 11.2(1) of the CCAA has codified a supervising judge's discretion to approve interim financing, and to grant a corresponding security or charge in favour of the lender in the amount the judge considers appropriate:

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.

[87] The breadth of a supervising judge's discretion to approve interim financing is apparent from the wording of s. 11.2(1). Aside from the protections regarding notice and pre-filing security, s. 11.2(1) does not mandate any standard form or terms.⁵ It simply provides that the financing must be in an amount that is “appropriate” and “required by the company, having regard to its cash-flow statement”.

⁵ A further exception has been codified in the 2019 amendments to the CCAA, which create s. 11.2(5) (see *Budget Implementation Act, 2019, No. 1*, s. 138). This section provides that at the time an initial order is sought, “no order shall be made under subsection [11.2](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”. This provision does not apply in this case, and the parties have not relied on it. However, it may be that it restricts the ability of supervising judges to approve LFAs as interim financing at the time of granting an Initial Order.

immédiat aux compagnies débitrices. Conformément aux objectifs réparateurs de la LACC, le financement temporaire permet essentiellement de préserver et de réaliser la valeur des éléments d'actif du débiteur.

[86] Depuis 2009, le par. 11.2(1) de la LACC a codifié le pouvoir discrétionnaire du juge surveillant d'approuver le financement temporaire et d'accorder une charge ou une sûreté correspondante, d'un montant qu'il estime indiqué, en faveur du prêteur :

Financement temporaire

11.2 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

[87] L'étendue du pouvoir discrétionnaire du juge surveillant d'approuver le financement temporaire ressort du libellé du par. 11.2(1). Abstraction faite des protections concernant le préavis et les sûretés constituées avant le dépôt des procédures, le par. 11.2(1) ne prescrit aucune forme ou condition type⁵. Il prévoit simplement que le financement doit être d'un montant qui est « indiqué » et qui tient compte de « l'état de l'évolution de l'encaisse et des besoins de [la compagnie] ».

⁵ Une autre exception a été codifiée dans les modifications apportées en 2019 à la LACC qui créent le par. 11.2(5) (voir *Loi n° 1 d'exécution du budget de 2019*, art. 138). Cet article prévoit que, lorsqu'une ordonnance relative à la demande initiale a été demandée, « le tribunal ne rend l'ordonnance visée au paragraphe [11.2](1) que s'il est également convaincu que les modalités du financement temporaire demandé sont limitées à ce qui est normalement nécessaire à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période ». Cette disposition ne s'applique pas en l'espèce, et les parties ne l'ont pas invoquée. Toutefois, il se peut qu'elle ait pour effet d'empêcher les juges surveillants d'approuver des AFL à titre de financement temporaire au moment où l'ordonnance relative à la demande initiale est rendue.

[88] The supervising judge may also grant the lender a “super-priority charge” that will rank in priority over the claims of any secured creditors, pursuant to s. 11.2(2):

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[89] Such charges, also known as “priming liens”, reduce lenders’ risks, thereby incentivizing them to assist insolvent companies (Innovation, Science and Economic Development Canada, *Archived — Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online), cl. 128, s. 11.2; Wood, at p. 387). As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower’s assets. However, debtor companies under CCAA protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors (McElcheran, at pp. 298-99). Although super-priority charges do subordinate secured creditors’ security positions to the interim financing lender’s — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) (see M. B. Rotsztain and A. Dostal, “Debtor-In-Possession Financing”, in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (2007), 227, at pp. 228-29 and 240-50). Indeed, this balance was expressly considered by the Standing Senate Committee on Banking, Trade and Commerce that recommended codifying interim financing in the CCAA (pp. 100-104).

[90] Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best-placed to answer. The CCAA

[88] Le juge surveillant peut également accorder au prêteur une « charge super prioritaire » qui aura priorité sur toute réclamation des créanciers garantis, en vertu du par. 11.2(2) :

Priorité — créanciers garantis

(2) Le tribunal peut préciser, dans l’ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

[89] Ces charges, également appelées « superprivilèges », réduisent les risques des prêteurs, les incitant ainsi à aider les compagnies insolvables (Innovation, Sciences et Développement économique Canada, *Archivé — Projet de loi C-55 : analyse article par article*, dernière mise à jour le 29 décembre 2016 (en ligne), cl. 128, art. 11.2; Wood, p. 387). Sur le plan pratique, ces charges constituent souvent le seul moyen d’encourager ce type de prêt. Généralement, le prêteur se protège contre le risque de crédit en prenant une sûreté sur les éléments d’actifs de l’emprunteur. Or, les compagnies débitrices qui sont sous la protection de la LACC ont souvent donné en gage la totalité ou la presque totalité de leurs actifs à d’autres créanciers. En l’absence d’une charge super prioritaire, le prêteur qui accepte d’apporter un financement temporaire prendrait rang derrière les autres créanciers (McElcheran, p. 298-299). Bien que la charge super prioritaire subordonne les sûretés des créanciers garantis à celle du prêteur qui apporte un financement temporaire — un résultat qui a suscité la controverse en common law — le législateur a signifié son acceptation générale des transactions allant de pair avec ces charges en adoptant le par. 11.2(2) (voir M. B. Rotsztain et A. Dostal, « Debtor-In-Possession Financing », dans S. Ben-Ishai et A. Duggan, dir., *Canadian Bankruptcy and Insolvency Law : Bill C-55, Statute c. 47 and Beyond* (2007), 227, p. 228-229 et 240-250). En effet, cet équilibre a été expressément pris en considération par le Comité sénatorial permanent des banques et du commerce, qui a recommandé la codification du financement temporaire dans la LACC (p. 111-115).

[90] Au bout du compte, la question de savoir s’il y a lieu d’approuver le financement temporaire projeté est une question à laquelle le juge surveillant est le

sets out a number of factors that help guide the exercise of this discretion. The inclusion of these factors in s. 11.2 was informed by the Standing Senate Committee on Banking, Trade and Commerce's view that they would help meet the "fundamental principles" that have guided the development of Canadian insolvency law, including "fairness, predictability and efficiency" (p. 103; see also Innovation, Science and Economic Development Canada, cl. 128, s. 11.2). In deciding whether to grant interim financing, the supervising judge is to consider the following non-exhaustive list of factors:

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.

(CCAA, s. 11.2(4))

[91] Prior to the coming into force of the above provisions in 2009, courts had been using the general discretion conferred by s. 11 to authorize interim financing and associated super-priority charges

mieux placé pour répondre. La LACC énonce un certain nombre de facteurs qui encadrent l'exercice de ce pouvoir discrétionnaire. L'inclusion de ces facteurs dans le par. 11.2 reposait sur le point de vue du Comité sénatorial permanent des banques et du commerce selon lequel ils permettraient de respecter les « principes fondamentaux » ayant guidé la conception des lois en matière d'insolvabilité au Canada, notamment « l'équité, la prévisibilité et l'efficience » (p. 115; voir également Innovation, Sciences et Développement économique Canada, cl. 128, art. 11.2). Pour décider s'il y a lieu d'accorder le financement temporaire, le juge surveillant doit prendre en considération les facteurs non exhaustifs suivants :

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

- a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;
- b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;
- c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;
- d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;
- e) la nature et la valeur des biens de la compagnie;
- f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;
- g) le rapport du contrôleur visé à l'alinéa 23(1)b).

(LACC, par. 11.2(4))

[91] Avant l'entrée en vigueur en 2009 des dispositions susmentionnées, les tribunaux utilisaient le pouvoir discrétionnaire général que confère l'art. 11 pour autoriser le financement temporaire

(*Century Services*, at para. 62). Section 11.2 largely codifies the approaches those courts have taken (Wood, at p. 388; McElcheran, at p. 301). As a result, where appropriate, guidance may be drawn from the pre-codification interim financing jurisprudence.

[92] As with other measures available under the CCAA, interim financing is a flexible tool that may take different forms or attract different considerations in each case. Below, we explain that third party litigation funding may, in appropriate cases, be one such form.

(2) Supervising Judges May Approve Third Party Litigation Funding as Interim Financing

[93] Third party litigation funding generally involves “a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party’s litigation costs, in exchange for a portion of that party’s recovery in damages or costs” (R. K. Agarwal and D. Fenton, “Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context” (2017), 59 *Can. Bus. L.J.* 65, at p. 65). Third party litigation funding can take various forms. A common model involves the litigation funder agreeing to pay a plaintiff’s disbursements and indemnify the plaintiff in the event of an adverse cost award in exchange for a share of the proceeds of any successful litigation or settlement (see *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Bayens*).

[94] Outside of the CCAA context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and

et la constitution des charges super prioritaires s’y rattachant (*Century Services*, par. 62). L’article 11.2 codifie en grande partie les approches adoptées par ces tribunaux (Wood, p. 388; McElcheran, p. 301). En conséquence, il est possible, le cas échéant, de s’inspirer de la jurisprudence relative au financement temporaire antérieure à la codification.

[92] Comme c’est le cas pour les autres mesures susceptibles d’être prises sous le régime de la LACC, le financement temporaire est un outil souple qui peut revêtir différentes formes ou faire intervenir différentes considérations dans chaque cas. Comme nous l’expliquerons plus loin, le financement d’un litige par un tiers peut, dans les cas qui s’y prêtent, constituer l’une de ces formes.

(2) Les juges surveillants peuvent approuver le financement d’un litige par un tiers à titre de financement temporaire

[93] Le financement d’un litige par un tiers met généralement en cause [TRANSLATION] « un tiers, n’ayant par ailleurs aucun lien avec le litige, [qui] accepte de payer une partie ou la totalité des frais de litige d’une partie, en échange d’une portion de la somme recouvrée par cette partie au titre des dommages-intérêts ou des dépens » (R. K. Agarwal et D. Fenton, « Beyond Access to Justice : Litigation Funding Agreements Outside the Class Actions Context » (2017), 59 *Rev. can. dr. comm.* 65, p. 65). Le financement d’un litige par un tiers peut revêtir diverses formes. Un modèle courant met en cause un bailleur de fonds de litiges qui s’engage à payer les débours du demandeur et à indemniser ce dernier dans l’éventualité d’une adjudication des dépens défavorable, en échange d’une partie de la somme obtenue dans le cadre d’un procès ou d’un règlement couronné de succès (voir *Dugal c. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Bayens*).

[94] En dehors du cadre de la LACC, l’approbation des accords de financement d’un litige par un tiers a été quelque peu controversée. Une partie de cette controverse découle de la possibilité que ces accords portent atteinte aux doctrines de common

maintenance.⁶ The tort of maintenance prohibits “officious intermeddling with a lawsuit which in no way belongs to one” (L. N. Klar et al., *Remedies in Tort* (loose-leaf), vol. 1, by L. Berry, ed., at p. 14-11, citing *Langtry v. Dumoulin* (1884), 7 O.R. 644 (Ch. Div.), at p. 661). Champerty is a species of maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (Ont. C.A.), at para. 26).

[95] Building on jurisprudence holding that *contingency fee* arrangements are not champertous where they are not motivated by an improper purpose (e.g., *McIntyre Estate*), lower courts have increasingly come to recognize that *litigation funding* agreements are also not *per se* champertous. This development has been focussed within class action proceedings, where it arose as a response to barriers like adverse cost awards, which were stymieing litigants’ access to justice (see *Dugal*, at para. 33; *Marcotte v. Banque de Montréal*, 2015 QCCS 1915, at paras. 43-44 (CanLII); *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, at para. 52, aff’d 2018 ONSC 6352, 429 D.L.R. (4th) 739 (Div. Ct.); see also *Stanway v. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192, at para. 13). The jurisprudence on the approval of third party litigation funding agreements in the class action context — and indeed, the parameters of their legality generally — is still evolving, and no party before this Court has invited us to evaluate it.

⁶ The extent of this controversy varies by province. In Ontario, champertous agreements are forbidden by statute (see *An Act respecting Champerty*, R.S.O. 1897, c. 327). In Quebec, concerns associated with champerty and maintenance do not arise as acutely because champerty and maintenance are not part of the law as such (see *Montgrain v. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; G. Michaud, “New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape” in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 221, at p. 231).

law concernant la champartie (*champerty*) et le soutien abusif (*maintenance*)⁶. Le délit de soutien abusif interdit [TRADUCTION] « l’immixtion trop empressée dans une action avec laquelle on n’a rien à voir » (L. N. Klar et autres, *Remedies in Tort* (feuilles mobiles), vol. 1, par L. Berry, dir., p. 14-11, citant *Langtry c. Dumoulin* (1884), 7 O.R. 644 (Ch. Div.), p. 661). La champartie est une sorte de soutien abusif qui comporte un accord prévoyant le partage de la somme obtenue ou de tout autre profit réalisé dans le cadre d’une action réussie (*McIntyre Estate c. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (C.A. Ont.), par. 26).

[95] S’appuyant sur la jurisprudence voulant que les conventions d’honoraires conditionnels ne constituent pas de la champartie lorsqu’elles ne sont pas motivées par un but illégitime (p. ex., *McIntyre Estate*), les tribunaux d’instance inférieure en sont venus progressivement à reconnaître que les accords de *financement d’un litige* ne constituent pas non plus de la champartie *en soi*. Cette évolution s’est opérée surtout dans le contexte des recours collectifs, en réaction aux obstacles, comme les adjudications de dépens défavorables, qui entravaient l’accès des parties à la justice (voir *Dugal*, par. 33; *Marcotte c. Banque de Montréal*, 2015 QCCS 1915, par. 43-44 (CanLII); *Houle c. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, par. 52, conf. par 2018 ONSC 6352, 429 D.L.R. (4th) 739 (C. div.); voir également *Stanway c. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192, par. 13). La jurisprudence relative à l’approbation des accords de financement de litige par un tiers dans le contexte des recours collectifs — et même les paramètres de leur légalité en général — continue d’évoluer, et aucune des parties au présent pourvoi ne nous a invités à l’analyser.

⁶ L’ampleur de la controverse varie selon les provinces. En Ontario, les accords de champartie sont interdits par la loi (voir *An Act respecting Champerty*, R.S.O. 1897, c. 327). Au Québec, les questions relatives à la champartie et au soutien abusif ne se posent pas de façon aussi aiguë parce que la champartie et le soutien abusif ne font pas partie du droit comme tel (voir *Montgrain c. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; G. Michaud, « New Frontier : The Emergence of Litigation Funding in the Canadian Insolvabilité Landscape » dans J. P. Sarra et autres, dir., *Annual Review of Insolvency Law 2018* (2019), 221, p. 231).

[96] That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor “keep the lights on” (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

[97] We conclude that third party litigation funding agreements may be approved as interim financing in CCAA proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the CCAA. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.

[98] The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large gold deposit in Venezuela. *Crystallex* eventually became insolvent and (similar to *Bluberi*) was left with only a single significant asset: a US\$3.4 billion arbitration claim against Venezuela. After entering CCAA protection,

[96] Cela dit, dans la mesure où les accords de financement de litige par un tiers ne sont pas illégaux *en soi*, il n’y a aucune raison de principe qui permet d’empêcher les juges surveillants d’approuver ce type d’accord à titre de financement temporaire dans les cas qui s’y prêtent. Nous reconnaissons que cette forme de financement diffère des formes plus courantes de financement temporaire qui visent simplement à aider le débiteur à [TRADUCTION] « payer les frais courants » (voir *Royal Oak*, par. 7 et 24). Toutefois, dans des circonstances semblables à celles en l’espèce, lorsqu’il existait un seul élément d’actif susceptible de monétisation au bénéfice des créanciers, l’objectif visant à maximiser le recouvrement des créanciers a occupé le devant de la scène. En pareilles circonstances, le financement de litige favorise la réalisation de l’objectif fondamental du financement temporaire : permettre au débiteur de réaliser la valeur de ses éléments d’actif.

[97] Nous concluons que les accords de financement de litige par un tiers peuvent être approuvés à titre de financement temporaire dans le cadre des procédures fondées sur la LACC lorsque le juge surveillant estime qu’il serait juste et approprié de le faire, compte tenu de l’ensemble des circonstances et des objectifs de la Loi. Cela implique la prise en considération des facteurs précis énoncés au par. 11.2(4) de la LACC. Cela dit, ces facteurs ne doivent pas être appliqués machinalement ou examinés individuellement par le juge surveillant. En effet, ils ne seront pas tous importants dans tous les cas, et ils ne sont pas non plus exhaustifs. Des enseignements supplémentaires peuvent être tirés d’autres domaines où des accords de financement de litige par un tiers ont été approuvés.

[98] Ce qui précède est compatible avec la pratique qui a déjà cours devant les tribunaux d’instance inférieure. Plus particulièrement, dans *Crystallex*, la Cour d’appel de l’Ontario a approuvé un accord de financement de litige par un tiers dans des circonstances très semblables à celles en l’espèce. Cette affaire mettait en cause une société minière ayant le droit d’exploiter un grand gisement d’or au Venezuela. *Crystallex* est finalement devenue insolvable, et (comme *Bluberi*) il ne lui restait plus qu’un seul élément d’actif important : une réclamation

Crystallex sought the approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising judge approved the agreement as interim financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 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" (para. 68).

[99] A key argument raised by the creditors in *Crystallex* — and one that Callidus and the Creditors' Group have put before us now — was that the litigation funding agreement at issue was a plan of arrangement and not interim financing. This was significant because, if the agreement was in fact a plan, it would have had to be put to a creditors' vote pursuant to ss. 4 and 5 of the CCAA prior to receiving court approval. The court in *Crystallex* rejected this argument, as do we.

[100] There is no definition of plan of arrangement in the CCAA. In fact, the CCAA does not refer to plans at all — it only refers to an "arrangement" or "compromise" (see ss. 4 and 5). The authors of *Bankruptcy and Insolvency Law of Canada* offer the following general definition of these terms, relying on early English case law:

A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word

d'arbitrage de 3,4 milliards de dollars américains contre le Venezuela. Après s'être placée sous la protection de la LACC, Crystallex a demandé l'approbation d'un accord de financement de litige par un tiers. L'accord prévoyait que le prêteur avancerait des fonds importants pour financer l'arbitrage en échange, notamment, d'un pourcentage de la somme nette obtenue à la suite d'une sentence ou d'un règlement. Le juge surveillant a approuvé l'accord à titre de financement temporaire en vertu de l'art. 11.2. La Cour d'appel a conclu à l'unanimité que le juge surveillant n'avait commis aucune erreur dans l'exercice de son pouvoir discrétionnaire. Elle a conclu que l'art. 11.2 [TRADUCTION] « n'empêche pas le juge surveillant d'approuver, s'il y a lieu, avant qu'un plan soit approuvé, l'octroi d'une charge garantissant un financement qui pourra continuer après que la compagnie aura émergé de la protection de la LACC » (par. 68).

[99] Dans *Crystallex*, l'un des principaux arguments soulevés par les créanciers — et l'un de ceux qu'ont soulevés Callidus et le groupe de créanciers dans le présent pourvoi — était que l'accord de financement de litige en cause était un plan d'arrangement et non pas un financement temporaire. Il s'agissait d'un argument important car, si l'accord était en fait un plan, il aurait dû être soumis à un vote des créanciers conformément aux art. 4 et 5 de la LACC avant de recevoir l'aval du tribunal. La cour, dans *Crystallex*, a rejeté cet argument, et nous en faisons autant.

[100] La LACC ne définit pas le plan d'arrangement. En fait, la LACC ne fait aucunement allusion aux plans — elle fait uniquement état d'un « arrangement » ou d'une « transaction » (voir art. 4 et 5). S'appuyant sur l'ancienne jurisprudence anglaise, les auteurs de *Bankruptcy and Insolvency Law of Canada* proposent la définition générale suivante de ces termes :

[TRADUCTION] La « transaction » suppose d'emblée l'existence d'un différend au sujet des droits visés par la transaction et d'un règlement de ce différend selon des conditions jugées satisfaisantes par le débiteur et le créancier. L'accord visant à accepter une somme inférieure à 100 ¢ par dollar constituerait une transaction lorsque

than “compromise” and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (P.C.).

(Houlden, Morawetz and Sarra, at §33)

[101] The apparent breadth of these terms notwithstanding, they do have some limits. More recent jurisprudence suggests that they require, at minimum, some compromise of creditors’ rights. For example, in *Crystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not “compromise the terms of [the creditors’] indebtedness or take away . . . their legal rights” (para. 93). The Court of Appeal adopted the following reasoning from the lower court’s decision, with which we substantially agree:

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.

(*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 50)

[102] Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least

le débiteur conteste la dette ou n’a pas les moyens de la payer. Le mot « arrangement » a un sens plus large que le mot « transaction » et ne se limite pas à quelque chose qui ressemble à une transaction. Il viserait tout plan de réorganisation des affaires du débiteur : *Re Guardian Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (C.P.).

(Houlden, Morawetz et Sarra, §33)

[101] Malgré leur vaste portée apparente, ces termes connaissent quand même certaines limites. Selon une jurisprudence plus récente, ils exigeraient, à tout le moins, une certaine transaction à l’égard des droits des créanciers. Dans *Crystallex*, par exemple, on a conclu que l’accord de financement de litige en cause (également appelé [TRADUCTION] « facilité de DE Tenor ») ne constituait pas un plan d’arrangement parce qu’il ne comportait pas [TRADUCTION] « une transaction visant les conditions [des] dettes envers [des créanciers] ni ne [. . .] privait [ceux-ci] de [. . .] leurs droits reconnus par la loi » (par. 93). La Cour d’appel a fait sien le raisonnement suivant du tribunal de première instance, auquel nous souscrivons pour l’essentiel :

[TRADUCTION] Le « plan d’arrangement » et la « transaction » ne sont pas définis dans la LACC. Il doit toutefois s’agir d’un arrangement ou d’une transaction entre un débiteur et ses créanciers. La facilité de DE Tenor ne constitue pas, à première vue, un arrangement ou une transaction entre *Crystallex* et ses créanciers. Fait important, les détenteurs de billets ne sont pas privés de leurs droits par la facilité de DE Tenor. Les détenteurs de billets sont des créanciers non garantis. Leurs droits se résument à poursuivre en vue d’obtenir un jugement et à faire exécuter ce jugement. S’ils ne sont pas payés, ils ont le droit de demander une ordonnance de faillite en vertu de la LFI. Sous le régime de la LACC, ils ont le droit de voter sur un plan d’arrangement ou une transaction. La facilité de DE Tenor ne les prive d’aucun de ces droits.

(*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, par. 50)

[102] Il n’est pas nécessaire de définir exhaustivement les notions de plan d’arrangement ou de transaction pour trancher les présents pourvois. Il suffit de conclure que les plans d’arrangement doivent au

some compromise of creditors' rights. It follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the CCAA.

[103] We add that there may be circumstances in which a third party litigation funding agreement may contain or incorporate a plan of arrangement (e.g., if it contemplates a plan for distribution of litigation proceeds among creditors). Alternatively, a supervising judge may determine that, despite an agreement itself not being a plan of arrangement, it should be packaged with a plan and submitted to a creditors' vote. That said, we repeat that third party litigation funding agreements are not necessarily, or even generally, plans of arrangement.

[104] None of the foregoing is seriously contested before us. The parties essentially agree that third party litigation funding agreements *can* be approved as interim financing. The dispute between them focusses on whether the supervising judge erred in exercising his discretion to approve the LFA in the absence of a vote of the creditors, either because it was a plan of arrangement or because it should have been accompanied by a plan of arrangement. We turn to these issues now.

(3) The Supervising Judge Did Not Err in Approving the LFA

[105] In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing.

moins comporter une certaine transaction à l'égard des droits des créanciers. Il s'ensuit que l'accord de financement de litige par un tiers visant à apporter un financement à la compagnie débitrice pour réaliser la valeur d'un élément d'actif ne constitue pas nécessairement un plan d'arrangement. Nous sommes d'avis de laisser aux juges surveillants le soin de déterminer si, compte tenu des circonstances particulières de l'affaire dont ils sont saisis, l'accord de financement de litige par un tiers comporte des conditions qui le convertissent effectivement en plan d'arrangement. Si l'accord ne comporte pas de telles conditions, il peut être approuvé à titre de financement temporaire en vertu de l'art. 11.2 de la LACC.

[103] Ajoutons que, dans certaines circonstances, l'accord de financement de litige par un tiers peut contenir ou incorporer un plan d'arrangement (p. ex., s'il contient un plan prévoyant la distribution aux créanciers des sommes obtenues dans le cadre du litige). Subsidiairement, le juge surveillant peut décider que, bien que l'accord lui-même ne constitue pas un plan d'arrangement, il y a lieu de l'accompagner d'un plan et de le soumettre à un vote des créanciers. Cela dit, nous le répétons, les accords de financement de litige par un tiers ne constituent pas nécessairement, ni même généralement, des plans d'arrangement.

[104] Rien de ce qui précède n'est sérieusement contesté en l'espèce. Les parties s'entendent essentiellement pour dire que les accords de financement de litige par un tiers *peuvent* être approuvés à titre de financement temporaire. Le différend qui les oppose porte sur la question de savoir si le juge surveillant a commis une erreur en exerçant son pouvoir discrétionnaire d'approuver l'AFL en l'absence d'un vote des créanciers, soit parce qu'il constituait un plan d'arrangement, soit parce qu'il aurait dû être accompagné d'un plan d'arrangement. Nous abordons maintenant cette question.

(3) Le juge surveillant n'a pas commis d'erreur en approuvant l'AFL

[105] À notre avis, il n'y a aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'AFL à titre de

The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context (para. 74, citing *Bayens*, at para. 41; *Hayes*, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of CCAA proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing *Houle*). His consideration of those objectives is also apparent from his reliance on *Crystallex*, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.

[106] While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the CCAA individually before reaching his conclusion, this was not itself an error. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with Bluberi's CCAA proceedings, leads us to conclude that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It bears repeating that, at the time of his decision, the supervising judge had been seized of these proceedings for well over two years and had the benefit of the Monitor's assistance. With respect to each of the s. 11.2(4) factors, we note that:

- the judge's supervisory role would have made him aware of the potential length of Bluberi's CCAA proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors

financement temporaire. Se fondant sur les principes applicables à l'approbation d'accords semblables dans le contexte des recours collectifs (par. 74, citant *Bayens*, par. 41; *Hayes*, par. 4), le juge surveillant a estimé que l'AFL était juste et raisonnable. Plus particulièrement, il a examiné soigneusement les conditions selon lesquelles les avocats de Bentham et de Bluberi seraient payés si le litige était couronné de succès, les risques qu'ils prenaient en investissant dans le litige et l'étendue du contrôle qu'exercerait désormais Bentham sur le litige (par. 79 et 81). Le juge surveillant a également pris en compte les objectifs uniques des procédures fondées sur la LACC en établissant une distinction entre l'AFL et des accords apparemment semblables qui n'avaient pas été approuvés dans le contexte des recours collectifs (par. 81-82, établissant une distinction avec l'affaire *Houle*). Sa prise en compte de ces objectifs ressort également du fait qu'il s'est fondé sur *Crystallex*, qui, comme nous l'avons expliqué, portait sur l'approbation d'un financement temporaire dans des circonstances très semblables à celles en l'espèce (voir par. 67 et 71). Nous ne voyons aucune erreur de principe ni rien de déraisonnable dans cette approche.

[106] Certes, le juge surveillant n'a pas examiné à fond chacun des facteurs énoncés au par. 11.2(4) de la LACC de façon individuelle avant de tirer sa conclusion, mais cela ne constituait pas une erreur en soi. L'examen des motifs du juge surveillant dans leur ensemble, conjugué à la reconnaissance de son expérience évidente des procédures intentées par Bluberi sous le régime de la LACC, nous mène à conclure que les facteurs énumérés au par. 11.2(4) concernent des questions qui n'auraient pu échapper à son attention et à son examen adéquat. Il convient de rappeler qu'au moment où il a rendu sa décision, le juge surveillant était saisi des procédures en question depuis plus de deux ans et avait pu bénéficier de l'aide du contrôleur. En ce qui a trait à chacun des facteurs énoncés au par. 11.2(4), nous soulignons ce qui suit :

- le rôle de surveillance du juge lui aurait permis de connaître la durée prévue des procédures intentées par Bluberi sous le régime de la LACC ainsi que la mesure dans laquelle les dirigeants de Bluberi bénéficiaient du soutien des créanciers

appear to be less significant than the others in the context of this particular case (see para. 96);

- the LFA itself explains “how the company’s business and financial affairs are to be managed during the proceedings” (s. 11.2(4)(b));
- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi’s submission that approval of the LFA would assist it in finalizing a plan “with a view towards achieving maximum realization” of its assets (para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.’s application, at para. 99; s. 11.2(4)(d));
- the supervising judge was apprised of the “nature and value” of Bluberi’s property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));
- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that “[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, the only potential recovery lies with the lawsuit that the Debtors will launch” (para. 91 (emphasis added); s. 11.2(4)(f)); and
- the supervising judge was also well aware of the Monitor’s reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

[107] In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the CCAA, and the particular circumstances of this case when he approved the LFA as interim financing. We cannot say that he erred in the exercise of his discretion.

(al. 11.2(4)a) et c)), mais nous constatons que ces facteurs semblent revêtir beaucoup moins d’importance que les autres dans le contexte de la présente affaire (voir par. 96);

- l’AFL lui-même indique « la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures » (al. 11.2(4)b));
- le juge surveillant était d’avis que l’AFL favoriserait la conclusion d’un plan viable, car il a accepté (1) le fait que Bluberi avait l’intention de présenter un plan et (2) l’argument de Bluberi selon lequel l’approbation de l’AFL l’aiderait à conclure un plan [TRADUCTION] « visant à atteindre une réalisation maximale » de ses éléments d’actif (par. 68, citant la demande de 9354-9186 Québec inc. et de 9354-9178 Québec inc., par. 99; al. 11.2(4)d));
- le juge surveillant était au courant de la « nature et [de] la valeur » des biens de Bluberi, qui se limitaient clairement aux réclamations retenues (al. 11.2(4)e));
- le juge surveillant a conclu implicitement que la charge relative au financement de litige ne causerait pas un préjudice sérieux aux créanciers, car il a affirmé que [TRADUCTION] « [c]ompte tenu du résultat du vote [sur le premier plan] et des circonstances particulières de la présente affaire, la seule possibilité de recouvrement réside dans l’action que vont tenter les débiteurs » (par. 91 (nous soulignons); al. 11.2(4)f));
- le juge surveillant était aussi bien au fait des rapports du contrôleur, et s’est appuyé sur le plus récent d’entre eux à divers endroits dans ses motifs (voir, p. ex., par. 64-65 et note 1; al. 11.2(4)g)). Il convient de souligner que le contrôleur appuyait l’approbation de l’AFL à titre de financement temporaire.

[107] À notre avis, il est manifeste que le juge surveillant a mis l’accent sur l’équité envers toutes les parties, les objectifs précis de la LACC et les circonstances particulières de la présente affaire lorsqu’il a approuvé l’AFL à titre de financement temporaire. Nous ne pouvons affirmer qu’il a commis une erreur

Although we are unsure whether the LFA was as favourable to Bluberi’s creditors as it might have been — to some extent, it does prioritize Bentham’s recovery over theirs — we nonetheless defer to the supervising judge’s exercise of discretion.

[108] To the extent the Court of Appeal held otherwise, we respectfully do not agree. Generally speaking, our view is that the Court of Appeal again failed to afford the supervising judge the necessary deference. More specifically, we wish to comment on three of the purported errors in the supervising judge’s decision that the Court of Appeal identified.

[109] First, it follows from our conclusion that LFAs can constitute interim financing that the Court of Appeal was incorrect to hold that approving the LFA as interim financing “transcended the nature of such financing” (para. 78).

[110] Second, in our view, the Court of Appeal was wrong to conclude that the LFA was a plan of arrangement, and that *Crystallex* was distinguishable on its facts. The Court of Appeal held that the LFA and associated super-priority Litigation Financing Charge formed a plan because they subordinated the rights of Bluberi’s creditors to those of Bentham.

[111] We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors’ rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi’s litigation claim is akin to a “pot of gold” (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to “compromise” those rights. When the “pot of gold” is secure — that

dans l’exercice de son pouvoir discrétionnaire. Nous ne savons pas avec certitude si l’AFL était aussi favorable aux créanciers de Bluberi qu’il aurait pu l’être — dans une certaine mesure, il donne priorité au recouvrement de Bentham sur le leur — mais nous nous en remettons néanmoins à l’exercice par le juge surveillant de son pouvoir discrétionnaire.

[108] Dans la mesure où la Cour d’appel a conclu le contraire, en toute déférence, nous ne sommes pas d’accord. De façon générale, nous estimons que la Cour d’appel a encore une fois omis de faire preuve de la déférence nécessaire à l’égard du juge surveillant. Plus particulièrement, nous souhaitons faire des observations sur trois des erreurs qu’aurait décelées la Cour d’appel dans la décision du juge surveillant.

[109] Premièrement, il découle de notre conclusion selon laquelle les AFL peuvent constituer un financement temporaire que la Cour d’appel a eu tort de conclure que l’approbation de l’AFL à titre de financement temporaire [TRADUCTION] « transcendait la nature de ce type de financement » (par. 78).

[110] Deuxièmement, à notre avis, la Cour d’appel a eu tort de conclure que l’AFL était un plan d’arrangement, et qu’il était possible d’établir une distinction entre l’espèce et les faits de l’affaire *Crystallex*. La Cour d’appel a conclu que l’AFL et la charge relative au financement de litige super prioritaire s’y rattachant constituaient un plan parce qu’ils subordonnaient les droits des créanciers de Bluberi à ceux de Bentham.

[111] Nous souscrivons à l’opinion du juge surveillant selon laquelle l’AFL ne constitue pas un plan d’arrangement parce qu’il ne propose aucune transaction visant les droits des créanciers. Pour reprendre la formule qu’a employée la Cour d’appel dans *Crystallex*, la réclamation de Bluberi s’apparente à une [TRADUCTION] « marmite d’or » (par. 4). Les plans d’arrangement établissent la façon dont le contenu de cette marmite sera distribué. Ils n’indiquent généralement pas ce que la compagnie débitrice devra faire pour la remplir. Le fait que les créanciers puissent en fin de compte remporter plus ou moins d’argent ne modifie en rien la nature ou

is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi’s total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge’s reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

[112] This is the very same conclusion that was reached in *Crystallex* in similar circumstances:

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.

...

... 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. [paras. 82 and 93]

[113] We disagree with the Court of Appeal that *Crystallex* should be distinguished on the basis that it involved a single option for creditor recovery (i.e., the arbitration) while this case involves two (i.e., litigation of the Retained Claims and Callidus’s New

l’existence de leurs droits d’avoir accès à la marmite une fois qu’elle est remplie, pas plus qu’on ne saurait dire qu’il s’agit d’une « transaction » à l’égard de leurs droits. Lorsque la « marmite d’or » aura été obtenue — c’est-à-dire dans l’éventualité d’une action ou d’un règlement — les sommes nettes seront distribuées aux créanciers. En l’espèce, si les réclamations retenues permettent de recouvrer des sommes qui dépassent le total des dettes de Bluberi, les créanciers seront payés en entier; si les sommes sont insuffisantes, un plan d’arrangement ou une transaction établira la façon dont les sommes seront distribuées. Bluberi s’est engagée à proposer un tel plan (voir les motifs du juge surveillant, par. 68, établissant une distinction avec *Cliffs Over Maple Bay Investments Ltd. c. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

[112] C’est exactement la même conclusion qui a été tirée dans *Crystallex* dans des circonstances semblables :

[TRADUCTION] Les faits de l’espèce sont inhabituels : la « marmite d’or » ne contient qu’un seul élément d’actif qui, s’il est réalisé, rapportera beaucoup plus que ce qui est nécessaire pour rembourser les créanciers. Le juge surveillant était le mieux placé pour établir un équilibre entre les intérêts de toutes les parties intéressées. J’estime que l’exercice par le juge surveillant de son pouvoir discrétionnaire d’approuver le prêt de DE Tenor était raisonnable et approprié, bien qu’il ait eu pour effet de limiter la position de négociation des créanciers.

...

... L’approbation du prêt de DE Tenor a certes amoindri l’influence que pouvaient exercer les détenteurs de billets lors de la négociation d’un plan, et rendu plus complexe la négociation d’un plan, mais ce prêt ne constituait pas une transaction visant les conditions de leurs dettes ni ne les privait de l’un de leurs droits reconnus par la loi. Il ne s’agit donc pas d’un arrangement, et un vote des créanciers n’était pas nécessaire. [par. 82 et 93]

[113] Nous ne souscrivons pas à l’opinion de la Cour d’appel selon laquelle il y a lieu d’établir une distinction avec *Crystallex* parce que, dans cette affaire, les créanciers disposaient d’un seul moyen de recouvrement (c.-à-d. l’arbitrage) tandis que, dans la

Plan). Given the supervising judge's conclusion that Callidus could not vote on the New Plan, that plan was not a viable alternative to the LFA. This left the LFA and litigation of the Retained Claims as the "only potential recovery" for Bluberi's creditors (supervising judge's reasons, at para. 91). Perhaps more significantly, even if there were multiple options for creditor recovery in either *Crystallex* or this case, the mere presence of those options would not necessarily have changed the character of the third party litigation funding agreements at issue or converted them into plans of arrangement. The question for the supervising judge in each case is whether the agreement before them ought to be approved as interim financing. While other options for creditor recovery may be relevant to that discretionary decision, they are not determinative.

[114] We add that the Litigation Financing Charge does not convert the LFA into a plan of arrangement by "subordinat[ing]" creditors' rights (C.A. reasons, at para. 90). We accept that this charge would have the effect of placing secured creditors like Callidus behind in priority to Bentham. However, this result is expressly provided for in s. 11.2 of the *CCAA*. This "subordination" does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2).

[115] Third, we are of the view that the Court of Appeal was wrong to decide that the supervising judge should have submitted the LFA together with a plan to the creditors for their approval (para. 89). As we have indicated, whether to insist that a debtor package their third party litigation funding agreement

présente affaire, il y en a deux (c.-à-d. l'introduction d'une action à l'égard des réclamations retenues et le nouveau plan de Callidus). Étant donné que le juge surveillant avait conclu que Callidus ne pouvait pas voter sur le nouveau plan, ce plan ne constituait pas une solution de rechange viable à l'AFL. La [TRA-DUCTION] « seule possibilité de recouvrement » qui s'offrait aux créanciers de Bluberi résidait donc dans l'AFL et l'introduction d'une action à l'égard des réclamations retenues (motifs du juge surveillant, par. 91). Fait peut-être plus important, même si les créanciers avaient disposé de plusieurs moyens de recouvrement, tant dans l'affaire *Crystallex* que dans la présente affaire, la simple existence de ces moyens n'aurait pas nécessairement modifié la nature des accords de financement de litige par un tiers en cause ni n'aurait eu pour effet de les convertir en plans d'arrangement. La question que doit se poser le juge surveillant dans chaque affaire est de savoir si l'accord qui lui est soumis doit être approuvé à titre de financement temporaire. Certes, les autres moyens de recouvrement dont disposent les créanciers peuvent entrer en ligne de compte dans la prise de cette décision discrétionnaire, mais ils ne sont pas déterminants.

[114] Ajoutons que la charge relative au financement de litige ne convertit pas l'AFL en plan d'arrangement en [TRADUCTION] « subordonn[ant] » les droits des créanciers (motifs de la Cour d'appel, par. 90). Nous reconnaissons que cette charge aurait pour effet de placer les créanciers garantis comme Callidus derrière Bentham dans l'ordre de priorité, mais ce résultat est expressément prévu par l'art. 11.2 de la *LACC*. Cette « subordination » ne convertit pas le financement temporaire autorisé par la loi en plan d'arrangement. Retenir cette interprétation aurait pour effet d'annihiler le pouvoir du juge surveillant d'approuver ces charges sans un vote des créanciers en vertu du par. 11.2(2).

[115] Troisièmement, nous estimons que la Cour d'appel a eu tort de conclure que le juge surveillant aurait dû soumettre l'AFL accompagné d'un plan à l'approbation des créanciers (par. 89). Comme nous l'avons indiqué, la décision d'exiger que le débiteur accompagne d'un plan son accord de financement

with a plan is a discretionary decision for the supervising judge to make.

[116] Finally, at the appellants' insistence, we point out that the Court of Appeal's suggestion that the LFA is somehow "akin to an equity investment" was unhelpful and potentially confusing (para. 90). That said, this characterization was clearly *obiter dictum*. To the extent that the Court of Appeal relied on it as support for the conclusion that the LFA was a plan of arrangement, we have already explained why we believe the Court of Appeal was mistaken on this point.

VI. Conclusion

[117] For these reasons, at the conclusion of the hearing we allowed these appeals and reinstated the supervising judge's order. Costs were awarded to the appellants in this Court and the Court of Appeal.

Appeals allowed with costs in the Court and in the Court of Appeal.

Solicitors for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.: Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited): Woods, Montréal.

Solicitors for the respondent Callidus Capital Corporation: Gowling WLG (Canada), Montréal.

Solicitors for the respondents International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier: McCarthy Tétrault, Montréal.

Solicitors for the intervenor Ernst & Young Inc.: Stikeman Elliott, Montréal.

de litige par un tiers est une décision discrétionnaire qui appartient au juge surveillant.

[116] Enfin, sur les instances des appelantes, nous soulignons que l'affirmation de la Cour d'appel selon laquelle l'AFL [TRADUCTION] « s'apparente [en quelque sorte] à un placement à échéance non déterminée » était inutile et pouvait prêter à confusion (par. 90). Cela dit, il s'agissait manifestement d'une remarque incidente. Dans la mesure où la Cour d'appel s'est fondée sur cette qualification pour conclure que l'AFL constituait un plan d'arrangement, nous avons déjà expliqué pourquoi nous croyons que la Cour d'appel a fait erreur sur ce point.

VI. Conclusion

[117] Pour ces motifs, à l'issue de l'audience, nous avons accueilli les pourvois et rétabli l'ordonnance du juge surveillant. Les dépens devant notre Cour et la Cour d'appel ont été adjugés aux appelantes.

Pourvois accueillis avec dépens devant la Cour et la Cour d'appel.

Procureurs des appelantes/intervenantes 9354-9186 Québec inc. et 9354-9178 Québec inc. : Davies Ward Phillips & Vineberg, Montréal.

Procureurs des appelantes/intervenantes IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)) : Woods, Montréal.

Procureurs de l'intimée Callidus Capital Corporation : Gowling WLG (Canada), Montréal.

Procureurs des intimés International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier : McCarthy Tétrault, Montréal.

Procureurs de l'intervenante Ernst & Young Inc. : Stikeman Elliott, Montréal.

Solicitors for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals: Norton Rose Fulbright Canada, Montréal.

Procureurs des intervenants l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation : Norton Rose Fulbright Canada, Montréal.

TAB 30

CITATION: Acerus Pharmaceuticals Corporation (Re), 2023 ONSC 3314

COURT FILE NO.: CV-23-00693595-00CL

DATE: 2023-06-02

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ACERUS PHARMACEUTICALS CORPORATION, ACERUS BIOPHARMA INC., ACERUS LABS INC., AND ACERUS PHARMACEUTICALS USA, LLC

BEFORE: Penny J.

COUNSEL: *Elizabeth Pillon, Lee Nicholson and Philip Yang* for the Applicants

Stuart Brotman and Mitch Stephenson for the Monitor

Mervyn D. Abramowitz for the United States of America

Alex MacFarlane and Xiaodi Jin for First Generation Capital Inc.

D.J. Miller and Alexander Soutter for Jones Day

Kristina Bezprozvannykh for The Canada Life Assurance Company

Troels Keldmann as principal of Keldmann Healthcare and Keldmann Innovation

Brian Gilderman as principal of Precision Clinical Research, Inc.

HEARD: May 30, 2023

ENDORSEMENT

Overview

- [1] On May 30, 2023 I granted a sale approval and reverse vesting order, extended the stay and granted other ancillary relief, with reasons to follow. These are my reasons. The capitalized terms used in these reasons reflect the meanings attributed to those terms in the relevant documents submitted to the court on this motion.

Background

- [2] APC is an Ontario public company listed on the TSX and the OTCQB Exchange. APC operates out of its registered head office in Mississauga, Ontario. ABI and ALI are also OBCA corporations. APL was formed under the laws of the State of Delaware. There is a cross border component to these proceedings.

- [3] Each of the subsidiaries (ABI, ALI, and APL) are wholly owned by APC. The applicants comprise one corporate group which is operated and controlled by the management of APC at its head office in Mississauga, Ontario.
- [4] The applicants are in a specialized pharmaceutical business, focused on the commercialization and development of prescription men's health products. Their primary products are (a) Natesto, which is currently the sole source of revenue; and (b) Noctiva, which is currently not in distribution. There are also a number of secondary products.
- [5] The procedural history is uncontroversial. It is well laid out in the supporting material, the Monitor's Third Report and the applicants' factum. I will not repeat any of that here, other than to note that the proposed transactions are the result of both a pre-filing strategic process and SISP, initialed by the applicants and overseen by E&Y, and a subsequent court approved SISP, also overseen by E&Y, which had been appointed Monitor by the initial order in these proceedings.
- [6] The proposed transactions which are before the Court are structured in the form of a Subscription Agreement, with the consideration or purchase price in the form of a credit bid of all secured debt obligations owing to First Generation Capital (FGC). FGC is the majority shareholder of APC. It is also the first in priority secured creditor of the applicants and the court approved DIP Lender. It is owed over \$60 million in secured debt.
- [7] The proposed transaction structure provides for available funding to remain with the applicants and court officers, as necessary, to implement the transactions, address ancillary post-closing steps, and emerge from the CCAA proceedings. The transactions contemplated in the Subscription Agreement have been structured as a "reverse vesting" (or RVO) transaction. The transactions provide for a share transaction under which:
- (a) FGC will subscribe for and purchase new shares of APC, who will, in turn, cancel and terminate all of its existing shares so that FGC may become the sole shareholder of APC and ultimately, each of the subsidiaries of APC (including APL); and
 - (b) all excluded contracts, excluded assets, and excluded liabilities with respect to the Companies (including APL) will be transferred and "vested out" to corporations (Residual Cos.) to be incorporated by APC in advance of the closing date, so as to allow FGC to indirectly acquire APC's business and assets on a "free and clear" basis.

Issues

- [8] The issues to be determined on this motion are whether this Court should:
- (a) approve the Subscription Agreement and proposed transactions in the form of an Approval and Reverse Vesting Order;

- (b) grant the requested releases in favour of the applicants' directors, officers, employees and advisors, FAAN as CRO, the Monitor and its advisors and FGC and its directors, officers and advisors;
- (c) grant ancillary relief in respect of the shares being cancelled and the articles of reorganization;
- (d) grant the sealing order over the bid comparison chart in the Monitor's Third Report; and
- (e) extend the stay period.

Analysis

Jurisdiction and Factors

- [9] Section 11 of the CCAA confers jurisdiction on the court in the broadest of terms: "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".
- [10] Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered on a motion to approve a sale. While this motion is not for approval of a traditional asset sale, the s. 36(3) factors have been applied in an ARVO context. The factors include:
 - (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the monitor approved the process leading to the proposed sale or disposition;
 - (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which the creditors were consulted;
 - (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
 - (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
- [11] The s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank v. Soundair Corp*, 1991 CanLII 2727 (ONCA) for the approval of the sale of assets in an insolvency scenario:

- (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers have been obtained; and
- (d) whether there has been unfairness in the working out of the process: see *Target Canada Co. (Re)*, 2015 ONSC 1487, at paras. 14-17.

[12] Use of the ARVO structure is an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an ARVO structure must be preceded by close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of the ARVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must address questions such as:

- (a) Why is the ARVO necessary in this case?
- (b) Does the ARVO structure produce an economic result at least as favourable as any other viable alternative?
- (c) Is any stakeholder worse off under the ARVO structure than they would have been under any other viable alternative? and
- (d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the ARVO structure?

The ARVO Structure is Necessary

[13] The applicants operate in the pharmaceutical industry which is heavily regulated. In order for the applicants to carry on business, therefore, they are required to maintain various licenses. These licences are essential to the viability of the business. The insolvent circumstances of the applicants rules out a simple share purchase. In a traditional asset transaction, the purchaser would have to apply to transfer existing licences or apply for new ones. The purchaser in this case is not prepared to take the risk or invest the time and money to go through that process which is, by its very nature uncertain at best. There is no other comparable or viable transaction on offer.

[14] The Subscription Agreement was structured as an ARVO transaction which is necessary to provide the following benefits:

- (a) the applicants will maintain the multiple licenses that are required to maintain operations;
 - (b) the applicants have several in-progress trials and testing programs that are proceeding under and in the name of the applicants;
 - (c) the applicants hold various contracts with government entities; and
 - (d) the applicants have net operating losses in the approximate amount of \$215 million.
- [15] The evidence is that it was not possible to structure the transaction in a different manner. The Monitor canvassed the possibility of structuring the transaction with FGC by way of a plan of arrangement. However, FGC was not willing to consider that approach.

More Favourable Economic Result

- [16] The benefits of the transactions include:
- (a) based on the price payable under the Subscription Agreement, all of the applicants' secured liabilities will be satisfied by way of the credit bid (which, including advances under the DIP Facility, totals over \$65 million), which would not otherwise be satisfied by any other potential alternative;
 - (b) various unsecured and contingent liabilities will be assumed, in comparison to the other potential alternatives which do not; and
 - (c) sufficient liquidity to provide for post-filing obligations incurred to date and those necessary to exit the CCAA proceedings, in comparison to the other potential alternatives which do not provide comparable funding.
- [17] The only other bid options available to the applicants were what is referred to in the material as Unsuccessful Bid 1 and Unsuccessful Bid 2. Neither of the unsuccessful bids was a better or even viable option because:

Unsuccessful Bid 1 offered nominal consideration for a minor asset owned by the applicants, where the consideration being offered was insufficient to cover even the expected professional fees related to closing that bid; and,

in respect of Unsuccessful Bid 2:

- (i) the cash payment provided by Unsuccessful Bidder 2 was insufficient to repay the DIP Facility and amounts secured by charges in order to permit the applicants to exit the CCAA proceedings and the applicants are unable to generate liquidity from the excluded assets;
- (ii) the vast majority of the offer value was driven by future sales, which are subject to a high degree of uncertainty and risk;

- (iii) the Bid was only for a single product of the applicants and did not provide for a going-concern solution related to the remaining business of the applicants; and
- (iv) the Bid does not assume any liabilities of the applicants nor provide for the potential employment of any existing employees.

The Transactions Do Not Disadvantage Any Stakeholder Relative to Any Other Viable Transaction

- [18] Under the proposed transactions, the applicants, some of the unsecured creditors and all of the existing shareholders will have no recovery. However, the evidence makes it clear that these stakeholders would not realize any recovery in any other available restructuring alternative either (i.e., under either of the unsuccessful bids or in a bankruptcy/liquidation).
- [19] The proposed transactions, by contrast, assure a going concern result. This will result in:
- (a) an opportunity for each of the pharmaceutical products previously held by the applicants to be pursued and determine if they can be successfully brought to market at a future date;
 - (b) potential for several of the applicants' employees preserving their employment; and
 - (c) suppliers of goods and services having the opportunity to maintain their business relationship with the applicants on an ongoing basis in the future.

Is the Consideration Fair and Reasonable?

- [20] The consideration payable for the purchased shares under the Subscription Agreement is fair, reasonable, and reflects the importance of the assets being preserved under the RVO structure. The purchase price for the purchased shares will be satisfied through FGC's credit bid and the financing of post-filing obligations, which, as noted, together total in excess of \$65 million. The fairness and reasonableness of the consideration is confirmed by the results of the pre-filing strategic process, the pre-filing SISP, and the court approved SISP (discussed in more detail below). The consideration allows for the satisfaction of all the applicants' secured liabilities and assumption of some unsecured liabilities. Further, the consideration provides the applicants with the ability to implement the transactions and exit the CCAA proceedings as a going-concern.
- [21] As noted earlier, the applicants' licenses and contracts with government entities may be difficult to transfer. Further, the applicants' tax attributes are also an important asset being preserved under the ARVO structure. The evidence is that the tax attributes were an important consideration for FGC in making its credit bid for all of the applicants' secured debt.
- [22] The market (and the evidence) has shown that there is no other bidder out there who is willing to pay more for these assets.

Section 36 CCAA Factors

The Process Leading Up to the Subscription Agreement and the Transactions

- [23] The execution of the Subscription Agreement represents the culmination of extensive solicitation efforts for investments beginning from March 2022 and a robust sales process conducted by the applicants and E&Y beginning from September 2022. These efforts include:
- (a) the applicants seeking refinancing or investment options;
 - (b) the pre-filing SISP which commenced in September 2022 and concluded in November 2022, with E&Y having canvassed its global network for prospective bidders;
 - (c) during the course of the CCAA the Monitor broadly canvassed the market under the SISP by approaching known potential bidders from prior processes and contacting 20 additional parties;
 - (d) the careful consideration of all the bids by the Special Committee, the applicants, the Monitor, the CRO, and their respective advisors and counsel of all available options; and
 - (e) negotiations between the Monitor, APC, and FGC in respect of the Subscription Agreement and the proposed transactions.
- [24] The SISP appears to have been well structured and, when combined with the pre-filing strategic processes, resulted in a broad canvassing of the market for potential purchasers of the applicants' business.

The Monitor Approved the Process Leading up to the Subscription Agreement and the Transactions

- [25] E&Y assisted with the pre-filing strategic initiative and the pre-filing SISP. The court approved SISP was developed in consultation with and supported by E&Y as Monitor. Further, the Monitor administered the SISP in accordance with its terms and the SISP order of this court. The Subscription Agreement is the product of the applicants' and the Monitor's continued efforts to solicit interest in the applicants' business and/or assets and is supported by the Monitor. It is the best alternative available.

More Beneficial to Creditors Than a Sale or Disposition Under a Bankruptcy

- [26] The Monitor has conducted an analysis of whether the completion of the proposed transactions contemplated by the Subscription Agreement would be more beneficial to the applicants' creditors and other stakeholders as compared to a sale or disposition of the business and assets of the applicants under a bankruptcy. The Monitor determined that:

- (a) a potential bankruptcy could cause significant disruption in operations and delay the market launch of Noctiva, thus adversely impacting the value of the business. The uncertainty surrounding the timeline for transferring the patents and license to a purchaser during bankruptcy proceedings adds to the uncertainty and complexity. This, coupled with the bankruptcy procedure itself, could result in a substantial delay in closing any transaction;
- (b) the RVO structure is a condition of closing the Subscription Agreement. The reverse vesting structure is unlikely to be available in a potential bankruptcy given the vesting of the assets in the trustee. Furthermore, even if FGC was willing to proceed based on an asset sale structure, instead of the RVO, the Monitor believes it is unlikely that the recovery could be enhanced by pursuing a sale transaction in a bankruptcy;
- (c) accordingly, it is the Monitor's view that a sale or disposition of the business and assets of the applicants in a bankruptcy would most likely result in a lower recovery. In the Monitor's view, the market has been sufficiently canvassed and the FGC bid is the only viable bid in the circumstances. It is unlikely that there is any material value to the assets of the applicants in any transaction other than the FGC bid.

Stakeholders Were Consulted During the Sale Process

- [27] The applicants consulted with their largest secured creditor, FGC, throughout the pre-filing strategic process. FGC, and FGC in its capacity as the DIP Lender, was given the opportunity to submit a bid in respect of the applicants' business and assets, which FGC did. This was through a court approved process on notice to all stakeholders. In addition, notice of this motion was given to a broad spectrum of the applicants' stakeholders as well.
- [28] In this context, I will address three specific situations which arose before and/or during the hearing of the motion.

Jones Day has an existing action against APL in the U.S. for outstanding professional fees owed by an APL predecessor. One of the issues raised by Jones Day in this CCAA proceeding involved a potential challenge to FGC's security beyond the amount advanced in December 2022 and pursuant to the DIP, in respect of the Applicants other than APC. The applicants, FGC and Jones Day were able to negotiate a specific carve-out of the Jones Day claim from the proposed releases and agreed that the following language would be approved by the court in this endorsement:

For greater certainty, in providing the releases as outlined in paragraph 31 of the proposed Approval and Reverse Vesting Order, such relief shall not be used or raised by APL or any individual defendants in the course of the Jones Day Litigation, to limit or

adversely affect the Jones Day Litigation as against APL or any individuals that have been named as defendants.

This language is so approved.

- [29] Dr. Troels Keldmann attended the hearing. He is a principal of Keldmann Healthcare and Keldmann Innovation which sold certain product rights to a predecessor of APL in 2009. Part of the payment to Keldmann Innovation A/S was to be in the form of royalties under the Amended Product Development Agreement between Trimel Biopharma SRL, Keldmann Healthcare A/S and Keldmann Innovation A/S dated December 30, 2009. This agreement, however, is one of the Excluded Contracts being transferred to a ResidualCo under the terms of the Subscription Agreement. Dr. Keldmann was concerned that, although the Keldmann counterparties would lose the right to any future payments, should the product sold to APL be successfully developed at some future point, they would remain subject to a non-compete provision embedded in that agreement. The applicants immediately made it clear that they had no intention of relying on enforcement rights under this excluded contract and proposed that they would issue a formal disclaimer of rights under that contract. This appeared to satisfactorily address Dr. Keldmann's concern.
- [30] Mr. Brian Gilderman also attended the hearing. Mr. Gilderman is a principal of Precision Clinical Research, Inc., which is conducting clinical trials on an APL product. Mr. Gilderman expressed concern about a potential mis-match between his obligation to continue to perform contractual services under the court's CCAA order while being at risk of not being paid for those services. This situation was complicated by the existence of "hold back" provisions in the service agreement. There was insufficient evidence before the court to address this issue properly. The applicants and the Monitor undertook to pursue the matter with Mr. Gilderman. If a satisfactory understanding cannot be reached, the parties may return to court for further direction.

The Subscription Agreement and the Proposed Transactions Allow Various Stakeholders to Maintain their Rights

- [31] As noted earlier, the analysis of the applicants and the Monitor is that none of the applicants' creditors will be materially disadvantaged by the Subscription Agreement and the proposed transactions relative to any other viable alternative. In addition, the Subscription Agreement maintains many of the rights that creditors would otherwise have in an asset sale transaction. In the case of parties with existing contracts with the applicants, though no assignment of contracts (consensual or through an assignment order) is contemplated as part of the proposed transactions, the Subscription Agreement provides for all contracts, other than the Excluded Contracts, to remain with the applicants. The contracting parties, therefore, have the opportunity to continue supplying goods and services to the applicants post-CCAA proceedings if they choose to do so. While the Subscription Agreement does not require FGC to cure pre-filing arrears under the Retained Contracts, all contract counterparties have also been served with the applicants' motion record to provide them with notice that their contracts are either being retained or excluded as part of the proposed transactions.

- [32] While the Excluded Contracts, Assets and Liabilities will be vested out into Residual Cos in this structure, this outcome is no different from the result that would obtain if the proposed transactions had been carried out using a typical asset purchase structure. Nor will there be any inter-company transfer of assets and liabilities among the existing applicants prior to closing. Therefore, the proposed transactions will not result in any material prejudice or impairment of any creditors' rights which might have been avoided in an asset purchase transaction.

Sufficient Effort has been Made to Obtain the Best Price and the Applicants have not Acted Improvidently

- [33] The execution of the Subscription Agreement represents the culmination of extensive solicitation efforts for investment or sale opportunities beginning in March 2022 and a robust sales process conducted by the applicants and E&Y from September 2022, both privately and under a court approved SISP post-filing. There is no evidence, or suggestion, that the process was less than fair and robust. Nor is there any prospect that a "better deal" was somehow available but not pursued.

The Share Transactions

- [34] Consistent with ARVOs previously granted by this court, the proposed order in this case will terminate and cancel all options, securities and other rights held by any person that are convertible or exchangeable for any securities of APC. APC, previously publicly traded on the TSX, will be taken private as a result of the proposed transaction. The purchaser, FGC, currently holds approximately 89% of the issued and outstanding shares of APC. The other shareholders have been notified of the CCAA proceedings and the proposed transactions by way of various press releases and notices issued by the applicants and/or the Monitor.
- [35] The jurisdictional and legal basis for these orders has been canvassed extensively in prior decisions of this court so I will not repeat that analysis here: *Harte Gold (Re)*, 2022 ONSC 653; *Just Energy Group Inc. v. Morgan Stanley Capital Group Inc.*, 2022 ONSC 6354. In essence, equity claims must be subordinate to the claims of creditors. In no possible scenario, on the record before me, would there be any recovery for the shareholders of APC. The OBCA provides the relevant authority to order the restructuring of the shares and the articles as contemplated in the proposed Approval and Reverse Vesting Order.

The Releases

- [36] The Release covers any and all present and future claims against the Released Parties based upon any fact or matter of occurrence in respect of the transactions or the applicants, its assets, business or affairs or administration of the applicants, except any claim that is not permitted to be released under s. 5.1(2) of the CCAA. For avoidance of doubt, as noted above, the Releases will not release APL or the individuals named as defendants in the Jones Day litigation from liability in respect of that action.

- [37] A non-exhaustive list of relevant factors to consider in determining court approval of proposed releases was laid out by Chief Justice Morawetz in *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54.
- [38] Considering those factors, I conclude the Release is reasonable and appropriate in the circumstances and that they should be granted for the following reasons:
- (a) The claims released are rationally connected to the applicants' restructuring. The Release will have the effect of diminishing claims against the Released Parties, which in turn will diminish indemnification claims by the Released Parties against the Administration Charge and the Directors' Charge. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the applicants' restructuring.
 - (b) The Released Parties made significant contributions to the applicants' restructuring, both prior to and throughout the CCAA proceedings. Among other things, the extensive efforts of the directors and management of the applicants were instrumental to the conduct of the pre-filing strategic process, the pre-filing SISP, the court-approved SISP and the continued operations of the applicants during the CCAA proceedings. The proposed transactions will maintain the applicants as a going concern; in this sense at least, the CCAA proceedings have had a successful outcome for the benefit of at least some of the applicants' stakeholders. This is an outcome which is, as discussed above, better than any other reasonably available alternative. The Released Parties have contributed time, energy and resources to achieve this outcome; they are deserving of the Release.
 - (c) The Release is fair and reasonable. The applicants, for example, are unaware of any statutory liabilities in respect of the Released Parties (particularly, the directors and officers of the applicants) and to date, no stakeholder of the applicants have made the applicants or the Monitor aware that they intend to assert a claim against any of the Released Parties in respect of any claims covered by the Release. Further, the Release is sufficiently narrow in circumstances as the Release carves out and preserve claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA, claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced to allow the applicants and the Released Parties to move forward with the Subscription Agreement and the transactions and work to conclude the CCAA proceedings.
 - (d) The Release will bring certainty and finality for the Released Parties. Additionally, the applicants, the Monitor, and FGC all believe that the Release is an essential component to the transactions.
 - (e) The Release benefits the applicants' creditors and other stakeholders by reducing the potential for the Released Parties to seek indemnification from the applicants, thus minimizing further claims against the applicants.

- (f) Creditors had knowledge of the nature and effect of the Release. All creditors on the Service List were served with materials relating to this motion. The applicants also made additional efforts to serve all parties with excluded claims under the transactions. To date, no creditor has objected to the Release. At this point, and in these circumstances, requiring a specific claims process for claims against the Released Parties would only result in additional costs and delay without any apparent corresponding benefit.

Sealing Order

- [39] The applicants seek a limited sealing order regarding the results of the bids under the SISP. Preservation of the confidentiality of bid information is recognized as meeting the requirements of the test for sealing court documents in *Sherman Estate*. It is in the public interest that the ability of the applicants and the Monitor to maximize value be preserved until the transactions contemplated by the Subscription Agreement have closed. The request for a sealing order of the bid information is granted.

Extension of the Stay

- [40] The applicants need further time to close the proposed transactions and implement the remaining steps to bring these proceedings to their conclusion. As detailed in Updated Cash Flow Forecast at Appendix B to the Third Report of the Monitor, the applicants are expected to maintain liquidity to fund operations up to July 2, 2023. The stay is extended to June 30, 2023.

Monitor Support

- [41] I will say, in summary fashion to the extent not specifically mentioned in connection with the issues addressed above, that the Monitor has deep familiarity and experience with the applicants and their circumstances, dating back to March 2022. The Monitor has worked closely with the stakeholders, the CRO and other players. The Monitor, appointed by the court and answerable to the court, fully supports all the relief being sought by the applicants and has explained the basis for its support in detail in its Third Report.

Conclusion

- [42] For the forgoing reasons, the motion is granted. The Subscription Agreement and proposed transactions, including the ARVO, are approved. The sealing order regarding the bid summary is granted. The stay of proceedings is extended to June 30, 2023.

Penny J.

Date: June 2, 2023

TAB 31

Her Majesty The Queen in Right of Canada
Appellant

v.

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

and

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

**INDEXED AS: CANADA v. CANADA NORTH
GROUP INC.**

2021 SCC 30

File No.: 38871.

2020: December 1; 2021: July 28.

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

**ON APPEAL FROM THE COURT OF APPEAL OF
ALBERTA**

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

Sa Majesté la Reine du chef du Canada
Appelante

c.

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

et

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

**RÉPERTOIRE : CANADA c. CANADA NORTH
GROUP INC.**

2021 CSC 30

N° du greffe : 38871.

2020 : 1^{er} décembre; 2021 : 28 juillet.

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

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

*Faillite et insolvabilité — Priorité — Retenues à la
source — Charges super prioritaires — Retenues à la
source des employés non versées à la Couronne par les
compagnies mises sous séquestre — Juge chargé de sur-
veiller la procédure de restructuration intentée sous le
régime de la Loi sur les arrangements avec les créan-
ciers des compagnies ordonnant que les actifs des com-
pagnies soient grevés de charges super prioritaires en
faveur du prêteur temporaire, du contrôleur et des admi-
nistrateurs — Ordonnance accordant aux charges super*

provincial statute — Property of debtor companies subject to deemed trust in favour of Crown for unremitted source deductions under Income Tax Act — Whether court has authority to rank priming charges ahead of Crown’s deemed trust for unremitted source deductions — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 227(4.1) — Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2, 11.51, 11.52.

Canada North Group and six related corporations initiated restructuring proceedings under the *Companies’ Creditors Arrangement Act* (“CCAA”). In their initial CCAA application, they requested a package of relief including the creation of three priming charges (or court-ordered super-priority charges): an administration charge in favour of counsel, a monitor and a chief restructuring officer for the fees they incurred, a financing charge in favour of an interim lender, and a directors’ charge protecting their directors and officers against liabilities incurred after the commencement of the proceedings. The application included an affidavit from one of their directors attesting to a debt to Her Majesty The Queen for unremitted employee source deductions and GST. The CCAA judge made an order (“Initial Order”) that the priming charges were to “rank in priority to all other security interests, . . . charges and encumbrances, claims of secured creditors, statutory or otherwise”, and that they were not to be “otherwise . . . limited or impaired in any way by . . . the provisions of any federal or provincial statutes” (“Priming Charges”). The Crown subsequently filed a motion for variance, arguing that the Priming Charges could not take priority over the deemed trust created by s. 227(4.1) of the *Income Tax Act* (“ITA”) for unremitted source deductions. The motion to vary was dismissed, and the Crown’s appeal to the Court of Appeal was also dismissed.

Held (Abella, Moldaver, Brown and Rowe JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Côté and Kasirer JJ.: The Priming Charges prevail over the deemed trust. Section 227(4.1)

prioritaires priorité sur les réclamations des créanciers garantis et précisant que ces charges ne doivent pas être limitées ou compromises de quelque façon que ce soit par les dispositions de toute loi fédérale ou provinciale — Biens des compagnies débitrices assujettis à la fiducie réputée en faveur de la Couronne à l’égard des retenues à la source non versées en application de la Loi de l’impôt sur le revenu — Le tribunal a-t-il le pouvoir d’accorder aux charges super prioritaires priorité de rang sur la fiducie réputée de la Couronne à l’égard des retenues à la source non versées? — Loi de l’impôt sur le revenu, L.R.C. 1985, c. 1 (5^e suppl.), art. 227(4.1) — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 11, 11.2, 11.51, 11.52.

Canada North Group et six sociétés liées ont intenté une procédure de restructuration sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« LACC »). Dans la demande initiale qu’elles ont présentée en vertu de la LACC, elles réclamaient une série de mesures, y compris la création de trois charges super prioritaires : une charge visant des frais administratifs constituée en faveur des avocats, du contrôleur et du directeur de la restructuration pour les frais qu’ils ont engagés, une charge de financement en faveur d’un prêteur temporaire, et une charge constituée en faveur des administrateurs en vue de les protéger ainsi que les dirigeants contre les obligations contractées après l’introduction de l’instance. La demande comprenait un affidavit de l’un de leurs administrateurs pour attester l’existence d’une dette envers Sa Majesté la Reine à l’égard de la TPS et de retenues à la source des employés non versées. Le juge chargé d’appliquer la LACC a rendu une ordonnance (« ordonnance initiale ») précisant que les charges super prioritaires devaient avoir « priorité sur tou[tes] les autres [. . .], garanties, [. . .], charges et sûretés, créances de créanciers garantis, d’origine législative ou autre », et ne devaient pas être « autrement limitées ou compromises de quelque façon que ce soit par [. . .] les dispositions de toute loi fédérale ou provinciale ». La Couronne a par la suite déposé une requête en modification, plaçant que les charges super prioritaires ne pouvaient avoir priorité sur la fiducie réputée créée par le par. 227(4.1) de la *Loi de l’impôt sur le revenu* (« LIR ») à l’égard des retenues à la source non versées. La requête en modification a été rejetée, tout comme l’appel de la Couronne à la Cour d’appel.

Arrêt (les juges Abella, Moldaver, Brown et Rowe sont dissidents) : Le pourvoi est rejeté.

Le juge en chef Wagner et les juges Côté et Kasirer : Les charges super prioritaires l’emportent sur la fiducie

does not create a proprietary interest in the debtor's property. Further, a court-ordered super-priority charge under the *CCAA* is not a security interest within the meaning of s. 224(1.3) of the *ITA*. As a result, there is no conflict between s. 227(4.1) of the *ITA* and the Initial Order made in this case, or between the *ITA* and s. 11 of the *CCAA*.

In general, courts supervising a *CCAA* reorganization have the authority to order super-priority charges to facilitate the restructuring process. The most important feature of the *CCAA* is the broad discretionary power it vests in the supervising court: s. 11 of the *CCAA* confers jurisdiction on the supervising court to “make any order that it considers appropriate in the circumstances”. This jurisdiction is constrained only by restrictions set out in the *CCAA* itself and the requirement that the order made be appropriate in the circumstances — its general language is not restricted by the availability of more specific orders in ss. 11.2, 11.4, 11.51 and 11.52. As restructuring under the *CCAA* often requires the assistance of many professionals, giving super priority to priming charges in favour of those professionals is required to derive the most value for the stakeholders. For a monitor and financiers to put themselves at risk to restructure and develop assets, only to later discover that a deemed trust supersedes all claims, would defy fairness and common sense.

Her Majesty does not have a proprietary interest in a debtor's property that is adequate to prevent the exercise of a supervising judge's discretion to order super-priority charges under s. 11 of the *CCAA* or any of the sections that follow it. Section 227(4.1) does not create a beneficial interest that can be considered a proprietary interest, and it does not give the Crown the same property interest a common law trust would. Without attaching to specific property, creating the usual right to the enjoyment of property or the fiduciary obligations of a trustee, the interest created by s. 227(4.1) lacks the qualities that allow a court to refer to a beneficiary as a beneficial owner.

Furthermore, under Quebec civil law, it is clear that s. 227(4.1) does not establish a legal trust as it does not meet the three requirements set out in arts. 1260 and 1261 of the *Civil Code of Québec*. Although s. 227(4.1) provides

réputée. Le paragraphe 227(4.1) ne crée pas un intérêt à titre de propriétaire sur les biens du débiteur. En outre, une charge super prioritaire ordonnée par un tribunal en vertu de la *LACC* n'est pas une garantie au sens du par. 224(1.3) de la *LIR*. Il n'y a donc pas de conflit entre le par. 227(4.1) de la *LIR* et l'ordonnance initiale rendue en l'espèce, ni entre la *LIR* et l'art. 11 de la *LACC*.

En général, les tribunaux chargés de surveiller les restructurations sous le régime de la *LACC* ont le pouvoir d'ordonner des charges super prioritaires afin de faciliter le processus de restructuration. La caractéristique la plus importante de la *LACC* est le vaste pouvoir discrétionnaire qu'elle confère au tribunal de surveillance : l'art. 11 de la *LACC* accorde à ce tribunal le pouvoir de « rendre [...] toute ordonnance qu'il estime indiquée ». Ce pouvoir n'est limité que par les restrictions imposées par la *LACC* elle-même, ainsi que par la condition requérant que l'ordonnance soit indiquée dans les circonstances — la possibilité de rendre ces ordonnances plus spécifiques en vertu des art. 11.2, 11.4, 11.51 et 11.52 n'a pas pour effet de restreindre la portée des termes généraux qui y sont employés. Comme il faut souvent obtenir l'aide de nombreux professionnels pour restructurer une compagnie sous le régime de la *LACC*, il est nécessaire de constituer des charges super prioritaires en faveur de ces professionnels pour que les parties prenantes bénéficient d'une valorisation maximale. Il serait contraire à l'équité et au bon sens qu'un contrôleur et des prêteurs s'exposent à des risques afin de restructurer une compagnie et de l'aider à se développer, puis découvrent par la suite qu'une fiducie réputée prévaut sur l'ensemble des créances.

Sa Majesté n'a pas sur les biens du débiteur un intérêt à titre de propriétaire suffisant pour empêcher le juge surveillant d'ordonner des charges super prioritaires en vertu du pouvoir discrétionnaire que lui confère l'art. 11 de la *LACC*, ou de l'un ou l'autre des articles qui le suivent. Le paragraphe 227(4.1) ne crée pas un droit de bénéficiaire qui peut être considéré comme un intérêt à titre de propriétaire, et il ne confère pas à la Couronne le même droit de propriété qu'une fiducie de common law. N'étant associé à aucun bien précis, ce qui conférerait à son titulaire le droit habituel à la jouissance du bien ou lui imposerait les obligations d'un fiduciaire, l'intérêt créé par le par. 227(4.1) ne possède pas les attributs qui permettent à un tribunal de qualifier le bénéficiaire de propriétaire bénéficiaire.

En outre, en droit civil québécois, il est clair que le par. 227(4.1) ne crée pas de fiducie légale, car il ne satisfait pas aux trois conditions prévues aux art. 1260 et 1261 du *Code civil du Québec*. Bien que le par. 227(4.1)

that the assets are deemed to be held “separate and apart from the property of the person” and “to form no part of the estate or property of the person”, the main element of a civilian trust is absent in the deemed trust established by s. 227(4.1): no specific property is transferred to a trust patrimony, and there is no autonomous patrimony to which specific property is transferred.

Section 227(4.1) states that the Receiver General shall be paid the proceeds of a debtor’s property “in priority to all such security interests”, as defined in s. 224(1.3), but court-ordered super-priority charges under s. 11 of the CCAA or any of the sections that follow it are not security interests within the meaning of s. 224(1.3). Section 224(1.3) defines “security interest” as meaning “any interest in, or for civil law any right in, property that secures payment or performance of an obligation” and including “an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for”. The grammatical structure of this provision evidences Parliament’s intent that the list have limiting effect, such that only the instruments enumerated and instruments that are similar in nature fall within the definition. Court-ordered super-priority charges are utterly different from any of the interests listed in s. 227(4.1) because they were not made for the sole benefit of the holder of the charge, nor were they made by consensual agreement or by operation of law. Instead, they were ordered by the CCAA judge to facilitate the restructuring in furtherance of the interests of all stakeholders. This interpretation is consistent with the presumption against tautology, which suggests that Parliament intended interpretive weight to be placed on the examples, and with the *ejusdem generis* principle, which limits the generality of the final words on the basis of the narrow enumeration that precedes them.

Preserving the deemed trusts under s. 37(2) of the CCAA does not modify the characteristics of these trusts. They continue to operate as they would have if the insolvent company had not sought CCAA protection. Similarly, granting Her Majesty the right to insist that a compromise or arrangement not be sanctioned by a court unless it provides for payment in full under s. 6(3) does not modify

dispose que les biens soient réputés détenus « séparés des propres biens de la personne » et « ne pas faire partie du patrimoine ou des biens de la personne », on ne retrouve pas l’élément principal d’une fiducie civiliste dans la fiducie réputée créée en application du par. 227(4.1) : aucun bien précis n’est transféré au patrimoine fiduciaire, et il n’existe aucun patrimoine autonome auquel sont transférés des biens précis.

Le paragraphe 227(4.1) précise que le receveur général reçoit le produit découlant des biens du débiteur « par priorité sur une telle garantie », au sens du par. 224(1.3), mais les charges super prioritaires ordonnées par le tribunal en vertu de l’art. 11 de la LACC ou de l’un ou l’autre des articles qui le suivent ne sont pas des garanties au sens du par. 224(1.3). Selon la définition de ce terme au par. 224(1.3), « garantie » s’entend d’un « [i]ntérêt ou, pour l’application du droit civil, [d’un] droit sur un bien qui garantit l’exécution d’une obligation, notamment un paiement », et « [s]ont en particulier des garanties les intérêts ou, pour l’application du droit civil, les droits nés ou découlant de débentures, hypothèques, privilèges, nantissements, sûretés, fiducies réputées ou réelles, cessions et charges, quelle qu’en soit la nature, de quelque façon ou à quelque date qu’elles soient créées, réputées exister ou prévues par ailleurs ». La structure grammaticale de cette disposition témoigne de l’intention du législateur de restreindre la portée de l’énumération, si bien que seuls les instruments énumérés ou les instruments de nature similaire répondent à la définition. Les charges super prioritaires d’origine judiciaire sont radicalement différentes de n’importe lequel des intérêts énumérés au par. 227(4.1), puisqu’elles n’ont pas été constituées au seul bénéfice de leur détenteur, ni par accord consensuel ou par application de la loi. Elles ont plutôt été ordonnées par le juge chargé d’appliquer la LACC dans le but de faciliter la restructuration dans l’intérêt de toutes les parties prenantes. Cette interprétation s’accorde avec la présomption d’absence de tautologie, laquelle donne à penser que le législateur voulait que l’on attribue une valeur interprétative aux exemples, de même qu’avec la règle *ejusdem generis*, qui limite la portée générale des derniers termes sur la base de l’énumération des exemples précis qui les précède.

Le fait que les fiducies réputées soient protégées par le par. 37(2) de la LACC ne modifie en rien les caractéristiques de ces fiducies. Elles continuent à produire leur effet comme si la compagnie insolvable n’avait pas demandé la protection de la LACC. De même, le fait d’accorder à Sa Majesté le droit d’insister auprès du tribunal afin qu’il refuse d’homologuer une transaction ou un arrangement

the deemed trust created by s. 227(4.1) in any way. In any event, s. 6(3) comes into operation only at the end of the CCAA process when parties seek court approval of their arrangement or compromise.

Finally, whether Her Majesty is a “secured creditor” under the CCAA or not, the supervising court’s power in s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders. Although ss. 11.2, 11.51 and 11.52 of the CCAA may attach only to the property of the debtor’s company, there is no such restriction in s. 11. That said, courts should still recognize the distinct nature of Her Majesty’s interest and ensure that they grant a charge with priority over the deemed trust only when necessary.

Per Karakatsanis and Martin JJ.: There is no conflict between the ITA and CCAA provisions at issue in this appeal. The broad discretionary power under s. 11 of the CCAA permits a court to rank priming charges ahead of the Crown’s deemed trust for unremitted source deductions.

Section 227(4.1) of the ITA provides that a deemed trust attaches to property of the employer to the extent of unremitted source deductions “notwithstanding any security interest in such property” or “any other enactment of Canada”. Although this provision clearly specifies that the Crown’s right operates notwithstanding other security interests, the content of that right for the purposes of insolvency cannot be inferred solely from the text of the ITA. Section 227(4.1) states that the amount of the unremitted source deductions is “beneficially owned” by the Crown, but there is no settled doctrinal meaning of the term “beneficial ownership”, and s. 227(4.1) modifies even those features of beneficial ownership that are widely associated with it under the common law.

As a creature of statute, a statutory deemed trust does not have to fulfill the ordinary requirements of trust law. In the case of the deemed trust in s. 227(4.1), there is no identifiable trust property and therefore no certainty of subject matter. Moreover, without specific property being transferred to the trust patrimony, s. 227(4.1) does not satisfy the requirements of an autonomous patrimony contemplated by the *Civil Code of Québec* in arts. 1260, 1261 and 1278. As a result, s. 227(4.1) traces the value of the unremitted source deductions, capping the Crown’s

qui ne pourvoit pas au paiement intégral prévu au par. 6(3) ne modifie d’aucune façon la fiducie présumée créée par le par. 227(4.1). Quoi qu’il en soit, le par. 6(3) ne s’applique qu’à l’issue de la procédure de la LACC, lorsque les parties cherchent à faire homologuer par le tribunal leur arrangement ou leur transaction.

Enfin, que Sa Majesté soit ou non un « créancier garanti » au sens de la LACC, la possibilité de rendre des ordonnances plus spécifiques n’a pas pour effet de restreindre le vaste pouvoir conféré au tribunal de surveillance par l’art. 11. Même si les art. 11.2, 11.51 et 11.52 de la LACC peuvent se rattacher uniquement aux biens de la compagnie débitrice, aucune restriction de ce genre ne figure à l’art. 11. Cela dit, les tribunaux devraient tout de même reconnaître le caractère distinct de l’intérêt de Sa Majesté et n’accorder une charge ayant priorité sur la fiducie réputée que dans les cas où c’est nécessaire.

Les juges Karakatsanis et Martin : Il n’existe aucun conflit entre les dispositions de la LIR et celles de la LACC en cause dans le présent pourvoi. Le vaste pouvoir discrétionnaire conféré par l’art. 11 de la LACC permet au tribunal de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l’égard des retenues à la source non versées.

Le paragraphe 227(4.1) de la LIR prévoit qu’une fiducie réputée s’attache aux biens de l’employeur jusqu’à concurrence de la valeur des retenues à la source non versées « malgré toute autre garantie sur ces biens » et « [m]algré [...] tout autre texte législatif fédéral ». Bien que la disposition indique clairement que le droit de la Couronne s’applique malgré toute autre garantie, la teneur de ce droit dans un contexte d’insolvabilité ne peut être déduite uniquement du texte de la LIR. Le paragraphe 227(4.1) précise que la Couronne a un « droit de bénéficiaire » sur le montant des retenues à la source non versées, mais ce terme n’a pas de signification établie dans la doctrine, et ce paragraphe modifie même les caractéristiques qui sont généralement associées à ce droit de bénéficiaire dans la common law.

Tirant son origine de la législation, la fiducie réputée créée par la loi n’a pas à satisfaire aux exigences ordinaires du droit des fiducies. Dans le cas de la fiducie réputée au par. 227(4.1), les biens de la fiducie ne sont pas identifiables et il n’y a donc aucune certitude quant à sa matière. De plus, sans transfert de biens précis au patrimoine fiduciaire, le par. 227(4.1) ne satisfait pas aux conditions d’un patrimoine autonome prévues aux art. 1260, 1261 et 1278 du *Code civil du Québec*. Par conséquent, le par. 227(4.1) permet d’établir la valeur des retenues à la

right at that value, and the specific property that constitutes the debtor's estate remains unchanged, with the debtor continuing to have control over it.

The *Bankruptcy and Insolvency Act* (“*BIA*”) and the *CCAA* each give the deemed trust meaning for their own purposes. The purpose of a *BIA* liquidation is to give the debtor a fresh start and pay out creditors to the extent possible. To realize these goals, the *BIA* is strictly rules-based and has a comprehensive scheme for the liquidation process. In the *BIA*, the deemed trust for unremitted source deductions appears in s. 67(3). Section 67(1)(a) excludes property held in trust by the bankrupt from property of the bankrupt that is divisible among creditors. Section 67(2) provides an exception for deemed trusts that are not true trusts. Section 67(3) provides a further exception by stating that s. 67(2) does not apply in respect of the Crown's deemed trust for unremitted source deductions under the *ITA* and other statutes. The result of this scheme is that the debtor's estate — to the extent of the unremitted source deductions — is not “property of a bankrupt divisible among his creditors”, as required by s. 67(1) of the *BIA*. Section 67 therefore gives content to the Crown's right of beneficial ownership under s. 227(4.1) of the *ITA*: the amount of the unremitted source deductions is taken out of the pool of money that is distributed to creditors in a *BIA* liquidation.

In contrast, the purpose of the *CCAA* is remedial; it provides a means for companies to avoid the devastating social and economic consequences of commercial bankruptcies. Due to its remedial nature, the *CCAA* is famously skeletal in nature and there is no rigid formula for the division of assets. When a debtor's restructuring is on the table, the goal pivots, and interim financing is introduced to facilitate restructuring. Entitlements and priorities shift to accommodate the presence of the interim lender — a new and necessary player who is absent from the liquidation scheme under the *BIA*.

The Crown's right to unremitted source deductions in a *CCAA* restructuring is protected by both ss. 37(2) and 6(3) of the *CCAA*. Section 37(2) provides that the Crown continues to beneficially own the debtor's property equal in value to the unremitted source deductions; the unremitted source deductions “shall . . . be regarded as being held

source non versées, limitant automatiquement le droit de la Couronne à cette valeur, et les biens précis qui constituent le patrimoine du débiteur ne changent pas, le débiteur en conservant la maîtrise.

La *Loi sur la faillite et l'insolvabilité* (« *LFI* ») et la *LACC* donnent chacune à la fiducie réputée le sens qui convient à leurs fins. L'objectif d'une liquidation sous le régime de la *LFI* est de permettre au débiteur de prendre un nouveau départ et de rembourser ses créanciers dans la mesure du possible. Pour réaliser ces objectifs, la *LFI* repose strictement sur des règles et elle établit un régime complet pour le processus de liquidation. Dans la *LFI*, la fiducie réputée créée à l'égard des retenues à la source non versées figure au par. 67(3). L'alinéa 67(1)a exclut du patrimoine attribué aux créanciers du failli les biens détenus par le failli en fiducie. Le paragraphe 67(2) prévoit une exception pour les fiducies réputées qui ne sont pas des fiducies véritables. Le paragraphe 67(3) établit une autre exception en mentionnant que le par. 67(2) ne s'applique pas à la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées prévues par la *LIR* et par d'autres lois. Il en résulte que le patrimoine du débiteur — jusqu'à concurrence du montant des retenues à la source non versées — ne fait pas partie des « biens d'un failli, constituant le patrimoine attribué à ses créanciers », comme l'exige le par. 67(1) de la *LFI*. L'article 67 détermine donc la teneur du droit de bénéficiaire de la Couronne prévu au par. 227(4.1) de la *LIR* : le montant des retenues à la source non versées est soustrait des fonds qui sont distribués aux créanciers dans le cadre d'une liquidation sous le régime de la *LFI*.

En revanche, la *LACC* est de nature réparatrice; elle fournit aux compagnies un moyen d'éviter les effets dévastateurs, tant sur le plan social qu'économique, d'une faillite commerciale. Étant donné son caractère réparateur, la *LACC* est notoirement schématique par nature, et il n'existe pas de formule stricte de répartition des actifs. Lorsqu'il est question de restructurer les affaires d'un débiteur, l'objectif change, et le financement temporaire est introduit pour faciliter la restructuration. Les droits et les priorités changent du fait de l'entrée en scène d'un acteur essentiel, le prêteur temporaire, lequel ne joue aucun rôle dans la liquidation aux termes de la *LFI*.

Le droit de la Couronne sur les retenues à la source non versées dans le cadre d'une restructuration sous le régime de la *LACC* est protégé tant par le par. 37(2) que par le par. 6(3) de la *LACC*. Le paragraphe 37(2) prévoit que la Couronne conserve un droit de bénéficiaire sur les biens du débiteur jusqu'à concurrence du montant des retenues

in trust for Her Majesty”. Although this signals that, unlike deemed trusts captured by s. 37(1), the Crown’s deemed trust continues and confers a stronger right, s. 37(2) does not explain what to do with that right for the purposes of a CCAA proceeding. It does not, for example, provide that trust property should be put aside, as it would be in the *BIA* context. Section 6(3) gives specific effect to the Crown’s right by requiring that a plan of compromise provide for payment in full of the Crown’s deemed trust claims within six months of the plan’s approval. As such, the Crown can demand to be paid in full in priority to all “security interests”, including priming charges. The remedial goal of the CCAA is at the forefront of providing flexibility in preserving the Crown’s right to unremitted source deductions in s. 37(2), and in giving a concrete effect to that right in s. 6(3) of the CCAA. The fact that the Crown’s right under s. 227(4.1) of the *ITA* is treated differently between the two statutes is consistent with the different schemes and purposes of the *BIA* and CCAA.

Sections 11.2, 11.51 and 11.52 of the CCAA, which allow the court to order priming charges over a company’s property, do not give the court the authority to rank priming charges ahead of the Crown’s deemed trust for unremitted source deductions. Instead, that authority comes from s. 11 of the CCAA. Section 11 allows the court to make any order that it considers appropriate in the circumstances, subject to the requirements of good faith and due diligence on the part of the applicant. It can be used to rank priming charges ahead of the Crown’s deemed trust for unremitted source deductions for two reasons. First, ranking a priming charge ahead of the Crown’s deemed trust does not conflict with the *ITA* provision. So long as the Crown is paid in full under a plan of compromise, the Crown’s right under s. 227(4.1) remains intact “notwithstanding any security interest” in the amount of the unremitted source deductions. Second, depending on the circumstances, such an order may further the remedial objectives of the CCAA. Interim financing is often crucial to the restructuring process. If there is evidence that interim lending cannot be obtained without ranking the interim loan ahead of the Crown’s deemed trust, such an order could further the CCAA’s remedial goals. In general, the court should have flexibility to order super-priority charges in favour of parties whose function is to facilitate

à la source non versées, lesquelles sont « assimil[ées] à des biens détenus en fiducie pour Sa Majesté ». Bien que cela indique que, contrairement aux fiducies réputées visées par le par. 37(1), la fiducie réputée de la Couronne est maintenue et confère un droit plus fort, le par. 37(2) n’explique pas quoi faire de ce droit dans le cadre d’une procédure engagée sous le régime de la LACC. Il ne prévoit pas, par exemple, que les biens de la fiducie devraient être écartés, comme ce serait le cas dans le contexte de la LFI. Le paragraphe 6(3) donne un effet précis au droit de la Couronne en exigeant que le plan de transaction prévoie le paiement intégral des créances de la Couronne visées par la fiducie réputée dans les six mois suivant l’homologation du plan. Par conséquent, la Couronne peut exiger que le plan prévoie le paiement intégral de sa créance par priorité sur toutes les « garanties », y compris les charges super prioritaires. L’objectif réparateur de la LACC joue un rôle de premier plan lorsqu’il s’agit de prévoir la souplesse nécessaire pour protéger le droit que le par. 37(2) confère à la Couronne sur les retenues à la source non versées et pour donner concrètement effet à ce droit prévu au par. 6(3) de la LACC. Le fait que les deux lois traitent différemment le droit que confère à la Couronne le par. 227(4.1) de la LIR est conforme aux régimes et aux objectifs différents de la LFI et de la LACC.

Les articles 11.2, 11.51 et 11.52 de la LACC, aux termes desquels un tribunal peut, par ordonnance, déclarer que les biens d’une compagnie sont grevés de charges super prioritaires, ne confèrent pas au tribunal le pouvoir de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l’égard des retenues à la source non versées. Ce pouvoir provient plutôt de l’art. 11 de la LACC. L’article 11 permet au tribunal de rendre toute ordonnance qu’il estime indiquée, sous réserve du respect par le demandeur des exigences de bonne foi et de diligence voulue. Cette disposition peut, pour deux raisons, être utilisée pour faire passer toute charge super prioritaire devant la fiducie réputée créée en faveur de la Couronne à l’égard des retenues à la source non versées. Premièrement, le fait de faire passer une charge super prioritaire devant la fiducie réputée de la Couronne n’entre pas en conflit avec la disposition de la LIR. Dès lors que les sommes qui lui sont dues lui sont payées intégralement dans le cadre d’un plan de transaction, le droit que possède la Couronne en vertu du par. 227(4.1) demeure intact « malgré toute autre garantie » sur le montant des retenues à la source non versées. Deuxièmement, selon les circonstances, une telle ordonnance peut favoriser la réalisation des objectifs réparateurs de la LACC. Le financement temporaire est souvent crucial

the proposal of a plan of compromise that, in any event, will be required to pay the Crown in full.

Per Abella, Brown and Rowe JJ. (dissenting): The appeal should be allowed. The text, context, and purpose of s. 227(4.1) of the *ITA* support the conclusion that s. 227(4.1) and the related deemed trust provisions under the *ITA*, the *CPP*, and the *EIA* (collectively, the “Fiscal Statutes”) bear only one plausible interpretation: the Crown’s deemed trust enjoys priority over all other claims, including priming charges granted under the *CCAA*. Parliament’s intention when it amended and expanded s. 227(4) and 227(4.1) of the *ITA* was clear and unmistakable: it granted this unassailable priority by employing the unequivocal language of “notwithstanding any . . . enactment of Canada”. This is a blanket paramountcy clause; it prevails over all other statutes. No similar “notwithstanding” provision appears in the *CCAA*. Indeed, it is quite the opposite: unlike most deemed trusts which are nullified in *CCAA* proceedings by the operation of s. 37(1) of the *CCAA*, s. 37(2) preserves the deemed trusts of the Fiscal Statutes.

The Fiscal Statutes give absolute priority to the deemed trusts for source deductions over all security interests notwithstanding the *CCAA*, and the priming charges provisions in ss. 11.2(1), 11.51(1) and 11.52(1) of the *CCAA* fall under the definition of “security interest”, because they are “interests in the debtor’s property securing payment or performance of an obligation”, i.e. the payment of the monitor, the interim lender, and directors. As the definition of “security interest” in the *ITA* includes “encumbrances of any kind, whatever, however or whenever arising, created, deemed to arise or otherwise provided for”, there is no reason that the definition would preclude the inclusion of an interest that is designed to operate to the benefit of all creditors. This is sufficient to decide the appeal.

This finding does not leave the deemed trust provisions in the Fiscal Statutes in conflict with the *CCAA*. Section 11

pour le processus de restructuration. S’il est démontré que le financement temporaire ne peut être obtenu sans que le prêt temporaire prenne rang devant la fiducie réputée de la Couronne, pareille ordonnance pourrait favoriser la réalisation des objectifs réparateurs de la *LACC*. En général, les tribunaux devraient disposer de la latitude nécessaire pour ordonner des charges super prioritaires en faveur des parties dont la fonction est de faciliter la proposition d’un plan de transaction qui, dans tous les cas, devra prévoir le paiement intégral des sommes dues à la Couronne.

Les juges Abella, Brown et Rowe (dissidents) : Le pourvoi devrait être accueilli. Le texte, le contexte et l’objectif du par. 227(4.1) de la *LIR* appuient la conclusion selon laquelle il n’existe qu’une seule interprétation plausible de ce paragraphe et des dispositions connexes concernant la fiducie réputée qui figurent dans la *LIR*, le *RPC* et la *LAE* (collectivement, les « lois fiscales ») : la fiducie réputée de la Couronne a préséance sur toute autre réclamation, y compris sur les charges super prioritaires accordées en vertu de la *LACC*. Lorsque le législateur a modifié les par. 227(4) et 227(4.1) de la *LIR* et élargi leur portée, son intention était claire et sans équivoque. Il a accordé cette priorité inattaquable en employant ces termes non équivoques : « [m]algré [. . .] tout autre texte législatif fédéral . . . » Il s’agit d’une disposition générale attributive de préséance; elle a préséance sur toute autre loi. Aucune disposition dérogatoire semblable ne figure dans la *LACC*. En fait, c’est tout l’inverse : contrairement à la plupart des fiducies réputées qui sont neutralisées dans le cadre de procédures engagées sous le régime de la *LACC* par l’application du par. 37(1) de la *LACC*, le par. 37(2) préserve la fiducie réputée prévue par les lois fiscales.

Les lois fiscales donnent à la fiducie réputée créée à l’égard des retenues à la source priorité absolue sur toute garantie malgré la *LACC*, et les dispositions relatives aux charges super prioritaires figurant aux par. 11.2(1), 11.51(1) et 11.52(1) de la *LACC* entrent dans la définition de « garantie », puisqu’elles constituent un « [i]ntérêt [. . .] sur un bien qui garantit l’exécution d’une obligation, notamment un paiement », par exemple le paiement du contrôleur, du prêteur temporaire et des dirigeants. Comme la définition de « garantie » énoncée dans la *LIR* englobe les « charges, quelle qu’en soit la nature, de quelque façon ou à quelque date qu’elles soient créées, réputées exister ou prévues par ailleurs », il n’y a aucune raison pour laquelle la définition permettrait d’exclure une garantie conçue pour fonctionner au profit de tous les créanciers. Il n’en faut pas davantage pour trancher le pourvoi.

Cette conclusion n’a pas pour effet de créer de conflit entre les dispositions relatives à la fiducie réputée

of the *CCAA* contains a grant of broad supervisory discretion and the power to “make any order that it considers appropriate in the circumstances”, but that grant of authority is not unlimited. Parliament avoided any conflict between the *CCAA* and the *ITA* by imposing three restrictions that are significant here. First, although s. 37(1) of the *CCAA* provides that “property of the 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”, s. 37(2) provides for the continued operation of the deemed trusts under the Fiscal Statutes in a *CCAA* proceeding. In addition, while the deemed trusts are not “true trusts” and the commingling of assets renders the money subject to the deemed trusts untraceable, tracing has no application to s. 227(4.1). Second, the unremitted source deductions are deemed not to form part of the property of the debtor’s company. If there is a default in remittances, the Crown is deemed to obtain beneficial ownership in the tax debtor’s property in the amount of the unremitted source deductions that it can collect “notwithstanding” any other enactment or security interest. However, priming charges can attach only to the debtor’s property, so the Crown’s interest under the deemed trust is not subject to the Priming Charges. Third, under the definition of “secured creditor” in s. 2 of the *CCAA*, the Crown is not a “secured creditor” in respect of its deemed trust claims under the Fiscal Statutes. That definition must be read as “secured creditor means . . . a holder of any bond of the debtor company secured by . . . a trust in respect of, all or any property of the debtor company”, which makes it manifestly clear that the Crown is not a “secured creditor” in respect of its deemed trust claims under the Fiscal Statutes.

Giving effect to Parliament’s clear intent to grant absolute priority to the deemed trust does not render s. 6(3) or s. 11.09 of the *CCAA* meaningless. To the contrary, s. 6(3) and s. 11.09 respect the ultimate priority of the deemed trusts by allowing for the ultimate priority of the Crown claim to persist, while not frustrating the remedial purpose of the *CCAA*. Section 6(3) of the *CCAA*, which protects the Crown’s claims under the deemed trusts as well as claims not subject to the deemed trusts under the Fiscal Statutes, operates only where there is an arrangement or compromise put to the court. In contrast, the deemed trusts

contenues dans les lois fiscales et la *LACC*. L’article 11 de la *LACC* confère au tribunal un vaste pouvoir discrétionnaire de surveillance ainsi que le pouvoir de « rendre toute ordonnance qu’il estime indiquée », mais les pouvoirs conférés ne sont pas sans limites. Le législateur a évité tout conflit entre la *LACC* et la *LIR* en imposant trois restrictions qui importent en l’espèce. Premièrement, même si le par. 37(1) de la *LACC* précise qu’« aucun des biens de la compagnie débitrice ne peut être considéré comme [un bien détenu en fiducie pour Sa Majesté] par le seul effet d’une telle disposition », le par. 37(2) prévoit le maintien en vigueur de la fiducie réputée créée par les lois fiscales dans le cadre d’une procédure engagée sous le régime de la *LACC*. Qui plus est, bien que les fiducies réputées ne soient pas des « fiducie[s] véritable[s] » et que le regroupement des biens rende non identifiable le montant assujéti à la fiducie réputée, le retraçage de l’origine du montant ne s’applique pas au par. 227(4.1). Deuxièmement, les retenues à la source non versées sont réputées ne pas faire partie des biens de la compagnie débitrice. En cas de non-versement, la Couronne est réputée obtenir un droit de bénéficiaire sur les biens du débiteur fiscal jusqu’à concurrence du montant des retenues à la source non versées, droit dont elle peut se prévaloir « malgré » tout autre texte législatif ou toute autre garantie. Toutefois, les charges super prioritaires ne peuvent se rattacher qu’aux biens du débiteur, de telle sorte que l’intérêt de la Couronne au titre de la fiducie réputée n’est pas subordonné aux charges super prioritaires. Troisièmement, selon la définition de « créancier garanti » énoncée à l’art. 2 de la *LACC*, la Couronne n’est pas un « créancier garanti » à l’égard de ses réclamations relatives à une fiducie réputée créée par les lois fiscales. Cette définition de « créancier garanti » inclut donc un « détenteur de quelque obligation d’une compagnie débitrice garantie par [. . .] une fiducie à [l’égard de l’ensemble ou d’une partie des biens de la compagnie débitrice] », ce qui indique de façon tout à fait claire que la Couronne ne peut être considérée comme tel au regard des réclamations relatives à la fiducie réputée que lui accordent les lois fiscales.

Donner effet à l’intention claire du législateur d’accorder la priorité absolue à la fiducie réputée ne rend pas le par. 6(3) ou l’art. 11.09 de la *LACC* dénué de sens. Au contraire, le par. 6(3) et l’art. 11.09 respectent la priorité absolue de la fiducie réputée en permettant le maintien de la priorité absolue de la réclamation de la Couronne sans contrecarrer l’objet réparateur de la *LACC*. Le paragraphe 6(3) de la *LACC*, qui protège les réclamations de la Couronne au titre d’une fiducie réputée ainsi que les réclamations qui ne sont pas assujetties à une fiducie réputée créée par les lois fiscales, s’applique seulement si une

arise immediately and operate continuously from the time the amount was deducted or withheld from employee's remuneration, and apply to only unremitted source deductions. Without s. 6(3), the Crown would be guaranteed entitlement only to unremitted source deductions when the court sanctions a compromise or arrangement, and not to its other claims under s. 224(1.2) of the *ITA*, because most of the Crown's claims rank as unsecured under s. 38 of the *CCAA*. However, s. 6(3) does not explain the survival of the deemed trust or the rights conferred on the Crown under the deemed trust. Their survival is explained by s. 37(2), which continues the operation of s. 227(4.1), or by s. 227(4.1), which provides that the proceeds of the trust property "shall be paid to the Receiver General in priority to all such security interests". Finally, s. 6(3) protects different interests than those captured by the deemed trusts, and the right not to have to compromise under s. 6(3) is a right independent of the Crown's right under deemed trusts.

Section 11.09 of the *CCAA*, which permits the court to stay the Crown's enforcement of its claims under the deemed trust claims, can apply to the Crown's deemed trust claims, but it does not remove the priority granted by the deemed trusts.

Further, no concerns regarding certainty of subject matter or autonomous patrimony arise here. The deemed trust is not a "true" trust and it does not confer an ownership interest or the rights of a beneficiary to the Crown as they are understood at common law or within the meaning of the *Civil Code of Québec*. The requirements of "true" trusts of civil and common law are irrelevant to ascertaining the operation of a statutorily deemed trust as the deemed trust is a legal fiction with *sui generis* characteristics that are described in s. 227(4) and (4.1) of the *ITA*.

Finally, concluding that the deemed trusts under the Fiscal Statutes have priority over the priming charges would not lead to absurd consequences. The conclusion that interim financing would simply end was not supported by the record, and there are usually enough funds available to satisfy both the Crown claim and the court-ordered priming charges. Equally unfounded is the claim that confirming the priority of the deemed trusts would inject an unacceptable level of uncertainty into the insolvency

transaction ou un arrangement est soumis au tribunal. En revanche, la fiducie réputée s'applique immédiatement et de façon continue à compter du moment où le montant est déduit ou retenu sur le salaire d'un employé, et elle s'applique uniquement aux retenues à la source non versées. En l'absence du par. 6(3), les réclamations de la Couronne à l'égard des retenues à la source non versées seraient garanties une fois que le tribunal aurait homologué une transaction ou un arrangement, mais pas ses autres réclamations visées par le par. 224(1.2) de la *LIR*, étant donné que la plupart des réclamations de la Couronne prennent rang comme réclamations non garanties en application de l'art. 38 de la *LACC*. Toutefois, le par. 6(3) n'explique ni la survie de la fiducie réputée ni les droits conférés à la Couronne au titre de la fiducie réputée. Leur survie s'explique par le par. 37(2), qui maintient l'application du par. 227(4.1), ou par le par. 227(4.1), lequel précise que le produit des biens de la fiducie « est payé au receveur général par priorité sur une telle garantie ». Enfin, le par. 6(3) protège des droits différents de ceux visés par la fiducie réputée, et le droit de ne pas avoir à transiger qu'accorde le par. 6(3) est indépendant du droit de la Couronne au titre de la fiducie réputée.

L'article 11.09 de la *LACC*, qui permet au tribunal de suspendre l'exercice par la Couronne de ses droits à l'égard de ses réclamations relatives à une fiducie réputée, peut s'appliquer à ces réclamations de la Couronne, mais il n'écarte pas la priorité accordée par la fiducie réputée.

En outre, il n'existe en l'espèce aucune préoccupation concernant la certitude quant à la matière ou le patrimoine autonome. La fiducie réputée n'est pas une fiducie « véritable » et elle ne confère pas à la Couronne un intérêt propriétaire ou des droits de bénéficiaire tels qu'on les entend en common law ou au sens du *Code civil du Québec*. Les conditions des fiducies « véritables » en droit civil et en common law ne sont d'aucune utilité pour déterminer le fonctionnement d'une fiducie réputée créée en application de la loi, puisque la fiducie réputée est une fiction juridique assortie de caractéristiques *sui generis* décrites aux par. 227(4) et 227(4.1) de la *LIR*.

Enfin, le fait de conclure que la fiducie réputée créée par les lois fiscales a préséance sur les charges super prioritaires n'entraînerait pas de conséquences absurdes. La conclusion selon laquelle le financement temporaire prendrait tout simplement fin n'était pas étayée par le dossier, et les fonds disponibles suffisent généralement à couvrir la réclamation de la Couronne et les charges super prioritaires ordonnées par le tribunal. Est également sans fondement l'affirmation suivant laquelle le fait de

process. Interim lenders can rely on the company's financial statements to evaluate the risk of providing financing.

Per Moldaver J. (dissenting): There is substantial agreement with the analysis and conclusions of Brown and Rowe JJ. However, there are two points to be addressed. First, the question of the nature of the Crown's interest should be left to another day. This is because, properly interpreted, the relevant provisions of the *CCAA* and *ITA* work in harmony to direct that the Crown's interest under s. 227(4.1) of the *ITA* — in whatever form it takes — must be given priority over court-ordered priming charges. This conclusion is sufficient to dispose of the appeal.

Second, while there is agreement that s. 37(2) of the *CCAA* can be interpreted as an internal restriction on s. 11, if this interpretation is mistaken, s. 11 is nonetheless restricted by s. 227(4.1), as Parliament has expressly indicated the supremacy of s. 227(4.1) over the provisions of the *CCAA*. The Crown's deemed trust claim must thus take priority over all court-ordered priming charges, whether they arise under the specific priming charge provisions, or under the court's discretionary authority. A necessary consequence of the absolute supremacy of the Crown's deemed trust claim is that the Crown's interest under s. 227(4.1) cannot be given effect by s. 6(3) of the *CCAA*. Unlike s. 227(4.1), which is focused on ensuring the priority of the Crown's claim, s. 6(3) merely establishes a six-month timeframe for payment to the Crown in the event that the debtor company succeeds in staying viable as a going concern. Accordingly, if s. 6(3) gave effect to the Crown's interest, the Crown could be ranked last, so long as it is paid within six months of any arrangement. Such an outcome would be plainly inconsistent with the absolute priority of the Crown's claim. Further, as s. 6(3) does not apply where a liquidation occurs under the *CCAA*, the Crown would be deprived of its priority over security interests in such circumstances.

It cannot be doubted that Parliament considered the potential consequences of its legislative actions, including any consequences for *CCAA* proceedings. If circumstances do arise in which the priority of the Crown's claim threatens the viability of a particular restructuring, it clearly lies with the Crown to be flexible so as to avoid

confirmer la priorité de la fiducie réputée introduirait un niveau d'incertitude inacceptable dans le processus de faillite. Les prêteurs temporaires peuvent se fonder sur les états financiers de la compagnie pour évaluer le risque d'offrir un financement.

Le juge Moldaver (dissident) : Il y a accord, pour l'essentiel, avec l'analyse et les conclusions des juges Brown et Rowe. Toutefois, deux points doivent être abordés. En premier lieu, l'examen de la nature du droit de la Couronne devrait être remis à une autre occasion. C'est le cas parce que, correctement interprétées, les dispositions pertinentes de la *LACC* et de la *LIR* s'harmonisent de façon à ce que l'intérêt que possède la Couronne en vertu du par. 227(4.1) de la *LIR* — quel qu'il soit — ait priorité sur les charges super prioritaires d'origine judiciaire. Cette conclusion suffit pour trancher le pourvoi.

En deuxième lieu, bien qu'il y ait accord pour dire que le par. 37(2) de la *LACC* peut être interprété comme une restriction interne à l'art. 11, si cette interprétation est inexacte, la portée de l'art. 11 est néanmoins restreinte par le par. 227(4.1), étant donné que le législateur a expressément indiqué que ce paragraphe a priorité sur les dispositions de la *LACC*. La réclamation de la Couronne au titre d'une fiducie réputée a donc priorité sur toutes les charges super prioritaires d'origine judiciaire, peu importe que celles-ci aient été créées en vertu des dispositions expresses à cet effet ou en vertu du pouvoir discrétionnaire du tribunal. Une conséquence nécessaire de la primauté absolue dont jouit la réclamation de la Couronne au titre d'une fiducie présumée est que le par. 6(3) de la *LACC* ne permet pas de donner effet à l'intérêt conféré à la Couronne par le par. 227(4.1). À l'inverse du par. 227(4.1), qui vise à accorder priorité à la réclamation de la Couronne, le par. 6(3) établit simplement un délai de six mois pour payer la Couronne au cas où la compagnie débitrice parviendrait à assurer sa viabilité. Par conséquent, si le par. 6(3) donnait effet à l'intérêt de la Couronne, celle-ci pourrait être reléguée au dernier rang pourvu qu'elle soit payée dans les six mois suivant tout arrangement. Un tel résultat serait de toute évidence incompatible avec la priorité absolue accordée à la réclamation de la Couronne. De plus, puisque le par. 6(3) ne s'applique pas en cas de liquidation sous le régime de la *LACC*, la Couronne perdrait alors sa priorité au profit d'autres garanties.

Il ne fait aucun doute que le législateur a réfléchi aux conséquences possibles de ses mesures législatives, y compris sur les procédures engagées sous le régime de la *LACC*. S'il devait arriver que la priorité accordée à la réclamation de la Couronne menace la viabilité d'une restructuration, c'est de toute évidence à la Couronne

any consequences that would undermine the remedial purposes of the CCAA.

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

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APPEAL from a judgment of the Alberta Court of Appeal (Rowbotham, Wakeling and Schutz JJ.A.), 2019 ABCA 314, 93 Alta. L.R. (6th) 29, 437 D.L.R. (4th) 122, 72 C.B.R. (6th) 161, 95 B.L.R. (5th) 222, [2019] 12 W.W.R. 635, 11 P.P.S.A.C. (4th) 157, 2019 D.T.C. 5111, [2019] A.J. No. 1154 (QL), 2019 CarswellAlta 1815 (WL Can.), affirming a decision of Topolniski J., 2017 ABQB 550, 60 Alta. L.R. (6th) 103, 52 C.B.R. (6th) 308, [2018] 2 W.W.R. 731, [2017] A.J. No. 930 (QL), 2017 CarswellAlta 1631

POURVOI contre un arrêt de la Cour d’appel de l’Alberta (les juges Rowbotham, Wakeling et Schutz), 2019 ABCA 314, 93 Alta. L.R. (6th) 29, 437 D.L.R. (4th) 122, 72 C.B.R. (6th) 161, 95 B.L.R. (5th) 222, [2019] 12 W.W.R. 635, 11 P.P.S.A.C. (4th) 157, 2019 D.T.C. 5111, [2019] A.J. No. 1154 (QL), 2019 CarswellAlta 1815 (WL Can.), qui a confirmé une décision de la juge Topolniski, 2017 ABQB 550, 60 Alta. L.R. (6th) 103, 52 C.B.R. (6th) 308, [2018] 2 W.W.R. 731, [2017] A.J. No. 930 (QL),

(WL Can.). Appeal dismissed, Abella, Moldaver, Brown and Rowe JJ. dissenting.

Michael Taylor and Louis L'Heureux, for the appellant.

Darren R. Bieganek, Q.C., and *Brad Angove*, for the respondents Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd. and Ernst & Young Inc. in its capacity as monitor.

Jeffrey Oliver and Mary I. A. Buttery, Q.C., for the respondent the Business Development Bank of Canada.

Kelly J. Bourassa, for the intervenor the Insolvency Institute of Canada.

Randal Van de Mosselaer, for the intervenor the Canadian Association of Insolvency and Restructuring Professionals.

The reasons of *Wagner C.J.* and *Côté and Kasirer JJ.* were delivered by

CÔTÉ J. —

I. Overview

[1] The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), has a long and storied history. From its origins in the Great Depression to its revival and reinvention during the 1970s and 1980s, the CCAA has played an important role in Canada's economy. Today, the CCAA provides an opportunity for insolvent companies with more than \$5,000,000 in liabilities to restructure their affairs through a plan of arrangement. The goal of the CCAA process is to avoid bankruptcy and maximize value for all stakeholders.

[2] In order to facilitate the restructuring process, courts supervising CCAA restructurings may

2017 CarswellAlta 1631 (WL Can.). Pourvoi rejeté, les juges Abella, Moldaver, Brown et Rowe sont dissidents.

Michael Taylor et Louis L'Heureux, pour l'appelante.

Darren R. Bieganek, c.r., et *Brad Angove*, pour les intimées Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd. et Ernst & Young Inc. en sa qualité de contrôleur.

Jeffrey Oliver et Mary I. A. Buttery, c.r., pour l'intimée la Banque de développement du Canada.

Kelly J. Bourassa, pour l'intervenant l'Institut d'insolvabilité du Canada.

Randal Van de Mosselaer, pour l'intervenante l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation.

Version française des motifs du juge en chef *Wagner* et des juges *Côté* et *Kasirer* rendus par

LA JUGE CÔTÉ —

I. Vue d'ensemble

[1] L'histoire de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« LACC »), est longue et mouvementée. Depuis ses origines, à l'époque de la Grande Dépression, jusqu'à sa renaissance et sa métamorphose dans les années 1970 et 1980, la LACC n'a jamais cessé de jouer un rôle important dans l'économie canadienne. De nos jours, elle offre aux compagnies insolvable dont le passif excède cinq millions de dollars la possibilité de restructurer leurs affaires au moyen d'un plan d'arrangement. Le processus qu'elle prévoit a pour but d'éviter la faillite et de maximiser la valeur pour toutes les parties prenantes.

[2] Afin de faciliter le processus de restructuration, les tribunaux chargés de le surveiller peuvent autoriser

authorize an insolvent company to incur certain critical costs associated with this process. Supervising courts may also secure payment of these costs by ordering a super-priority charge against the insolvent company's assets. Today, our Court is called upon to determine whether a supervising court may order super-priority charges over assets that are subject to a claim of Her Majesty protected by a deemed trust created by s. 227(4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*").

[3] The Crown raises two arguments as to why a supervising court should be unable to subordinate Her Majesty's interest to super-priority charges. First, the Crown says that s. 227(4.1) creates a proprietary interest in a debtor's assets and a court cannot attach a super-priority charge to assets subject to Her Majesty's interest. Second, the Crown says that even if s. 227(4.1) does not create a proprietary interest, it creates a security interest that has statutory priority over all other security interests, including super-priority charges.

[4] Both of these arguments must fail. As this Court has previously held, the *CCAA* generally empowers supervising judges to order super-priority charges that have priority over all other claims, including claims protected by deemed trusts. In all cases where a supervising court is faced with a deemed trust, the court must assess the nature of the interest established by the empowering enactment, and not simply rely on the title of deemed trust. In this case, when the relevant provisions of the *ITA* are examined in their entirety, it is clear that the *ITA* does not establish a proprietary interest because Her Majesty's claim does not attach to any specific asset. Further, there is no conflict between the *CCAA* order and the *ITA*, as the deemed trust created by the *ITA* has priority only over a defined set of security interests. A super-priority charge ordered under s. 11 of the *CCAA* does not fall within that definition. For the reasons that follow, I would therefore dismiss the appeal.

une compagnie insolvable à effectuer certaines dépenses importantes dans le cadre de ce processus. Ces tribunaux peuvent également garantir le paiement de ces dépenses par la constitution d'une charge super prioritaire grevant l'actif de la compagnie insolvable. Aujourd'hui, la Cour est appelée à décider si le juge surveillant peut grever de charges super prioritaires les actifs qui font l'objet d'une créance de Sa Majesté protégée par une fiducie réputée créée en vertu du par. 227(4.1) de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, c. 1 (5^e suppl.) (« *LIR* »).

[3] La Couronne fait valoir deux arguments en raison desquels un juge surveillant ne devrait pas pouvoir subordonner l'intérêt de Sa Majesté à des charges super prioritaires. En premier lieu, la Couronne affirme que le par. 227(4.1) crée un intérêt à titre de propriétaire dans les biens du débiteur et que le tribunal ne peut pas grever d'une charge super prioritaire les biens faisant l'objet d'un intérêt de Sa Majesté. En second lieu, la Couronne affirme que, même si le par. 227(4.1) ne crée pas d'intérêt à titre de propriétaire, il crée, en vertu de la loi, une garantie qui a priorité sur toutes les autres garanties, y compris les charges super prioritaires.

[4] Ces deux arguments doivent être rejetés. Ainsi que notre Cour l'a déjà jugé, la *LACC* habilite de façon générale les juges surveillants à ordonner des charges super prioritaires qui ont priorité sur toutes les autres créances, y compris celles qui sont protégées par des fiducies réputées. Chaque fois qu'il est en présence d'une fiducie réputée, le juge surveillant doit déterminer la nature du droit conféré par le texte de loi habilitant, et il ne peut se fonder uniquement sur cette notion de fiducie réputée. En l'espèce, lorsqu'on examine les dispositions pertinentes de la *LIR* dans leur intégralité, il est évident que la *LIR* ne crée pas d'intérêt à titre de propriétaire, parce que la créance de Sa Majesté ne se rattache à aucun bien spécifique. De plus, il n'y a pas de conflit entre la *LIR* et l'ordonnance rendue en vertu de la *LACC*, étant donné que la fiducie réputée créée en vertu de la *LIR* n'a priorité que sur un ensemble bien précis de garanties. La charge super prioritaire constituée en vertu de l'art. 11 de la *LACC* ne répond pas à cette définition. Pour les motifs qui suivent, je suis donc d'avis de rejeter le pourvoi.

II. Background

[5] Canada North Group and six related corporations (“Debtors”) initiated restructuring proceedings under s. 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”), but soon changed course and sought to restructure under the CCAA. In their initial CCAA application, they requested a package of relief standard to CCAA proceedings, including a thirty-day stay on all proceedings against them, the appointment of a monitor and the creation of three super-priority charges. The first charge they requested was an administration charge of up to \$1,000,000 in favour of counsel, a monitor and a chief restructuring officer for the fees they incurred. The second was a \$1,000,000 financing charge in favour of an interim lender. The third was a \$150,000 directors’ charge protecting their directors and officers against liabilities incurred after the commencement of the proceedings. The Debtors included in their initial motion an affidavit from one of their directors attesting to a \$1,140,000 debt to Her Majesty The Queen for source deductions and Goods and Services Tax (“GST”).

[6] Justice Nielsen of the Court of Queen’s Bench heard the motion together with a cross-motion by the Debtors’ primary lender, Canadian Western Bank, seeking the appointment of a receiver. Justice Nielsen granted an initial order in favour of the Debtors on the terms requested in the initial application, aside from a \$500,000 reduction in the administration charge (*Alta. Q.B.*, No. 1703-12327, July 5, 2017 (“Initial Order”). The terms of that order included the following with regard to priority:

Each of the Directors’ Charge, Administration Charge and the Interim Lender’s Charge (all as constituted and defined herein) shall constitute a charge on the Property

II. Contexte

[5] Canada North Group et six sociétés liées (« débitrices ») ont entamé, en vertu du par. 50.4(1) de la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, c. B-3 (« *LFI* »), un processus de restructuration, mais ont rapidement changé de cap pour tenter de se restructurer sous le régime de la LACC. Dans la demande initiale qu’elles ont présentée en vertu de la LACC, elles réclamaient une série de mesures habituellement demandées dans le cadre des instances introduites sous ce régime, y compris les mesures suivantes : une suspension de trente jours de toutes les procédures engagées contre elles, la désignation d’un contrôleur et la création de trois charges super prioritaires. La première charge demandée visait des frais administratifs d’un million de dollars et devait être constituée en faveur des avocats, du contrôleur et du directeur de la restructuration pour les frais qu’ils ont engagés. La deuxième était une charge de financement d’un million de dollars en faveur d’un prêteur temporaire. La troisième était une garantie de 150 000 \$ constituée en faveur des administrateurs en vue de les protéger ainsi que les dirigeants contre les obligations contractées après l’introduction de l’instance. Les débitrices ont joint à leur demande initiale un affidavit de l’un de leurs administrateurs pour attester l’existence d’une dette de 1 140 000 \$ envers Sa Majesté la Reine pour des retenues à la source et pour la taxe sur les produits et services (« TPS »).

[6] Le juge Nielsen, de la Cour du Banc de la Reine, a instruit la requête, ainsi que la requête incidente présentée par le principal prêteur des débitrices, la Banque canadienne de l’Ouest, en vue d’obtenir la nomination d’un séquestre. Le juge Nielsen a rendu, en faveur des débitrices, une ordonnance initiale conforme aux modalités de leur demande initiale (hormis une réduction de 500 000 \$ de la charge au titre des frais administratifs) (*B.R. Alb.*, n° 1703-12327, 5 juillet 2017 (« ordonnance initiale »)). Cette ordonnance prévoyait notamment ce qui suit au sujet de l’ordre de priorité :

[TRADUCTION] Chacune des charges relatives à l’administration, aux administrateurs et au prêteur temporaire (constituées et définies aux présentes) grèvent les biens et,

and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, “Encumbrances”) in favour of any Person. [Emphasis deleted; para. 44.]

Justice Nielsen further ordered that these charges “shall not otherwise be limited or impaired in any way by . . . (d) the provisions of any federal or provincial statutes” (para. 46).

[7] Three weeks after the Initial Order was granted, the Debtors sought supplementary orders extending the stay of proceedings and increasing the interim financing to \$2,500,000. Canadian Western Bank again filed a motion to appoint a receiver. At the hearing of the three motions, counsel for Her Majesty appeared in order to advise that Her Majesty would be filing a motion to vary the Initial Order on the ground that the order failed to recognize Her priority interest in unremitted source deductions (the portion of remuneration that employers are required to withhold from employees and remit directly to the Canada Revenue Agency (“CRA”)).

[8] The Crown filed the motion soon after. Its argument for variance was grounded in the nature of Her Majesty’s interest in the Debtors’ property. It argued that the nature of Her Majesty’s interest is determined by s. 227(4.1) of the *ITA* and that that provision creates a proprietary interest:

(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.

sous réserve du paragraphe 34(11) de la LACC, toutes ces charges ont priorité sur tous les autres privilèges, garanties, fiducies, charges et sûretés, créances de créanciers garantis, d’origine législative ou autre (collectivement « les sûretés ») détenus par quiconque. [Caractères gras omis; par. 44.]

Le juge Nielsen a également précisé que les charges en question [TRADUCTION] « ne sont pas autrement limitées ou compromises de quelque façon que ce soit par [. . .] (d) les dispositions de toute loi fédérale ou provinciale » (par. 46).

[7] Trois semaines après le prononcé de l’ordonnance initiale, les débitrices ont demandé des ordonnances supplémentaires pour prolonger la suspension de l’instance et faire passer à 2,5 millions de dollars le financement temporaire. La Banque canadienne de l’Ouest a de nouveau déposé une requête en nomination d’un séquestre. Durant l’instruction de ces trois requêtes, l’avocat de Sa Majesté a comparu afin d’annoncer que celle-ci s’apprêtait à déposer une requête pour faire modifier l’ordonnance initiale au motif que cette ordonnance ne reconnaissait pas sa priorité sur les retenues à la source non versées (la partie de la rémunération que les employeurs ont l’obligation de retenir auprès de leurs employés et de remettre directement à l’Agence du revenu du Canada (« ARC »)).

[8] La Couronne a déposé sa requête peu de temps après. L’argument qu’elle invoquait pour justifier sa demande de modification de l’ordonnance initiale reposait sur la nature du droit que possédait Sa Majesté sur les biens des débitrices. Elle a fait valoir que la nature du droit de Sa Majesté était déterminée par le par. 227(4.1) de la *LIR*, qui créait un intérêt à titre de propriétaire :

(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.

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

III. Judgments Below

A. *Court of Queen's Bench, 2017 ABQB 550, 60 Alta. L.R. (6th) 103*

[9] Justice Topolniski heard Her Majesty's motion to vary the Initial Order. Despite the delay between the Initial Order and the motion to vary, Topolniski J. found that she had jurisdiction to hear the motion based on the discretion and flexibility conferred by the CCAA. However, she dismissed the motion on the ground that s. 227(4.1) of the ITA creates a security interest that can be subordinated to court-ordered super-priority charges.

(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, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) qui, en l'absence d'une garantie au sens du même paragraphe, seraient ceux 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, séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est déduit ou retenu, 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 une telle garantie.

Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre 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 une telle garantie.

III. Les décisions des juridictions inférieures

A. *Cour du Banc de la Reine, 2017 ABQB 550, 60 Alta. L.R. (6th) 103*

[9] La juge Topolniski a instruit la requête présentée par Sa Majesté en vue de faire modifier l'ordonnance initiale. Malgré le délai écoulé entre l'ordonnance initiale et la requête en modification, la juge Topolniski a estimé qu'elle avait compétence pour entendre la requête vu le pouvoir discrétionnaire et la marge de manœuvre que lui confère la LACC. Elle a toutefois rejeté la requête au motif que le par. 227(4.1) de la LIR créait une garantie qui pouvait être subordonnée à des charges super prioritaires d'origine judiciaire.

[10] Justice Topolniski relied upon *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274, and *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, to conclude that the deemed trust created by s. 227(4.1) of the *ITA* is not a proprietary interest. Rather, the *ITA* creates something similar to a floating charge over all the debtor's assets, which permits the debtor to alienate property subject to the deemed trust. These characteristics are inconsistent with a proprietary interest, and thus s. 227(4.1) does not create such an interest.

[11] Justice Topolniski also considered whether s. 227(4.1) creates a security interest that requires Her Majesty's interest to take priority over court-ordered charges. She acknowledged that the *CCAA* preserves the operation of the deemed trust, but she found that it also authorizes the reorganization of priorities by court order. Because each of the charges included in the Initial Order was critical to the restructuring process, they were necessarily required by the *CCAA* regime.

B. *Leave to Appeal*, 2017 ABCA 363, 54 C.B.R. (6th) 5

[12] Following the dismissal of the Crown's motion, the Debtors determined that there were sufficient assets in the estate to satisfy both Her Majesty and the beneficiaries of the three court-ordered super-priority charges in full. However, the Crown sought and obtained leave to appeal in order to seek appellate guidance on the nature of Her Majesty's priority.

C. *Court of Appeal of Alberta*, 2019 ABCA 314, 93 Alta. L.R. (6th) 29

[13] The Court of Appeal dismissed the appeal. It was divided as to whether the super-priority charges had priority over Her Majesty's claim. Justice Rowbotham wrote for the majority and agreed with the motion judge that s. 227(4.1) of the *ITA* creates a security interest, in accordance with this Court's earlier finding in *First Vancouver* that the deemed

[10] La juge Topolniski s'est appuyée sur les arrêts *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274, et *First Vancouver Finance c. M.N.R.*, 2002 CSC 49, [2002] 2 R.C.S. 720, pour conclure que la fiducie réputée créée en application du par. 227(4.1) de la *LIR* ne conférait pas d'intérêt à titre de propriétaire. Selon elle, la *LIR* crée plutôt une sorte de charge flottante sur l'ensemble des actifs du débiteur, ce qui permet à ce dernier d'aliéner ses biens sous réserve de la fiducie réputée. Ces caractéristiques sont incompatibles avec un intérêt à titre de propriétaire, de sorte que le par. 227(4.1) ne crée pas un tel intérêt.

[11] La juge Topolniski s'est également demandé si le par. 227(4.1) crée une garantie qui exige que l'intérêt détenu par Sa Majesté prenne rang devant les charges d'origine judiciaire. Elle a reconnu que la *LACC* ne fait pas obstacle à la fiducie réputée, mais elle a estimé que cette loi autorise cependant le tribunal à réaménager l'ordre de priorité par ordonnance. Étant donné que chacune des charges énumérées dans l'ordonnance initiale était essentielle au processus de restructuration, elles étaient indispensables au bon fonctionnement du régime de la *LACC*.

B. *Autorisation d'appel*, 2017 ABCA 363, 54 C.B.R. (6th) 5

[12] Suite au rejet de la requête de la Couronne, les débitrices ont déterminé que les actifs du patrimoine étaient suffisants pour payer intégralement Sa Majesté et les bénéficiaires des trois charges super prioritaires d'origine judiciaire. Toutefois, la Couronne a demandé et obtenu l'autorisation d'interjeter appel afin d'obtenir des directives de la Cour d'appel quant à la nature de la priorité de Sa Majesté.

C. *Cour d'appel de l'Alberta*, 2019 ABCA 314, 93 Alta. L.R. (6th) 29

[13] La Cour d'appel a rejeté l'appel. Elle était divisée sur la question de savoir si les charges super prioritaires prenaient rang devant la créance de Sa Majesté. La juge Rowbotham a écrit au nom de la majorité et s'est dite d'accord avec le juge de première instance pour affirmer que le par. 227(4.1) de la *LIR* crée une garantie, conformément à la conclusion

trust is like a “floating charge over all of the assets of the tax debtor in the amount of the default” (*First Vancouver*, at para. 40). She found further support for this in the fact that the deemed trust also falls squarely within the *ITA*’s definition of “security interest” in s. 224(1.3).

[14] After determining that Her Majesty’s interest in the Debtors’ property was a security interest, Rowbotham J.A. turned to the question of whether the deemed trust could be subordinated to the court-ordered super-priority charges. She found that “while a conflict may appear to exist at the level of the ‘black letter’ wording” of the *ITA* and the *CCAA*, “the presumption of statutory coherence require[d] that the provisions be read to work together” (para. 45). A deemed trust that could not be subordinated to super-priority charges would undermine both Acts’ objectives because fewer restructurings could succeed and thus less tax revenue could be collected. If the Crown’s position prevailed, then absurd consequences could follow. Approximately 75 percent of restructurings require interim lenders. Without the assurance that they would be repaid in priority, these lenders would not come forward, nor would monitors or directors. The reality is that all of these services are provided in reliance on super priorities. Without these priorities, *CCAA* restructurings may be severely curtailed or at least delayed until Her Majesty’s exact claim could be ascertained, by which point the company might have totally collapsed.

[15] Justice Wakeling dissented. In his view, none of the arguments raised by the majority could overcome the text of the *ITA*. On his reading, the text of s. 227(4.1) is clear: Her Majesty is the beneficial owner of the amounts deemed to be held separate and apart from the debtor’s property, and these amounts must be paid to Her Majesty notwithstanding any

tirée par notre Cour dans l’arrêt *First Vancouver* selon laquelle la fiducie réputée est assimilable à une « charge flottante grevant, jusqu’à concurrence du montant en souffrance, l’ensemble des éléments d’actif du débiteur fiscal » (*First Vancouver*, par. 40). Elle s’est dite confortée dans son opinion par le fait que la fiducie réputée entre carrément dans la définition que la *LIR* donne de la « garantie » au par. 224(1.3).

[14] Après avoir conclu que le droit de Sa Majesté sur les biens des débitrices constituait une garantie, la juge Rowbotham s’est penchée sur la question de savoir si la fiducie réputée pouvait être subordonnée à des charges super prioritaires d’origine judiciaire. Elle a conclu que [TRADUCTION] « bien que, si l’on s’en tient rigoureusement à leur libellé respectif, il puisse sembler exister un conflit » entre la *LIR* et la *LACC*, « la présomption de cohérence entre les lois exige[ait] que l’on interprète ces dispositions en considérant qu’elles s’appliquent de concert » (par. 45). Une fiducie réputée qui ne pourrait être subordonnée à des charges super prioritaires irait à l’encontre de l’objectif des deux lois en question parce qu’il serait plus difficile de mener à bien une restructuration et que cela diminuerait par conséquent les recettes fiscales. L’acceptation de la thèse de la Couronne entraînerait selon elle des conséquences absurdes. Environ 75 p. 100 des compagnies qui se restructurent font appel à des prêteurs temporaires. Sans l’assurance d’être remboursés en priorité, ces prêteurs refuseraient de s’engager, tout comme les contrôleurs et les administrateurs. La réalité est que tous ces services sont fournis sur la foi de l’existence de super priorités. Sans elles, les restructurations effectuées sous le régime de la *LACC* risqueraient d’être fortement compromises, ou à tout le moins retardées, jusqu’à ce qu’on puisse établir le montant exact de la créance de Sa Majesté, alors que la compagnie se serait peut-être déjà totalement effondrée.

[15] Le juge Wakeling a exprimé sa dissidence. À son avis, aucun des arguments soulevés par la majorité ne permettait de faire abstraction du texte de la *LIR*. Selon lui, le libellé du par. 227(4.1) est sans équivoque : Sa Majesté a un droit de bénéficiaire sur les sommes réputées être détenues de façon distincte et séparée des biens du débiteur, et

type of security interest, including super-priority charges. In his view, nothing in the *CCAA* overrides this proprietary interest. Section 11 of the *CCAA* cannot permit discretion to be exercised without regard for s. 227(4.1) of the *ITA*, nor can ss. 11.2, 11.51 and 11.52 of the *CCAA* be used, as they only allow a court to make orders regarding “all or part of the company’s property” (s. 11.2(1)). In conclusion, since no part of the *CCAA* authorizes a court to override s. 227(4.1), a court must give effect to the clear text of s. 227(4.1) and cannot subordinate Her Majesty’s claims to super-priority charges.

IV. Issue

[16] The central issue in this appeal is whether the *CCAA* authorizes courts to grant super-priority charges with priority over a deemed trust created by s. 227(4.1) of the *ITA*. In order to answer this question, I proceed in three stages. First, I assess the nature of the *CCAA* regime and the power of supervising courts to order such charges. Given that supervising courts generally have the authority to order super-priority charges with priority over all other claims, I then turn to s. 227(4.1) of the *ITA* to determine whether it gives Her Majesty an interest that cannot be subordinated to super-priority charges. Here I assess the Crown’s two arguments as to why s. 227(4.1) provides for an exception to the general rule, namely that Her Majesty has a proprietary or ownership interest in the insolvent company’s assets and that, even if Her Majesty does not have such an interest, s. 227(4.1) provides Her with a security interest that has absolute priority over all claims. I conclude by assessing how courts should exercise their authority to order super-priority charges where Her Majesty has a claim against an insolvent company protected by a s. 227(4.1) deemed trust.

ces sommes doivent être payées à Sa Majesté, peu importe le type de garantie, y compris les charges super prioritaires. À son avis, rien dans le libellé de la *LACC* ne permettait d’écarter cet intérêt à titre de propriétaire. L’article 11 de la *LACC* ne saurait permettre au tribunal d’exercer son pouvoir discrétionnaire sans tenir compte du par. 227(4.1) de la *LIR*, et les art. 11.2, 11.51 et 11.52 de la *LACC* ne sauraient non plus être utilisés à cette fin, car ils permettent uniquement au tribunal de rendre des ordonnances concernant « la totalité ou une partie des biens de la compagnie » (par. 11.2(1)). En conclusion, comme aucune des dispositions de la *LACC* ne lui permet d’écarter le par. 227(4.1), le tribunal doit donner effet au texte clair du par. 227(4.1) et il ne peut subordonner les créances de Sa Majesté à des charges super prioritaires.

IV. Question en litige

[16] La principale question à trancher dans le présent pourvoi est celle de savoir si la *LACC* autorise les tribunaux à constituer des charges super prioritaires ayant priorité sur une fiducie réputée créée en vertu du par. 227(4.1) de la *LIR*. Pour répondre à cette question, je vais procéder en trois étapes. D’abord, je vais examiner la nature du régime de la *LACC* et le pouvoir des tribunaux de surveillance d’ordonner pareilles charges. Étant donné que les tribunaux de surveillance ont généralement le pouvoir d’ordonner des charges super prioritaires qui ont priorité sur toutes les autres créances, je vais ensuite examiner le par. 227(4.1) de la *LIR* pour déterminer s’il confère à Sa Majesté un intérêt qui ne peut être subordonné à une charge super prioritaire. Je vais passer en revue les deux arguments invoqués par la Couronne pour affirmer que le par. 227(4.1) prévoit une exception à la règle générale, à savoir que Sa Majesté possède un intérêt à titre de propriétaire dans les actifs de la compagnie insolvable et que, même si elle ne possède pas un tel intérêt, le par. 227(4.1) lui confère une garantie qui a priorité absolue sur toutes les créances. Je vais conclure mon analyse en indiquant comment les tribunaux devraient exercer leur pouvoir d’ordonner des charges super prioritaires lorsque Sa Majesté fait valoir, contre la compagnie insolvable, une réclamation protégée par une fiducie réputée créée en vertu du par. 227(4.1).

V. Analysis

[17] In order to determine whether the CCAA empowers a court to order super-priority charges over assets subject to a deemed trust created by s. 227(4.1) of the *ITA*, we must understand both the CCAA regime and the nature of the interest created by s. 227(4.1).

A. *CCAA Regime*

[18] The CCAA is part of Canada's system of insolvency law, which also includes the *BIA* and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, s. 6(1), for banks and other specified institutions. Although both the CCAA and the *BIA* create reorganization regimes, what distinguishes the CCAA regime is that it is restricted to companies with liabilities of more than \$5,000,000 and "offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations" (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 14).

[19] The CCAA works by creating breathing room for an insolvent debtor to negotiate a way out of insolvency. Upon an initial application, the supervising judge makes an order that ordinarily preserves the status quo by freezing claims against the debtor while allowing it to remain in possession of its assets in order to continue carrying on business. During this time, it is hoped that the debtor will negotiate a plan of arrangement with creditors and other stakeholders. The goal is to enable the parties to reach a compromise that allows the debtor to reorganize and emerge from the CCAA process as a going concern (*Century Services*, at para. 18).

[20] The view underlying the entire CCAA regime is thus that debtor companies retain more value as going concerns than in liquidation scenarios

V. Analyse

[17] Afin de déterminer si la LACC habilite un tribunal à ordonner des charges super prioritaires sur des biens assujettis à une fiducie réputée au titre du par. 227(4.1) de la *LIR*, il nous faut comprendre à la fois le régime de la LACC et la nature du droit créé par le par. 227(4.1).

A. *Le régime de la LACC*

[18] La LACC fait partie de la législation canadienne en matière d'insolvabilité, qui comprend également la *LFI* et la *Loi sur les liquidations et les restructurations*, L.R.C. 1985, c. W-11, par. 6(1), laquelle s'applique aux banques et à d'autres institutions déterminées. Bien que la LACC et la *LFI* instaurent toutes deux un régime de réorganisation, ce qui distingue le régime de la LACC est le fait qu'il est réservé aux compagnies dont le passif dépasse cinq millions de dollars et qu'il « 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 » (*Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, par. 14).

[19] La LACC vise à accorder au débiteur insolvable la latitude nécessaire pour négocier avec ses créanciers afin de trouver une issue à son insolvabilité. À la suite d'une demande initiale, le juge surveillant rend une ordonnance aux termes de laquelle il préserve habituellement le statu quo en suspendant les réclamations qui visent le débiteur tout en permettant à ce dernier de conserver la possession de ses actifs afin de poursuivre ses activités. Dans l'intervalle, on espère que le débiteur négociera un plan d'arrangement avec ses créanciers et les autres parties prenantes. L'objectif est de permettre aux parties de parvenir à un compromis qui donne au débiteur la possibilité de se réorganiser et de poursuivre ses activités à l'issue du processus de la LACC (*Century Services*, par. 18).

[20] La vision sous-jacente au régime de la LACC est donc qu'une compagnie débitrice possède une plus grande valeur lorsqu'elle poursuit ses

(*Century Services*, at para. 18). The survival of a going-concern business is ordinarily the result with the greatest net benefit. It often enables creditors to maximize returns while simultaneously benefiting shareholders, employees, and other firms that do business with the debtor company (para. 60). Thus, this Court recently held that the CCAA embraces “the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm’s financial distress . . . and enhancement of the credit system generally” (9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, at para. 42, quoting J. P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2nd ed. 2013), at p. 14).

[21] The most important feature of the CCAA — and the feature that enables it to be adapted so readily to each reorganization — is the broad discretionary power it vests in the supervising court (*Callidus Capital*, at paras. 47-48). Section 11 of the CCAA confers jurisdiction on the supervising court to “make any order that it considers appropriate in the circumstances”. This power is vast. As the Chief Justice and Moldaver J. recently observed in their joint reasons, “[o]n the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the CCAA itself, and the requirement that the order made be ‘appropriate in the circumstances’” (*Callidus Capital*, at para. 67). Keeping in mind the centrality of judicial discretion in the CCAA regime, our jurisprudence has developed baseline requirements of appropriateness, good faith and due diligence in order to exercise this power. The supervising judge must be satisfied that the order is appropriate and that the applicant has acted in good faith and with due diligence (*Century Services*, at para. 69). The judge must also be satisfied as to appropriateness, which is assessed by considering whether the order would advance the policy and remedial objectives of the CCAA (para. 70). For instance, given that the purpose of the CCAA is to facilitate the survival of going concerns, when crafting an initial order, “[a] court must first of all

activités que lorsqu’elle est liquidée (*Century Services*, par. 18). La survie d’une entreprise en activité est généralement le résultat qui présente le plus grand avantage net. Elle permet souvent aux créanciers de maximiser leur rendement, tout en profitant aux actionnaires, aux employés et aux autres entreprises qui font affaire avec la compagnie débitrice (par. 60). Ainsi, notre Cour a récemment jugé que la LACC a « comme objectifs simultanés de maximiser le recouvrement au profit des créanciers, de préserver la valeur d’exploitation dans la mesure du possible, de protéger les emplois et les collectivités touchées par les difficultés financières de l’entreprise [. . .] et d’améliorer le système de crédit de manière générale » (9354-9186 *Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 521, par. 42, citant J. P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2^e éd. 2013), p. 14).

[21] La caractéristique la plus importante de la LACC — et celle qui la rend assez souple pour s’adapter si aisément à chaque réorganisation — est le vaste pouvoir discrétionnaire qu’elle confère au tribunal de surveillance (*Callidus Capital*, par. 47-48). L’article 11 de la LACC accorde au tribunal le pouvoir de « rendre [. . .] toute ordonnance qu’il estime indiquée ». Ce pouvoir est vaste. Comme le juge en chef et le juge Moldaver l’ont récemment fait observer dans leurs motifs conjoints, « [s]elon le libellé clair de la disposition, le pouvoir conféré par l’art. 11 n’est limité que par les restrictions imposées par la LACC elle-même, ainsi que par l’exigence que l’ordonnance soit “indiquée” dans les circonstances » (*Callidus Capital*, par. 67). Étant donné le rôle essentiel que le pouvoir discrétionnaire judiciaire joue dans le cadre du régime de la LACC, notre jurisprudence a mis au point les exigences de base encadrant l’exercice de ce pouvoir : l’opportunité, la bonne foi et la diligence. Le juge doit être convaincu que l’ordonnance est indiquée et que le demandeur a agi de bonne foi et avec la diligence voulue (*Century Services*, par. 69). Le juge doit également être convaincu de l’opportunité de rendre l’ordonnance sollicitée en se demandant si elle favorisera la réalisation des objectifs réparateurs et de politique générale de la LACC (par. 70). Par exemple, étant donné que la LACC a pour objet de

provide the conditions under which the debtor can attempt to reorganize” (para. 60).

[22] On review of a supervising judge’s order, an appellate court should be cognizant that supervising judges have been given this broad discretion in order to fulfill their difficult role of continuously balancing conflicting and changing interests. Appellate courts should also recognize that orders are generally temporary or interim in nature and that the restructuring process is constantly evolving. These considerations require not only that supervising judges be endowed with a broad discretion, but that appellate courts exercise particular caution before interfering with orders made in accordance with that discretion (*Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (C.A.), at paras. 30-31).

[23] In addition to s. 11, there are more specific powers in some of the provisions following that section. They include the power to order a super-priority security or charge on all or part of a company’s assets in favour of interim financiers (s. 11.2), critical suppliers (s. 11.4), the monitor and financial, legal or other experts (s. 11.52), or indemnification of directors or officers (s. 11.51). Each of these provisions empowers the court to “order that the security or charge rank in priority over the claim of any secured creditor of the company” (ss. 11.2(2), 11.4(4), 11.51(2) and 11.52(2)).

[24] As this Court held in *Century Services*, at para. 70, the general language of s. 11 is not restricted by the availability of these more specific orders. In fact, courts regularly grant super-priority charges in favour of persons not specifically referred to in the aforementioned provisions, including through orders that have priority over orders made under the specific provisions. These include, for example, key employee retention plan charges (*Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (Ont.

faciliter la survie des entreprises en leur permettant de poursuivre leurs activités, lorsqu’il rend son ordonnance initiale, « [l]e tribunal doit d’abord créer les conditions propres à permettre au débiteur de tenter une réorganisation » (par. 60).

[22] Lorsqu’une cour d’appel révisé l’ordonnance d’un juge surveillant, elle ne doit pas oublier que ce vaste pouvoir discrétionnaire a été confié aux juges surveillants afin qu’ils assument le rôle difficile de concilier sans cesse des intérêts conflictuels et fluctuants. La cour d’appel doit également reconnaître que les ordonnances ont généralement un caractère temporaire ou provisoire, et que le processus de restructuration évolue constamment. Ces considérations nécessitent non seulement que les juges surveillants soient investis d’un large pouvoir discrétionnaire, mais aussi que les cours d’appel fassent preuve d’une déférence particulière avant de modifier des ordonnances rendues en vertu de ce pouvoir discrétionnaire (*Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (C.A.), par. 30-31).

[23] En plus de l’art. 11, on trouve dans certaines des dispositions qui le suivent des pouvoirs plus spécifiques, dont celui d’ordonner une sûreté ou une charge super prioritaire grevant tout ou partie des actifs de la compagnie débitrice en faveur de prêteurs temporaires (art. 11.2), de fournisseurs essentiels (art. 11.4), du contrôleur et des experts — notamment en finance et en droit — (art. 11.52), ou afin d’indemniser les dirigeants ou administrateurs (art. 11.51). Chacune de ces dispositions habilite le tribunal à « préciser, dans l’ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie » (par. 11.2(2), 11.4(4), 11.51(2) et 11.52(2)).

[24] Ainsi que notre Cour l’a jugé dans l’arrêt *Century Services*, par. 70, la possibilité pour le tribunal de rendre ces ordonnances plus spécifiques n’a pas pour effet de restreindre la portée des termes généraux employés à l’art. 11. En fait, les tribunaux constituent régulièrement des charges super prioritaires en faveur de personnes qui ne sont pas expressément mentionnées dans les dispositions susmentionnées, y compris au moyen d’ordonnances ayant préséance sur les ordonnances rendues en

S.C.J.); *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169), and bid protection charges (*In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands Inc.*, 2020 ONSC 3565, 84 C.B.R. (6th) 146).

[25] In *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 60, quoting the amended initial order in that case, this Court confirmed that a court-ordered financing charge with priority over “all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise”, had priority over a deemed trust established by the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (“PPSA”), to protect employee pensions. Justice Deschamps wrote for a unanimous Court on this point. She found that the existence of a deemed trust did not preclude orders granting first priority to financiers: “This will be the case only if the provincial priorities provided for in s. 30(7) of the PPSA ensure that the claim of the Salaried Plan’s members has priority over the [debtor-in-possession (“DIP”)] charge” (para. 48).

[26] Justice Deschamps first assessed the supervising judge’s order to determine whether it had truly been necessary to give the financing charge priority over the deemed trust. Even though the supervising judge had not specifically considered the deemed trust in the order authorizing a super-priority charge, he had found that there was no alternative but to make the order. Financing secured by a super priority was necessary if the company was to remain a going concern (para. 59). Justice Deschamps rejected the suggestion “that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust”, because “[t]he harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of

vertu de ces dispositions. Songeons, par exemple, aux charges relatives aux plans de rétention des employés clés (*Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (C.S.J. Ont.); *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169), et aux charges relatives à la protection des offres (*In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands Inc.*, 2020 ONSC 3565, 84 C.B.R. (6th) 146).

[25] Dans l’arrêt *Sun Indalex Finance, LLC c. Syndicat des Métallistes*, 2013 CSC 6, [2013] 1 R.C.S. 271, par. 60, citant l’ordonnance initiale modifiée dans cette affaire, notre Cour a confirmé que la charge de financement d’origine judiciaire qui devait prendre rang devant [TRADUCTION] « toutes les autres sûretés, y compris les fiducies, privilèges, charges et grèvements, d’origine législative ou autre » prenait effectivement rang devant la fiducie réputée qui avait été établie par la *Loi sur les sûretés mobilières*, L.R.O. 1990, c. P.10 (« LSM »), dans le but de protéger les régimes de retraite des employés. La juge Deschamps s’est exprimée sur ce point au nom d’une Cour unanime. Elle a conclu que l’existence d’une fiducie réputée ne faisait pas obstacle au prononcé d’ordonnances accordant une priorité aux bailleurs de fonds : « Ce sera le cas seulement si la priorité de rang accordée par la province aux participants au régime des salariés, au par. 30(7) de la LSM, fait en sorte que leur réclamation a préséance sur la charge [débiteur-exploitant (« DE »)] » (par. 48).

[26] La juge Deschamps a tout d’abord examiné l’ordonnance du juge surveillant afin de déterminer si celle-ci était véritablement nécessaire pour que la charge de financement ait priorité sur la fiducie réputée. Même s’il ne s’était pas expressément penché sur la fiducie réputée dans l’ordonnance aux termes de laquelle il avait constitué la charge super prioritaire, le juge surveillant avait conclu qu’il n’avait d’autre choix que de rendre l’ordonnance. Le financement devait être garanti par une super priorité pour que la compagnie demeure en activité (par. 59). La juge Deschamps a rejeté l’idée « que les prêteurs DE auraient accepté que leur réclamation soit subordonnée à celles fondées sur la fiducie réputée », étant donné que « [l]a dure réalité est que l’octroi de prêts est

the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries” (para. 59).

[27] After determining that the order was necessary, she turned to the statute creating the deemed trust’s priority. Section 30(7) of the *PPSA* provided that the deemed trust would have priority over all security interests. In her view, this created a conflict between the court-ordered super priority and the statutory priority of the claim protected by the deemed trust. The super priority therefore prevailed by virtue of federal paramountcy (para. 60).

[28] There are also practical considerations that explain why supervising judges must have the discretion to order other charges with priority over deemed trusts. Restructuring under the *CCAA* often requires the assistance of many professionals. As Wagner C.J. and Moldaver J. recently recognized for a unanimous Court, the role the monitor plays in a *CCAA* proceeding is critical: “The monitor is an independent and impartial expert, acting as ‘the eyes and the ears of the court’ throughout the proceedings The core of the monitor’s role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing” (*Callidus Capital*, at para. 52, quoting *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 109). In the words of Morawetz J. (as he then was), “[i]t is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position” (*Timminco*, at para. 66).

régi par les impératifs commerciaux des prêteurs, et non par les intérêts des participants ou par les considérations de politique générale qui ont incité les législateurs provinciaux à protéger les bénéficiaires de caisses de retraite » (par. 59).

[27] Après avoir décidé que l’ordonnance était nécessaire, la juge Deschamps a examiné la loi accordant la priorité à la fiducie réputée. Le paragraphe 30(7) de la *LSM* prévoyait que la fiducie réputée prenait rang devant toutes les garanties, ce qui, à son avis, créait un conflit entre la super priorité d’origine judiciaire et la priorité légale accordée à la créance protégée par la fiducie réputée. La super priorité avait donc préséance sur la fiducie réputée en raison de la doctrine de la prépondérance fédérale (par. 60).

[28] Il existe aussi des considérations d’ordre pratique qui expliquent pourquoi les juges surveillants doivent disposer du pouvoir discrétionnaire d’ordonner des charges ayant priorité sur les fiducies réputées. Pour restructurer une compagnie sous le régime de la *LACC*, il faut souvent obtenir l’aide de nombreux professionnels. Ainsi que le juge en chef Wagner et le juge Moldaver l’ont récemment reconnu au nom d’une Cour unanime, le contrôleur joue un rôle crucial dans une instance introduite sous le régime de la *LACC* : « Le contrôleur est un expert indépendant et impartial qui agit comme [TRADUCTION] “les yeux et les oreilles du tribunal” tout au long de la procédure [. . .] Il a essentiellement pour rôle de donner au tribunal des avis consultatifs sur le caractère équitable de tout plan d’arrangement proposé et sur les ordonnances demandées par les parties, y compris celles portant sur la vente d’actifs et le financement provisoire » (*Callidus Capital*, par. 52, citant *Ernst & Young Inc. c. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, par. 109). Comme l’a dit le juge Morawetz (maintenant juge en chef de la Cour supérieure de justice de l’Ontario), [TRADUCTION] « [o]n ne peut raisonnablement s’attendre à ce que des professionnels prennent le risque de ne pas être payés pour leurs services et à ce que les administrateurs et les dirigeants demeurent en poste s’ils se retrouvent dans une position délicate » (*Timminco*, par. 66).

[29] This Court has similarly found that financing is critical as “case after case has shown that ‘the priming of the DIP facility is a key aspect of the debtor’s ability to attempt a workout’” (*Indalex*, at para. 59, quoting J. P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2007), at p. 97). As lower courts have affirmed, “[p]rofessional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the CCAA process, certainty must accompany the granting of such super-priority charges” (*First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299, at para. 51 (CanLII)).

[30] Super-priority charges in favour of the monitor, financiers and other professionals are required to derive the most value for the stakeholders. They are beneficial to all creditors, including those whose claims are protected by a deemed trust. The fact that they require super priority is just a part of “[t]he harsh reality . . . that lending is governed by the commercial imperatives of the lenders” (*Indalex*, at para. 59). It does not make commercial sense to act when there is a high level of risk involved. For a monitor and financiers to put themselves at risk to restructure and develop assets, only to later discover that a deemed trust supersedes all claims, smacks of unfairness. As McLachlin J. (as she then was) said, granting a deemed trust absolute priority where it does not amount to a trust under general principles of law would “defy fairness and common sense” (*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, at p. 33).

[31] It is therefore clear that, in general, courts supervising a CCAA reorganization have the authority to order super-priority charges to facilitate the restructuring process. Similarly, courts have ensured that the CCAA is given a liberal construction to

[29] Notre Cour a pareillement conclu que le financement est essentiel, étant donné qu’il « a été démontré maintes et maintes fois que [TRADUCTION] “la priorité accordée au financement DE constitue un élément clé de la capacité du débiteur de tenter de conclure un arrangement” » (*Indalex*, par. 59, citant J. P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2007), p. 97). Ainsi que les juridictions inférieures l’ont affirmé, [TRADUCTION] « [l]es services professionnels sont fournis et le financement DE est avancé sur la foi des charges super prioritaires contenues dans les ordonnances initiales. Pour assurer l’intégrité, la prévisibilité et l’équité du processus de la LACC, la certitude doit caractériser l’octroi de ces charges super prioritaires » (*First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299, par. 51 (CanLII)).

[30] Pour que les parties prenantes bénéficient d’une valorisation maximale, il est nécessaire de constituer des charges super prioritaires en faveur du contrôleur, des bailleurs de fonds et d’autres professionnels. Ces mesures profitent à l’ensemble des créanciers, y compris ceux dont les créances sont protégées par une fiducie réputée. Le fait qu’ils aient besoin d’une super priorité n’est qu’un des aspects de « [l]a dure réalité [. . .] que l’octroi de prêts est régi par les impératifs commerciaux des prêteurs » (*Indalex*, par. 59). Il n’est pas sensé, au plan commercial, de s’engager en présence d’un risque élevé. Il n’y a rien d’équitable dans la situation où, pour aider une entreprise à se restructurer et à se développer, un contrôleur et des prêteurs s’exposent à des risques, et découvrent par la suite qu’une fiducie réputée prévaut sur l’ensemble des créances. Comme la juge McLachlin (plus tard juge en chef) l’a dit, accorder la priorité absolue à une fiducie réputée — alors qu’elle ne constitue pas une fiducie selon les principes généraux du droit — serait « contrair[e] à l’équité et au bon sens » (*Colombie-Britannique c. Henfrey Samson Belair Ltd.*, [1989] 2 R.C.S. 24, p. 33).

[31] Il est donc évident qu’en général, les tribunaux chargés de surveiller les restructurations sous le régime de la LACC ont le pouvoir d’ordonner des charges super prioritaires afin de faciliter le processus de restructuration. Dans la même veine, les

fulfill its broad purpose and to prevent this purpose from being neutralized by other statutes: [TRANSLATION] “As the courts have ruled time and again, the purpose of the CCAA and orders made under it cannot be affected or neutralized by another [Act], whether of public order or not” (*Triton Électronique inc. (Arrangement relatif à)*, 2009 QCCS 1202, at para. 35 (CanLII)). “This case is not so much about the rights of employees as creditors, but the right of the court under the [CCAA] to serve not the special interests of the directors and officers of the company but the broader constituency referred to in *Chef Ready Foods Ltd. [v. Hongkong Bank of Can. (1990), 51 B.C.L.R. (2d) 84 (C.A.)]* . . . Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the [CCAA] must be served” (*Pacific National Lease Holding*, at para. 28). Courts have been particularly cautious when interpreting security interests so as to ensure that the CCAA’s important purpose can be fulfilled. For instance, in *Chef Ready Foods*, Gibbs J.A. observed that if a bank’s rights under the *Bank Act*, S.C. 1991, c. 46, were to be interpreted as being immune from the provisions of the CCAA, then the benefits of CCAA proceedings would be “largely illusory” (p. 92). “There will be two classes of debtor companies: those for whom there are prospects for recovery under the [CCAA]; and those for whom the [CCAA] may be irrelevant dependent upon the whim of the [creditor]” (p. 92). It is important to keep in mind that CCAA proceedings operate for the benefit of the creditors as a group and not for the benefit of a single creditor. Without clear and direct instruction from Parliament, we cannot countenance the possibility that it intended to create a security interest that would limit or eliminate the prospect of reorganization and recovery under the CCAA for some companies. To do so would turn the CCAA into a dead letter. With this in mind, I turn to the specific provision at issue in this appeal.

tribunaux se sont assurés que la LACC reçoive une interprétation libérale pour être capable d’en réaliser l’objectif général tout en évitant que cet objectif ne soit neutralisé par d’autres lois : « Ce que les tribunaux ont décidé à maintes reprises, c’est que la finalité de la LACC et les ordonnances qui en découlent ne sauraient être affectées, ni neutralisées par une autre loi, fut-elle d’ordre public ou non » (*Triton Électronique inc. (Arrangement relatif à)*, 2009 QCCS 1202, par. 35 (CanLII)). [TRADUCTION] « L’affaire qui nous occupe concerne moins les droits des employés en tant que créanciers que le droit accordé par la [LACC] au tribunal de servir non pas les intérêts spéciaux des dirigeants et administrateurs de la compagnie, mais l’ensemble plus large d’intéressés dont il est question dans *Chef Ready Foods Ltd. [c. Hongkong Bank of Can. (1990), 51 B.C.L.R. (2d) 84 (C.A.)]* [. . .] Pareille décision risque d’entrer en conflit avec la législation provinciale, mais il faut atteindre les objectifs généraux de la [LACC] » (*Pacific National Lease Holding*, par. 28). Les tribunaux se sont montrés particulièrement vigilants au moment d’interpréter les garanties, pour veiller à ce que l’important objectif de la LACC puisse être réalisé. Par exemple, dans l’arrêt *Chef Ready Foods*, le juge d’appel Gibbs a fait remarquer que, s’il fallait considérer que les droits conférés à une banque par la *Loi sur les banques*, L.C. 1991, c. 46, étaient à l’abri des dispositions de la LACC, les avantages des procédures intentées sous le régime de cette loi seraient [TRADUCTION] « en grande partie illusoirs » (p. 92). « Il y aura deux groupes de compagnies débitrices : celles qui peuvent se rétablir sous le régime de la [LACC], et celles à l’égard de qui la pertinence de la [LACC] varierait selon le caprice du [créancier] » (p. 92). Il importe de garder à l’esprit que ces procédures sont engagées au bénéfice de l’ensemble des créanciers, et non au bénéfice d’un seul d’entre eux. En l’absence de directives claires et expresses, nous ne saurions supposer que le Parlement ait voulu créer une garantie de nature à suggérer que, sous le régime de la LACC, la perspective de réorganisation et de rétablissement de certaines compagnies sera limitée, voire inexistante. La LACC deviendrait alors lettre morte. En gardant ces principes à l’esprit, je me tourne à présent vers la disposition en litige dans la présente affaire.

B. Nature of the Interest Created by Section 227(4.1) of the ITA

[32] The Crown argues that, despite the authority a supervising court may have to order super-priority charges, Her Majesty's claim to unremitted source deductions is protected by a deemed trust, and that ordering charges with priority over the deemed trust is contrary to s. 227(4.1) of the *ITA*. To determine whether this is true, we must begin by understanding how the deemed trust comes about.

[33] Section 153(1) of the *ITA* requires employers to withhold income tax from employees' gross pay and forward the amounts withheld to the CRA. When an employer withholds income tax from its employees in accordance with the *ITA*, it assumes its employees' liability for those amounts (s. 227(9.4)). As a result, Her Majesty cannot have recourse to the employees if the employer fails to remit the withheld amounts. Instead, Her Majesty's interest is protected by a deemed trust. Section 227(4) of the *ITA* provides that amounts withheld are deemed to be held separate and apart from the employer's assets and in trust for Her Majesty. If an employer fails to remit the amounts withheld in the manner provided by the *ITA*, s. 227(4.1) extends the trust to all of the employer's assets. In this case, the Debtors failed to remit the amounts withheld to the CRA, bringing s. 227(4.1) into operation.

[34] When a company seeks protection under the *CCAA*, s. 37(1) of the *CCAA* provides that most of Her Majesty's deemed trusts are nullified (unless the property in question would be regarded as held in trust in the absence of the statutory provision creating the deemed trust). However, s. 37(2) of the *CCAA* exempts the deemed trusts created by s. 227(4) and (4.1) of the *ITA* from the nullification provided for in s. 37(1). These deemed trusts continue to operate throughout the *CCAA* process (*Century Services*, at para. 45). In my view, this preservation by the *CCAA* of the deemed trusts created by the *ITA* does not modify the characteristics of these trusts. They

B. Nature de l'intérêt créé par le paragraphe 227(4.1) de la LIR

[32] La Couronne soutient que, même si le tribunal de surveillance peut ordonner des charges super prioritaires, la créance de Sa Majesté sur les retenues à la source non versées est protégée par une fiducie réputée, et que la constitution de charges prenant rang devant la fiducie réputée va à l'encontre du par. 227(4.1) de la *LIR*. Pour déterminer le bien-fondé de cette position, il faut d'abord comprendre l'origine de la fiducie réputée.

[33] Le paragraphe 153(1) de la *LIR* oblige les employeurs à retenir l'impôt sur le salaire brut de leurs employés et à transmettre les sommes retenues à l'ARC. L'employeur qui retient l'impôt sur le revenu de ses employés conformément à la *LIR* devient responsable des sommes dues à ce titre par ses employés (par. 227(9.4)). Par conséquent, Sa Majesté ne peut exercer de recours contre les employés si l'employeur fait défaut de verser les montants qu'il a retenus. L'intérêt de Sa Majesté est protégé par une fiducie réputée. Le paragraphe 227(4) de la *LIR* prévoit que les montants retenus sont réputés détenus en fiducie pour Sa Majesté, séparément des propres biens de l'employeur. Si l'employeur fait défaut de verser les retenues conformément aux modalités prévues par la *LIR*, le par. 227(4.1) étend la fiducie à l'ensemble des biens de l'employeur. En l'espèce, les débitrices ont fait défaut de verser les retenues à l'ARC, ce qui a entraîné l'application du par. 227(4.1).

[34] Lorsqu'une compagnie cherche à se prévaloir de la protection de la *LACC*, le par. 37(1) de cette loi prévoit que la plupart des fiducies réputées de Sa Majesté sont annulées (à moins que les biens en question eussent été assimilés à des biens détenus en fiducie même en l'absence de la disposition législative créant la fiducie réputée). Toutefois, le par. 37(2) de la *LACC* soustrait les fiducies réputées créées en vertu des par. 227(4) et (4.1) de la *LIR* à l'annulation prévue au par. 37(1). Ces fiducies réputées continuent de produire leur effet tout au long du processus de la *LACC* (*Century Services*, par. 45). À mon avis, le fait que la *LACC* permet aux fiducies

continue to operate as they would have if the insolvent company had not sought CCAA protection. Therefore, the Crown's arguments must be assessed by reviewing the nature of the interest created by s. 227(4.1) of the *ITA*.

[35] Before doing so, and while it is not strictly speaking required of me given the reasons I set out below, I pause here to clarify the role of s. 6(3) of the CCAA, which provides as follows:

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act* . . .

[36] Section 6(3) merely grants Her Majesty the right to insist that a compromise or arrangement not be sanctioned by a court unless it provides for payment in full to Her Majesty of certain claims within six months after court sanction. Section 6(3) does not say that it modifies the deemed trust created by s. 227(4.1) of the *ITA* in any way, and it comes into operation only at the end of the CCAA process when parties seek court approval of their arrangement or compromise. Section 6(3) also applies to numerous claims that are not protected by the deemed trust, including penalties, interest, withholdings on non-resident dispositions and certain retirement contributions (see ss. 224(1.2) and 227(10.1) of the *ITA*, the latter of which refers to amounts payable under ss. 116, 227(9), (9.2), (9.3), (9.4) and (10.2), Part XII.5 and Part XIII). Equating the deemed trust with the right under s. 6(3) renders s. 37(2) of the CCAA and the deemed trust meaningless. I therefore proceed, as this Court did in *Indalex*, by assessing

réputées créées par la *LIR* de continuer à produire leurs effets ne modifie en rien les caractéristiques de ces fiducies. Elles continuent à produire leur effet comme si la compagnie insolvable n'avait pas demandé la protection de la *LACC*. Par conséquent, il faut examiner les arguments de la Couronne en tenant compte de la nature du droit découlant du par. 227(4.1) de la *LIR*.

[35] Mais avant de procéder à cet examen, et bien que cela ne soit pas à proprement parler nécessaire vu les motifs que j'expose ci-dessous, j'ouvre une parenthèse pour clarifier le rôle du par. 6(3) de la *LACC*, dont voici le texte :

(3) Le tribunal ne peut, sans le consentement de Sa Majesté, homologuer la transaction ou l'arrangement qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'homologation, de toutes les sommes qui étaient dues lors de la demande d'ordonnance visée aux articles 11 ou 11.02 et qui pourraient, de par leur nature, faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* . . .

[36] Le paragraphe 6(3) accorde simplement à Sa Majesté le droit d'insister auprès du tribunal afin qu'il refuse d'homologuer la transaction ou l'arrangement qui ne prévoit pas le paiement intégral de certaines créances de Sa Majesté dans un délai de six mois suivant l'homologation. Le paragraphe 6(3) ne dit pas qu'il modifie la fiducie présumée créée par le par. 227(4.1) de la *LIR* de quelque façon que ce soit, et il ne s'applique qu'à l'issue de la procédure de la *LACC* lorsque les parties cherchent à faire homologuer par le tribunal leur arrangement ou leur transaction. Le paragraphe 6(3) s'applique également à de nombreuses créances qui ne sont pas protégées par la fiducie réputée, y compris les pénalités, les intérêts, les retenues sur les dispositions relatives aux non-résidents et certaines cotisations de retraite (voir les par. 224(1.2) et 227(10.1) de la *LIR*, le deuxième faisant état des sommes payables en application de l'art. 116 et des par. 227(9), (9.2), (9.3), (9.4) et (10.2), à la partie XII.5 et à la partie XIII). Assimiler

the interest created by s. 227(4.1) of the *ITA* without regard to the *CCAA* (*Indalex*, at para. 48).

[37] Section 227(4.1) provides:

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

(1) Does Section 227(4.1) of the *ITA* Create a Proprietary or Ownership Interest in the Debtor's Assets?

[38] This appeal — like previous appeals to this Court — does not require the Court to exhaustively

la fiducie réputée au droit prévu au par. 6(3) vide de leur sens le par. 37(2) de la *LACC* et la fiducie présumée. La démarche que je vais suivre consiste donc, à l'instar de celle suivie par notre Cour dans l'affaire *Indalex*, à évaluer l'intérêt créé par le par. 227(4.1) de la *LIR* en faisant abstraction de la *LACC* (*Indalex*, par. 48).

[37] Le paragraphe 227(4.1) dispose :

(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, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) qui, en l'absence d'une garantie au sens du même paragraphe, seraient ceux 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, séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est déduit ou retenu, 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 une telle garantie.

Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre 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 une telle garantie.

(1) Le paragraphe 227(4.1) de la *LIR* crée-t-il un intérêt à titre de propriétaire dans l'actif du débiteur?

[38] Le présent pourvoi — comme certains pourvois précédents devant notre Cour — n'oblige pas

define the nature and content of the interest created by s. 227(4.1) of the *ITA* (*Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, and *First Vancouver*). All that is necessary is to determine whether s. 227(4.1) confers upon Her Majesty an interest in the debtor's property that precludes a court from ordering charges with priority over Her Majesty's claim. The Crown argues that s. 227(4.1) does so by giving Her Majesty a proprietary interest in the debtor's assets, which "causes those assets to become the property of the Crown" (A.F., at para. 46). The Crown rests this argument on the wording of the section. First, it says that property equal in value to the amount deemed to be held in trust by a person is deemed to be held "separate and apart from the property of the person". Second, it says that the property deemed to be held in trust is deemed "to form no part of the estate or property of the person". Third, it says that the property deemed to be held in trust "is property beneficially owned by Her Majesty notwithstanding any security interest in such property". The Crown submits that, as a result of Her Majesty's proprietary interest, amounts subject to the deemed trust cannot be considered assets of the debtor in *CCAA* proceedings.

[39] In order to determine whether s. 227(4.1) confers a proprietary or ownership interest upon Her Majesty, we must look at the nature of the rights afforded to Her Majesty by the deemed trust and compare them to the rights ordinarily afforded to an owner. To begin with, it is clear that the statute does not purport to transfer legal title to any property to Her Majesty. Instead, the Crown's argument places considerable weight on the common law meaning of the words "beneficially owned by Her Majesty" and "in trust". Trusts and beneficial ownership are equitable concepts that are part of the common law. As in all cases of statutory interpretation, the meaning of these words is a question of parliamentary intent. In the interpretation of a federal statute that uses concepts of property and civil rights, reference

la Cour à définir de façon exhaustive la nature et le contenu de l'intérêt créé par le par. 227(4.1) de la *LIR* (*Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411, et *First Vancouver*). Il suffit de déterminer si le par. 227(4.1) confère à Sa Majesté un intérêt dans les actifs du débiteur de nature à empêcher un tribunal d'ordonner des charges ayant priorité sur la réclamation de Sa Majesté. La Couronne soutient que c'est ce que fait le par. 227(4.1) en accordant à Sa Majesté un intérêt à titre de propriétaire dans les actifs du débiteur, de sorte que [TRADUCTION] « ces actifs deviennent des biens de la Couronne » (m.a., par. 46). L'argument de la Couronne repose sur le libellé de la disposition. Premièrement, elle affirme que des biens d'une valeur égale au montant réputé détenu en fiducie par une personne sont réputés détenus « séparés des propres biens de la personne ». Deuxièmement, elle affirme que les biens qui sont réputés détenus en fiducie sont réputés « ne pas faire partie du patrimoine ou des biens de la personne ». Troisièmement, elle fait valoir que les biens qui sont réputés détenus en fiducie « sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ». La Couronne soutient qu'en raison de l'intérêt que possède Sa Majesté à titre de propriétaire, les montants assujettis à la fiducie réputée ne peuvent être considérés comme des actifs du débiteur dans le cadre de procédures intentées sous le régime de la *LACC*.

[39] Afin de déterminer si le par. 227(4.1) confère à Sa Majesté un intérêt à titre de propriétaire, il nous faut examiner la nature des droits que la fiducie réputée confère à Sa Majesté et comparer ces droits à ceux habituellement accordés à un propriétaire. D'entrée de jeu, il est évident que la loi ne vise pas à transférer à Sa Majesté le titre en common law de quelque bien que ce soit. Au soutien de sa thèse, la Couronne table beaucoup sur le sens que la common law donne aux termes « biens dans lesquels Sa Majesté a un droit de bénéficiaire » et « en fiducie ». La fiducie et la propriété bénéficiaire sont des concepts d'equity qui font partie de la common law. Comme pour tous les cas d'interprétation des lois, le sens de ces termes dépend de l'intention du législateur. Dans l'interprétation d'une loi fédérale

must be had to ss. 8.1 and 8.2 of the *Interpretation Act*, R.S.C. 1985, c. I-21. These sections provide:

8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

[40] In other words, where Parliament uses a private law expression and is silent as to its meaning, courts must refer to the applicable provincial private law. This is known as the principle of complementarity. However, as both these sections also make clear, Parliament is free to derogate from provincial private law and create a uniform rule across all provinces (see R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 158-59).

[41] In this case, Parliament has expressly chosen to dissociate itself from provincial private law. Section 227(4.1) says that it operates “[n]otwithstanding 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”. In *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94, the majority found that, through these words, Parliament has created a standalone scheme of uniform application across all provinces (paras. 11-13). The nature of the deemed trust created by s. 227(4.1) must thus be understood on its own terms.

qui fait appel à des notions de propriété et de droits civils, il faut se référer aux art. 8.1 et 8.2 de la *Loi d'interprétation*, L.R.C. 1985, c. I-21. Ces articles sont ainsi libellés :

8.1 Le droit civil et la common law font pareillement autorité et sont tous deux sources de droit en matière de propriété et de droits civils au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.

8.2 Sauf règle de droit s'y opposant, est entendu dans un sens compatible avec le système juridique de la province d'application le texte qui emploie à la fois des termes propres au droit civil de la province de Québec et des termes propres à la common law des autres provinces, ou qui emploie des termes qui ont un sens différent dans l'un et l'autre de ces systèmes.

[40] En d'autres termes, lorsque le législateur utilise une expression de droit privé et qu'il n'en précise pas le sens, les tribunaux doivent se référer au droit privé provincial applicable. C'est ce qu'on appelle le principe de complémentarité. Toutefois, comme ces deux articles l'indiquent clairement, il est loisible au législateur de déroger au droit privé provincial et de créer une règle uniforme applicable dans toutes les provinces (voir R. Sullivan, *Sullivan on the Construction of Statutes* (6^e éd. 2014), p. 158-159).

[41] En l'espèce, le législateur a délibérément choisi de se dissocier du droit privé provincial. Le paragraphe 227(4.1) indique qu'il s'applique « [m]algré 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 ». Dans l'arrêt *Caisse populaire Desjardins de l'Est de Drummond c. Canada*, 2009 CSC 29, [2009] 2 R.C.S. 94, la majorité a conclu que, par ces termes, le législateur a créé un régime autonome d'application uniforme dans toutes les provinces (par. 11-13). La nature de la fiducie réputée créée par le par. 227(4.1) doit donc être comprise d'après les termes de cette disposition.

[42] With that said, it is also clear that Parliament has chosen to use terms with established legal meanings in constructing the deemed trust. While the meaning of these terms is not to be based on their precise meaning under Alberta common law, it is difficult to attempt to understand s. 227(4.1) without any reference to how these concepts generally operate. Despite the protestations of my colleagues Justices Brown and Rowe, I do not see how we could begin to understand the meaning of the words “deemed trust”, “held in trust” or “beneficially owned” without reference to the civil law or common law. The law of trusts in both civil law and common law thus provides critical context for understanding Parliament’s intent. From a civil law perspective, some courts have found it awkward to apply the idea of beneficial ownership under s. 227(4.1) in Quebec “on the ground that it is a concept that is obviously derived from the common law” (*Canada (Attorney General) v. Caisse populaire d’Amos*, 2004 FCA 92, 324 N.R. 31, at para. 48). I agree with the following observation by Noël J.A. (as he then was):

It is not the task of the judiciary to determine whether it is appropriate for Parliament to use common law concepts in Quebec (or to use civil law concepts elsewhere in Canada) for the purpose of giving effect to federal legislation. The task of the courts is limited to discovering Parliament’s intention and giving effect to it. [para. 49]

[43] Under Quebec civil law, it is clear that s. 227(4.1) does not establish a trust within the meaning of the *Civil Code of Québec* (“C.C.Q.”). Articles 1260 and 1261 C.C.Q. provide the following:

1260. A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer.

1261. The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.

[42] Cela dit, il est également clair que le législateur a choisi d’employer des termes qui possèdent une signification juridique bien établie pour constituer la fiducie réputée. Bien que le sens de ces termes ne doive pas être fondé sur le sens précis qu’ils ont selon la common law de l’Alberta, on peut difficilement analyser le par. 227(4.1) sans tenir compte de la façon dont ces concepts opèrent généralement. Malgré les protestations de mes collègues les juges Brown et Rowe, je ne vois pas comment l’on pourrait chercher à comprendre le sens des mots « fiducie réputée », « détenus en fiducie » ou « droit de bénéficiaire » sans tenir compte du droit civil ou de la common law. Le droit des fiducies tant en droit civil qu’en common law fournit donc un contexte essentiel pour comprendre la volonté de législateur. Du point de vue du droit civil, certains tribunaux ont trouvé difficile d’appliquer au Québec le concept de « droit de bénéficiaire » énoncé au par. 227(4.1), « au motif qu’il s’agit d’un concept évidemment issu de la common law » (*Canada (Procureur général) c. Caisse populaire d’Amos*, 2004 CAF 92, 324 N.R. 31, par. 48). Je souscris à la remarque suivante du juge Noël (maintenant juge en chef) :

La question de savoir s’il est opportun pour le législateur fédéral d’utiliser au Québec des concepts de common law (ou d’utiliser ailleurs au Canada des concepts de droit civil) pour donner effet aux lois fédérales ne relève pas du pouvoir judiciaire. La tâche des tribunaux se limite à déceler l’intention du législateur et [à] y donner effet. [par. 49]

[43] En droit civil québécois, il est clair que le par. 227(4.1) ne crée pas de fiducie au sens du *Code civil du Québec* (« C.c.Q. »). Les articles 1260 et 1261 C.c.Q. prévoient ce qui suit :

1260. La fiducie résulte d’un acte par lequel une personne, le constituant, transfère de son patrimoine à un autre patrimoine qu’il constitue, des biens qu’il affecte à une fin particulière et qu’un fiduciaire s’oblige, par le fait de son acceptation, à détenir et à administrer.

1261. Le patrimoine fiduciaire, formé des biens transférés en fiducie, constitue un patrimoine d’affectation autonome et distinct de celui du constituant, du fiduciaire ou du bénéficiaire, sur lequel aucun d’entre eux n’a de droit réel.

As this Court held in *Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31, “[t]hree requirements must therefore be met in order for a trust to be constituted [under Quebec civil law]: property must be transferred from an individual’s patrimony to another patrimony by appropriation; the property must be appropriated to a particular purpose; and the trustee must accept the property.”

[44] Under s. 227(4.1) of the *ITA*, however, no specific property is transferred to a trust patrimony. Indeterminacy remains as to which assets are subject to the deemed trust, *ergo*, as to which assets left the settlor’s patrimony and entered the trust’s patrimony. Although s. 227(4.1) provides that the assets are deemed to be held “separate and apart from the property of the person” and “to form no part of the estate or property of the person”, this is not sufficient to constitute an autonomous patrimony such as the one contemplated by the civilian trust regime. It flows from the autonomous nature of the trust patrimony that assets held in trust must be property in which none of the settlor, trustee or beneficiary has any property right. But this runs afoul of the interest created by s. 227(4.1), because nothing in that provision deprives the person whose assets are subject to a deemed trust of property rights in these assets. Therefore, the main element of a civilian trust is absent in the deemed trust established by s. 227(4.1): there is no autonomous patrimony to which specific property is transferred.

[45] Furthermore, under s. 227(4.1), the person whose assets are subject to the deemed trust would act as trustee. Again, this is inconsistent with the definition of a trustee in civil law. The person whose assets are subject to a deemed trust pursuant to s. 227(4.1) does not “undertak[e], by his acceptance, to hold and administer” a trust patrimony (art. 1260 *C.C.Q.*). But most importantly, the fact that assets subject to the deemed trust are indeterminate makes the trustee’s role effectively impossible to play. The *C.C.Q.* provides that the trustee “has the control and the exclusive administration of the trust patrimony” and “acts as the administrator of the property of others charged with full administration” (art. 1278).

Comme l’a statué notre Cour dans *Banque de Nouvelle-Écosse c. Thibault*, 2004 CSC 29, [2004] 1 R.C.S. 758, par. 31, « [t]rois conditions sont donc nécessaires pour la constitution d’une fiducie [en droit civil québécois] : le transfert de biens du patrimoine d’une personne à un patrimoine d’affectation, l’affectation des biens à une fin particulière et l’acceptation par un fiduciaire. »

[44] Toutefois, selon le par. 227(4.1) de la *LIR*, aucun bien précis n’est transféré au patrimoine fiduciaire. L’incertitude demeure quant aux biens assujettis à la fiducie réputée et, partant, quant aux actifs qui ont quitté le patrimoine du constituant pour entrer dans celui de la fiducie. Bien que le par. 227(4.1) dispose que les biens soient réputés détenus « séparés des propres biens de la personne » et « ne pas faire partie du patrimoine ou des biens de la personne », cela ne suffit pas pour constituer un patrimoine autonome tel que celui envisagé par le régime civiliste de fiducie. Il découle du caractère autonome du patrimoine fiduciaire que les actifs détenus en fiducie doivent être des biens sur lesquels ni le constituant, ni le fiduciaire, ni le bénéficiaire n’a de droit de propriété. Cela va toutefois à l’encontre de l’intérêt créé en vertu du par. 227(4.1), parce que rien dans cette disposition ne prive la personne dont les actifs sont sujets à une fiducie réputée de droits de propriété sur ces actifs. Par conséquent, on ne retrouve pas l’élément principal d’une fiducie civiliste dans la fiducie réputée créée en application du par. 227(4.1) : il n’existe aucun patrimoine autonome auquel sont transférés des biens précis.

[45] En outre, selon le par. 227(4.1), la personne dont les actifs sont assujettis à la fiducie réputée agirait comme fiduciaire. Là encore, cela ne cadre pas avec la définition d’un fiduciaire en droit civil. La personne dont les actifs sont assujettis à une fiducie réputée en application du par. 227(4.1) ne « s’oblige [pas], par le fait de son acceptation, à détenir et à administrer » le patrimoine fiduciaire (art. 1260 *C.c.Q.*). Mais plus important encore, le fait que les actifs assujettis à la fiducie réputée sont indéterminés empêche carrément le fiduciaire de jouer son rôle. Aux termes du *C.c.Q.*, celui-ci « a la maîtrise et l’administration exclusive du patrimoine fiduciaire » et « exerce tous les droits afférents au

Thus, the trustee under s. 227(4.1) would be required to administer its own property — or at least an indefinite part of it — in the interest of Her Majesty (art. 1306 *C.C.Q.*). The trustee would be subject to obligations impossible to fulfill, such as the obligation not to mingle the administered property with its own (art. 1313 *C.C.Q.*). Obviously, one cannot act as an administrator of the property of others with respect to one's own property. It is therefore clear that the interest created by s. 227(4.1) has little, if anything, in common with the trust in civil law.

[46] In the common law, a trust arises when legal ownership and beneficial ownership of a particular property are separated (see *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8, [2018] 1 S.C.R. 224, at para. 18). “Because a trust divides legal and beneficial title to property between a trustee and a beneficiary, respectively, the ‘hallmark’ characteristic of a trust is the fiduciary relationship existing between the trustee and the beneficiary, by which the trustee is to hold the trust property solely for the beneficiary’s enjoyment” (para. 17 (footnote omitted)). As Rothstein J. wrote, because of this fiduciary relationship, “[t]he beneficial owner of property has been described as ‘the real owner of property even though it is in someone else’s name’” (*Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795, at para. 4, quoting *Csak v. Aumon* (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570).

[47] While the precise rights given to a beneficial owner may vary according to the terms of the trust and the principles of equity, I agree with the Crown that, where this type of interest exists, it will generally be inappropriate for the supervising judge to order a super-priority charge over the property subject to the interest, although the broad power conferred on the court by s. 11 of the *CCAA* would enable it to do so. Property held in trust cannot be said to belong to the trustee because “in equity, it belongs to another person” (*Henfrey*, at p. 31). However, a close

patrimoine et peut prendre toute mesure propre à en assurer l’affectation » (art. 1278). Ainsi, le fiduciaire visé au par. 227(4.1) serait tenu d’administrer ses propres biens — ou à tout le moins une partie indéterminée de ceux-ci — dans l’intérêt de Sa Majesté (art. 1306 *C.c.Q.*). Le fiduciaire serait assujéti à des obligations impossibles à remplir, comme celle de ne pas confondre les biens administrés avec ses propres biens (art. 1313 *C.c.Q.*). De toute évidence, une personne ne saurait agir en tant qu’administrateur des biens d’autrui à l’égard de ses propres biens. Il est donc clair que l’intérêt créé en vertu du par. 227(4.1) n’a pas grand-chose, sinon rien, en commun avec la fiducie en droit civil.

[46] En common law, une fiducie est constituée lorsque la propriété en common law et la propriété bénéficiaire d’un bien en particulier sont dissociées (voir *Valard Construction Ltd. c. Bird Construction Co.*, 2018 CSC 8, [2018] 1 R.C.S. 224, par. 18). « Étant donné que la fiducie divise le titre de propriété en common law et le titre bénéficiaire sur un bien entre un fiduciaire et un bénéficiaire, respectivement, la caractéristique [TRADUCTION] “distinctive” d’une fiducie réside dans la relation fiduciaire qui existe entre le fiduciaire et le bénéficiaire et suivant laquelle le premier doit détenir les biens en fiducie uniquement pour que le second puisse en jouir » (par. 17 (note en bas de page omise)). Ainsi que le juge Rothstein l’a écrit, du fait de cette relation fiduciaire, « [l]e propriétaire bénéficiaire d’un bien est [TRADUCTION] “le véritable propriétaire du bien même si ce dernier n’est pas à son nom” » (*Pecore c. Pecore*, 2007 CSC 17, [2007] 1 R.C.S. 795, par. 4, citant *Csak c. Aumon* (1990), 69 D.L.R. (4th) 567 (H.C.J. Ont.), p. 570).

[47] Bien que les droits précis conférés au propriétaire bénéficiaire puissent varier selon les modalités de la fiducie et les principes d’équité, je suis d’accord avec la Couronne pour dire que, lorsque la propriété bénéficiaire existe, il n’est généralement pas indiqué que le juge surveillant grève d’une charge super prioritaire les biens faisant l’objet de l’intérêt, encore que le vaste pouvoir conféré au tribunal par l’art. 11 de la *LACC* lui permettrait de le faire. On ne peut pas dire que les biens détenus en fiducie appartiennent au fiduciaire parce qu’« en *equity*, ils appartiennent

examination of the nature of the interest created by s. 227(4.1) of the *ITA* reveals that it does not create this type of interest because “[t]he employer is not actually required to hold the money separate and apart, the usual fiduciary obligations of a trustee are absent, and the trust exists without a *res*. The law of tracing is similarly corrupted” (R. J. Wood and R. T. G. Reeson, “The Continuing Saga of the Statutory Deemed Trust: *Royal Bank v. Tuxedo Transportation Ltd.*” (2000), 15 *B.F.L.R.* 515, at p. 532). In other words, the key attributes that allow the common law to refer to beneficial ownership as being a proprietary interest are missing.

[48] According to the common law understanding of a trust, the legal owner or trustee owes a fiduciary duty to the equitable owner or beneficiary. The fiduciary relationship impresses the office of trustee with three fundamental duties: the trustee must act honestly and with reasonable skill and prudence, the trustee cannot delegate the office, and the trustee cannot personally profit from its dealings with the trust property or its beneficiaries (see *Valard*, at para. 17). This severely restricts what the trustee may do with trust property and creates a relationship significantly different from the one between a debtor and a creditor. For instance, while a debtor may attempt to reduce its debt or reach a compromise, a trustee cannot, since it must always act in the best interest of the beneficiary and cannot consider its own interests. Similarly, while a debtor is liable to a creditor until the debt is repaid, a trustee is not liable to a beneficial owner where property is lost, unless it was lost through a breach of the standard of care owed (see E. E. Gillese, *The Law of Trusts* (3rd ed. 2014), at p. 14). In the case of the deemed trust, however, Parliament did not create such a fiduciary relationship. Parliament expressly contemplated a potential compromise between Her Majesty and the debtor in s. 6(3) of the *CCAA*. In addition, the terms of the *ITA* do not require that the debtor actually keep the property subject to the deemed trust separate and use it solely for the benefit of Her Majesty. In fact, Her Majesty does not enjoy the benefit of Her interest in the property while the property is held by

à une autre personne » (*Henfrey*, p. 31). Toutefois, un examen attentif de la nature de l’intérêt créé par le par. 227(4.1) de la *LIR* révèle que ce dernier ne crée pas de propriété bénéficiaire parce que [TRANSDUCTION] « [l]’employeur n’est pas réellement tenu de détenir l’argent séparément, les obligations fiduciaires habituelles d’un fiduciaire sont absentes et la fiducie n’est associée à aucun bien spécifique. Le droit de retraçage s’en trouve lui aussi vicié » (R. J. Wood et R. T. G. Reeson, « The Continuing Saga of the Statutory Deemed Trust : *Royal Bank v. Tuxedo Transportation Ltd.* » (2000), 15 *B.F.L.R.* 515, p. 532). En d’autres termes, on ne retrouve pas les caractéristiques essentielles qui permettent en common law de qualifier la propriété bénéficiaire d’intérêt à titre de propriétaire.

[48] Selon la conception que l’on se fait de la fiducie en common law, le propriétaire en common law ou le fiduciaire a une obligation fiduciaire envers le propriétaire en equity ou envers le propriétaire bénéficiaire. La relation fiduciaire attribue à la charge de fiduciaire trois devoirs fondamentaux : le fiduciaire doit agir honnêtement et de façon habile et prudente; le fiduciaire ne peut déléguer sa charge à autrui et le fiduciaire ne peut tirer un avantage personnel des opérations qu’il mène à l’égard des biens de la fiducie ou de ses rapports avec ses bénéficiaires (voir *Valard*, par. 17). Cela limite considérablement la marge de manœuvre du fiduciaire à l’égard des biens visés par la fiducie et crée une relation très différente de celle qui existe entre un débiteur et un créancier. Par exemple, si un débiteur peut chercher à réduire sa dette ou à trouver un compromis, un fiduciaire doit toujours agir dans l’intérêt supérieur du bénéficiaire et ne peut tenir compte de ses propres intérêts. De même, alors que le débiteur est redevable envers le créancier tant qu’il n’a pas remboursé sa dette, le fiduciaire n’est pas redevable envers le propriétaire bénéficiaire en cas de perte des biens, à moins que cette perte ne soit attribuable à l’inobservation de la norme de diligence à laquelle il était tenu (voir E. E. Gillese, *The Law of Trusts* (3^e éd. 2014), p. 14). Dans le cas de la fiducie réputée, cependant, le législateur n’a pas créé une telle relation fiduciaire. Il a expressément envisagé un compromis potentiel entre Sa Majesté et le débiteur au par. 6(3) de la *LACC*. En outre, le libellé de la *LIR* n’oblige pas le débiteur à

the debtor. Instead, Parliament contemplated that the debtor would continue to use and dispose of the property subject to the trust for its own business purposes (see *First Vancouver*, at paras. 42-46).

[49] Another core attribute of beneficial ownership is certainty as to the property that is subject to the trust (see Gillese, at p. 39). Many deemed trusts fail to provide for certainty of subject matter. For instance, in *Henfrey*, the Court considered the deemed trust created by the British Columbia *Social Service Tax Act*, R.S.B.C. 1979, c. 388. Like s. 227(4.1) of the *ITA*, the *Social Service Tax Act* provided that tax collected but not remitted was deemed to be held in trust for Her Majesty. It further provided that unremitted amounts were deemed to be held separate and apart from and form no part of the assets or estate of the tax collector. While McLachlin J. found that the property was identifiable at the time the tax was collected, she noted that “[t]he difficulty in this, as in most cases, is that trust property soon ceases to be identifiable. The tax money is mingled” (p. 34). Therefore, she concluded that there was no trust under general principles of equity. The legislature’s attempt to resolve this problem by deeming the amounts to be separate from and form no part of the tax debtor’s property was merely a tacit acknowledgment that “the reality is that after conversion the statutory trust bears little resemblance to a true trust. There is no property which can be regarded as being impressed with a trust” (p. 34).

[50] In *First Vancouver*, this Court examined the nature of the interest created by s. 227(4.1) of the *ITA*. Writing for the Court, Iacobucci J. held that this provision creates a charge which “is in principle similar to a floating charge over all the assets of the tax debtor in the amount of the default” (para. 40). He concluded that Parliament specifically intended to create a charge with fluidity, a charge that could

scinder effectivement les biens assujettis à la fiducie réputée et à les utiliser uniquement au profit de Sa Majesté. En fait, Sa Majesté ne bénéficie pas de l’intérêt qu’elle possède dans le bien tant que celui-ci est détenu par le débiteur. Le législateur a plutôt envisagé que le débiteur continuerait à utiliser et à aliéner les biens assujettis à la fiducie à ses propres fins commerciales (voir *First Vancouver*, par. 42-46).

[49] Une autre caractéristique essentielle de la propriété bénéficiaire est la certitude quant aux biens assujettis à la fiducie (voir Gillese, p. 39). Bon nombre de fiducies réputées ne satisfont pas au critère de la certitude quant à l’objet. Par exemple, dans l’affaire *Henfrey*, la Cour examinait une fiducie réputée créée en vertu de la *Social Service Tax Act*, R.S.B.C. 1979, c. 388, de la Colombie-Britannique. À l’instar du par. 227(4.1) de la *LIR*, la *Social Service Tax Act* prévoyait que l’impôt perçu, mais non versé, était réputé détenu en fiducie pour Sa Majesté. Elle prévoyait également que les montants non versés étaient réputés détenus séparément et ne pas faire partie du patrimoine ou des biens du perceuteur d’impôt. Bien que la juge McLachlin ait conclu que le bien en fiducie était identifiable au moment de la perception de la taxe, elle a souligné que « [l]a difficulté que présente l’espèce, qui est la même que dans la plupart des autres cas, vient de ce que le bien en fiducie cesse bientôt d’être identifiable. Le montant de la taxe est confondu avec d’autres sommes » (p. 34). Elle a donc conclu qu’il n’y avait pas de fiducie selon les principes généraux de l’équité. La tentative de la législature de résoudre ce problème en déclarant que ce montant serait réputé détenu séparément du patrimoine du débiteur fiscal n’était qu’une reconnaissance tacite du fait qu’« en réalité, après l’affectation de la somme, la fiducie légale ressemble peu à une fiducie véritable. Il n’y a pas de bien qu’on puisse considérer comme sujet à la fiducie » (p. 34).

[50] Dans l’affaire *First Vancouver*, notre Cour s’est penchée sur la nature de l’intérêt créé par le par. 227(4.1) de la *LIR*. S’exprimant au nom de la Cour, le juge Iacobucci a conclu que cette disposition crée une charge « s’apparentant, sur le plan des principes, à une charge flottante grevant, jusqu’à concurrence du montant en souffrance, l’ensemble des éléments d’actif du débiteur fiscal » (par. 40). Il

readily float over all of the debtor's assets rather than attach to a particular one (para. 33). Parliament's intention was to capture any property that comes into the possession of the tax debtor whilst simultaneously allowing any asset to be alienated and the proceeds of disposition to be captured (para. 5).

[51] This lack of certainty as to the subject matter of the trust is even starker in the present case than in *Henfrey* or in *Sparrow Electric*, where there was certainty as to the assets until they were mingled. Section 227(4.1) purports to bring all assets owned by the debtor within its reach. Despite the wording of the section, this interest — one of the same nature as a “floating charge” — has no particular property to which it attaches. Without certainty of subject matter, equity cannot know which property the debtor has a fiduciary obligation to maintain in the beneficiary's interest and thus “[t]he notion of a trust without a *res* simply cannot be made sensible or coherent” (Wood and Reeson, at pp. 532-33 (footnote omitted); see also *Sparrow Electric*, at para. 31).

[52] Parliament's decision to avoid certainty of subject matter was an intentional modification to the deemed trust following this Court's decision in *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182. In *Dauphin Plains*, the Court refused to enforce Her Majesty's claim because the Crown had failed to establish that the moneys purported to be deducted actually existed or were kept in such a way as to be traceable (p. 1197). Traceability is another key aspect of a beneficial interest, since it allows the beneficial owner to enjoy the benefits of ownership, such as income from the property. It also ensures that the beneficial owner is responsible for the costs of ownership. By choosing not to attach Her Majesty's claim to any particular asset, Parliament has protected Her Majesty from the risks associated with asset ownership, including damage, depreciation and loss. I agree with Gonthier J., who, speaking of the predecessor to s. 227(4.1) (albeit in dissent), said

a conclu que le législateur souhaitait expressément créer une charge qui se caractériserait par une certaine fluidité et qui grèverait d'emblée la totalité des biens du débiteur plutôt qu'un bien en particulier (para. 33). L'intention du législateur était de viser tout bien se retrouvant en la possession du débiteur fiscal tout en permettant à ce dernier de se départir de tout bien et d'assujettir à la fiducie réputée le produit de la disposition de ce bien (para. 5).

[51] Cette incertitude quant à l'objet de la fiducie est encore plus frappante en l'espèce que dans l'affaire *Henfrey* ou dans l'affaire *Sparrow Electric*, où il y avait certitude quant aux biens jusqu'au moment où ils avaient été confondus avec d'autres biens. Le paragraphe 227(4.1) a vocation de faire entrer dans son champ d'application tous les biens appartenant au débiteur. Malgré le libellé de la disposition, cet intérêt — qui participe de la nature d'une « charge flottante » — n'est associé à aucun bien spécifique. Sans certitude quant à l'objet, l'équité ne peut savoir sur quels biens porte l'obligation fiduciaire du débiteur stipulée au profit du bénéficiaire, de sorte qu'on [TRANSLATION] « ne peut tout simplement pas justifier l'idée d'une fiducie qui n'est associée à aucun bien précis » (Wood et Reeson, p. 532-533 (note en bas de page omise); voir aussi *Sparrow Electric*, par. 31).

[52] La décision du législateur de dispenser de l'obligation de démontrer la certitude quant à l'objet est une modification intentionnelle qu'il a apportée à la fiducie réputée à la suite de la décision rendue par notre Cour dans *Dauphin Plains Credit Union Ltd. c. Xyloid Industries Ltd.*, [1980] 1 R.C.S. 1182. Dans l'arrêt *Dauphin Plains*, la Cour a refusé de rendre exécutoire la réclamation de Sa Majesté parce que la Couronne n'avait pas établi que les sommes censées être retenues existaient bel et bien ou qu'elles avaient été conservées de façon à pouvoir être retracées (p. 1197). La possibilité de retracer l'origine des biens est un autre aspect essentiel de l'intérêt bénéficiaire puisqu'elle permet au propriétaire bénéficiaire de profiter des avantages de la propriété, comme les revenus tirés du bien. Elle garantit également que le propriétaire bénéficiaire est responsable des coûts de la propriété. En décidant de n'associer la créance de Sa Majesté à aucun bien en particulier, le législateur a protégé Sa Majesté des risques que comporte la

that “this subsection is antithetical to tracing in the traditional sense, to the extent that it requires no link at all between the subject matter of the trust and the fund or asset which the subject matter is being traced into” (*Sparrow Electric*, at para. 37). Had Parliament wanted to confer a beneficial ownership interest upon Her Majesty, it would have had to impose these associated risks as well.

[53] For the same reason as in *Henfrey*, the statement that property is deemed to be removed from the debtor’s estate is equally ineffective at preventing a judge from ordering super priorities over the debtor’s property. Because the deemed trust does not attach to specific property and the debtor remains free to alienate any of its assets, no property is actually removed from the debtor’s estate.

[54] This interpretation is supported by the existence of s. 227(4.2) of the *ITA*, which specifically anticipates other interests taking priority over the deemed trust (something that would be impossible if there were an ownership interest). It states that “[f]or the purposes of subsections 227(4) and 227(4.1), a security interest does not include a prescribed security interest”. In the *Income Tax Regulations*, C.R.C., c. 945, s. 2201(1), the Governor in Council has defined “prescribed security interest” as a registered mortgage “that encumbers land or a building, where the mortgage is registered . . . before the time the amount is deemed to be held in trust by the person”. Therefore, in certain situations, mortgage holders take priority over Her Majesty.

[55] I reiterate that, without specific property to attach to, there can be no trust. The fact that s. 227(4.1) specifically anticipates that the character of assets will change over time and automatically releases any assets that the debtor chooses to alienate from the deemed trust means that Parliament had in mind something different from beneficial ownership in the

propriété d’un bien, y compris l’endommagement, la dépréciation et la perte. Je suis d’accord avec le juge Gonthier, qui (même s’il était dissident), déclarait au sujet du prédécesseur du par. 227(4.1) : « . . . ce paragraphe est à l’opposé du sens traditionnel du mot “retracer”, dans la mesure où il ne nécessite aucun lien entre l’objet de la fiducie et le fonds ou l’actif auquel on rattache cet objet . . . » (*Sparrow Electric*, par. 37). Mais, si le législateur avait voulu conférer un intérêt de propriété bénéficiaire à Sa Majesté, il lui aurait fallu aussi faire supporter à cette dernière les risques qui y sont associés.

[53] Pour la même raison que dans l’affaire *Henfrey*, l’énoncé selon lequel des biens sont réputés soustraits au patrimoine du débiteur est tout aussi inefficace pour empêcher un juge de grever les biens du débiteur de charges super prioritaires. Puisque la fiducie réputée n’est associée à aucun bien spécifique, et que le débiteur reste libre d’aliéner n’importe lequel de ses biens, aucun bien n’est soustrait en fait de son patrimoine.

[54] Cette interprétation est appuyée par l’existence du par. 227(4.2) de la *LIR*, qui prévoit expressément que d’autres intérêts prennent rang devant la fiducie réputée (ce qui serait impossible s’il existait un intérêt à titre de propriétaire). Il dispose que « [p]our l’application des paragraphes (4) et (4.1), n’est pas une garantie celle qui est visée par règlement ». Dans le *Règlement de l’impôt sur le revenu*, C.R.C., c. 945, par. 2201(1), le gouverneur en conseil a défini comme suit la garantie visée par règlement : « . . . hypothèque garantissant l’exécution d’une obligation de la personne qui greve un fonds de terre ou un bâtiment, à condition que l’hypothèque soit enregistrée [. . .] avant le moment où la personne est réputée détenir le montant en fiducie ». Par conséquent, dans certaines situations, les créanciers hypothécaires ont priorité sur Sa Majesté.

[55] Je répète qu’il ne peut y avoir de fiducie si aucun bien précis n’y est associé. Le fait que le par. 227(4.1) prévoit expressément que la nature des biens change avec le temps, et ce, indépendamment des biens que le débiteur choisit de soustraire à la fiducie réputée, démontre que le législateur avait autre chose en tête que la propriété bénéficiaire au sens où

common law sense of the word. I tend to agree with Noël J.A.’s assessment of s. 227(4.1): “The deemed trust mechanism, whether applied in Quebec or elsewhere, effectively creates in favour of the Crown a security interest . . .” (*Caisse populaire d’Amos*, at para. 46).

[56] Other scholars agree that s. 227(4.1) “merely secures payment or performance of an obligation” (R. J. Wood, “Irresistible Force Meets Immovable Object: *Canada v. Canada North Group Inc.*” (2020), 63 *Can. Bus. L.J.* 85, at p. 95; see also A. Duggan and J. Ziegel, “Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security” (2007), 57 *U.T.L.J.* 227, at pp. 245-46). Wood and Reeson reach the particularly damning conclusion that “[t]he concept of a trust is used in the legislation, but in virtually every respect the characteristics of a trust are lacking” and thus “the use of inappropriate legal concepts” has led to the creation of a “statutory provision [that] is deeply flawed” (pp. 531-32). They “suspec[t] that the intention of the drafters was that Revenue Canada should obtain a charge on all the assets of the debtor”, and they state that “the statutory deemed trust is nothing more than a legislative mechanism that is intended to create a non-consensual security interest in the assets of the employer” (p. 533).

[57] Nonetheless, for our purposes it is not necessary to conclusively determine whether the interest created by s. 227(4.1) should be characterized as a security interest. What is clear is that s. 227(4.1) does not create a beneficial interest that can be considered a proprietary interest. Like the deemed trust at issue in *Henfrey*, it “does not give [the Crown] the same property interest a common law trust would” (p. 35). Without attaching to specific property, creating the usual right to the enjoyment of property or the fiduciary obligations of a trustee, the interest created by s. 227(4.1) lacks the qualities that allow a court to refer to a beneficiary as a beneficial owner. Therefore, I do not accept the Crown’s argument that Her Majesty has a proprietary interest in a debtor’s property that is adequate to prevent the exercise of a

l’entend la common law. Je suis portée à souscrire à l’avis du juge Noël sur le par. 227(4.1) : « Le mécanisme de la fiducie réputée, qu’il soit appliqué au Québec ou ailleurs, a comme effet de créer en faveur de la Couronne une garantie . . . » (*Caisse populaire d’Amos*, par. 46).

[56] D’autres universitaires sont d’accord pour dire que le par. 227(4.1) [TRADUCTION] « garantit simplement le paiement ou l’exécution d’une obligation » (R. J. Wood, « Irresistible Force Meets Immovable Object : *Canada v. Canada North Group Inc.* » (2020), 63 *Rev. can. dr. comm.* 85, p. 95; voir aussi A. Duggan et J. Ziegel, « Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security » (2007), 57 *U.T.L.J.* 227, p. 245-246). Wood et Reeson en arrivent à la conclusion particulièrement accablante que [TRADUCTION] « [l]a loi utilise le concept de fiducie, mais à presque tous les égards, les caractéristiques de la fiducie sont absentes », de sorte que « le recours à des concepts juridiques inadaptés » a mené à la création d’une « disposition législative profondément déficiente » (p. 531-532). Ils [TRADUCTION] « soupçonne[nt] que l’intention des rédacteurs était que Revenu Canada se voit conférer une charge grevant l’ensemble du patrimoine du débiteur », et ajoutent que « la fiducie réputée créée par la loi n’est rien de plus qu’un mécanisme législatif visant à créer une garantie non consensuelle grevant les biens de l’employeur » (p. 533).

[57] Néanmoins, pour nos besoins, il n’est pas nécessaire de trancher de façon définitive la question de savoir si l’intérêt créé par le par. 227(4.1) doit être qualifié de garantie. Ce qui est clair, en revanche, c’est que le par. 227(4.1) ne crée pas un droit de bénéficiaire qui peut être considéré comme un intérêt à titre de propriétaire. À l’instar de la fiducie réputée dont il était question dans l’affaire *Henfrey*, le par. 227(4.1) « ne confère pas [à la Couronne] le même droit de propriété qu’une fiducie de *common law* » (p. 35-36). N’étant associé à aucun bien précis, ce qui conférerait à son titulaire le droit habituel à la jouissance du bien ou imposerait les obligations d’un fiduciaire, l’intérêt créé par le par. 227(4.1) ne possède pas les attributs qui permettent à un tribunal de qualifier le bénéficiaire de propriétaire bénéficiaire.

supervising judge’s discretion to order super-priority charges under s. 11 of the CCAA or any of the sections that follow it.

(2) Does Section 227(4.1) of the ITA Create a Super Priority That Conflicts With a Court-Ordered Super-Priority Charge?

[58] The Crown also refers to the part of s. 227(4.1) which states that the Receiver General shall be paid the proceeds of a debtor’s property “in priority to all such security interests”, as defined in s. 224(1.3). In the Crown’s view, court-ordered super-priority charges under s. 11 of the CCAA or any of the sections that follow it are security interests within the meaning of s. 224(1.3) and therefore Her Majesty’s interest has priority over them.

[59] My colleagues Justices Brown and Rowe point to the legislative history of s. 227(4.1) as evidence that Parliament intended Her Majesty’s deemed trust to have “absolute priority” over all other security interests (para. 201). In particular, they rely upon Justice Iacobucci’s comment in *Sparrow Electric* that “it is open to Parliament to step in and assign absolute priority to the deemed trust” by using the words “shall be paid to the Receiver General in priority to any such security interest” (para. 202, citing *Sparrow Electric*, at para. 112). They further rely upon the press release accompanying the amendments, which stated that the deemed trust was to have absolute priority.

[60] With respect, I disagree with this reasoning. *Sparrow Electric* dealt with a type of interest very different from the one before us now. In *Sparrow Electric*, this Court held that a fixed and specific charge over the tax debtor’s inventory had priority over Her Majesty’s deemed trust created by the ITA. Thus the purpose of the amendments was to “clarify that the deemed trusts for unremitted source

Par conséquent, je n’accepte pas l’argument de la Couronne selon lequel Sa Majesté a un intérêt à titre de propriétaire dans les biens du débiteur qui suffit à empêcher le juge surveillant d’ordonner des charges super prioritaires en vertu du pouvoir discrétionnaire que lui confère l’art. 11 de la LACC ou l’un ou l’autre des articles qui le suivent.

(2) Le paragraphe 227(4.1) de la LIR crée-t-il une super priorité qui entre en conflit avec une charge super prioritaire d’origine judiciaire?

[58] La Couronne s’appuie également sur la partie du par. 227(4.1) suivant laquelle le receveur général reçoit le produit découlant des biens du débiteur « par priorité sur une telle garantie », au sens du par. 224(1.3). De l’avis de la Couronne, les charges super prioritaires ordonnées par le tribunal en vertu de l’art. 11 de la LACC ou de l’un ou l’autre des articles qui le suivent sont des garanties au sens du par. 224(1.3) et, partant, l’intérêt de Sa Majesté a priorité sur elles.

[59] Mes collègues les juges Brown et Rowe invoquent l’historique législatif du par. 227(4.1) comme preuve que le législateur voulait que la fiducie réputée de Sa Majesté ait une « priorité absolue » sur toutes les autres garanties (par. 201). Ils s’appuient en particulier sur le commentaire du juge Iacobucci dans l’arrêt *Sparrow Electric* selon lequel « il est loisible au législateur d’intervenir et d’accorder la priorité absolue à la fiducie réputée » en employant les mots « doi[vent] être payée[s] au receveur général par priorité sur toute autre garantie au titre de ce[s] somme[s] » (par. 202, citant *Sparrow Electric*, par. 112). Ils s’appuient également sur le communiqué de presse accompagnant les modifications qui indiquait que la fiducie réputée devait avoir priorité absolue.

[60] Avec égards, je ne suis pas d’accord avec ce raisonnement. L’affaire *Sparrow Electric* portait sur un type d’intérêt très différent de celui dont nous avons à traiter aujourd’hui. Dans l’arrêt *Sparrow Electric*, notre Cour a jugé qu’une charge fixe et spécifique grevant les stocks du débiteur fiscal avait priorité sur la fiducie réputée que la LIR constitue en faveur de Sa Majesté. Les modifications cherchaient

deductions and GST apply whether or not other security interests have been granted in respect of the inventory or trade receivables of a business” (Department of Finance Canada, *Unremitted Source Deductions and Unpaid GST* (April 7, 1997), at p. 2). If Parliament had intended that the deemed trust have absolute priority, it would not have enacted s. 227(4.2) at the same time. As noted above, s. 227(4.2) provides that “a security interest does not include a prescribed security interest”, and thus specifically envisions that the deemed trust will not have absolute priority. In my view, by using the words “in priority to all such security interests” in s. 227(4.1), Parliament intended that the priority be absolute not over all possible interests, but only over security interests as defined in s. 224(1.3). What must therefore be determined is whether a court-ordered super-priority charge under the CCAA falls within that definition.

[61] Section 224(1.3) reads as follows:

security interest means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for

[62] This definition is expansive. However, the list of illustrative security interests makes it clear that a super-priority charge created under the CCAA cannot fall within its meaning. Court-ordered super-priority charges are utterly different from any of the interests listed. These super-priority charges are granted, not for the sole benefit of the holder of the charge, but to facilitate restructuring in furtherance of the interests of all stakeholders. In this way, they benefit the creditors as a group. The fact that Parliament chose to provide a list of examples whose nature is so unlike that of a court-ordered super-priority charge demonstrates that it must have had a very different type of interest in mind when drafting s. 224(1.3). I

donc à « préciser que les fiducies [réputées] relatives aux retenues à la source non versées et à la TPS impayée s’appliquent indépendamment du fait que d’autres garanties aient été consenties à l’égard des stocks ou des comptes clients d’une entreprise » (Ministère des Finances du Canada, *Retenues à la source non versées et TPS impayée* (7 avril 1997), p. 2). Si le législateur avait voulu que la fiducie réputée ait priorité absolue, il n’aurait pas adopté simultanément le par. 227(4.2). Comme je l’ai mentionné plus haut, le par. 227(4.2) prévoit que « n’est pas une garantie celle qui est visée par règlement », et il envisage donc expressément que la fiducie réputée ne bénéficie pas d’une priorité absolue. À mon avis, en utilisant les mots « par priorité sur une telle garantie » au par. 227(4.1), le législateur voulait que la priorité soit absolue non pas sur toutes les garanties possibles, mais seulement sur les garanties au sens où on l’entend au par. 224(1.3). Il faut donc déterminer si une charge super prioritaire ordonnée par le tribunal en vertu de la LACC répond à cette définition.

[61] Voici la version anglaise du par. 224(1.3) :

security interest means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for

[62] Cette définition est large. Il ressort toutefois de la liste d’exemples de garanties qu’une charge super prioritaire créée en vertu de la LACC n’y répond pas. Les charges super prioritaires d’origine judiciaire sont radicalement différentes de n’importe quel des intérêts énumérés. Ces charges super prioritaires sont constituées non pas au seul bénéfice de leur détenteur, mais pour faciliter la restructuration dans l’intérêt de toutes les parties prenantes. Elles bénéficient ainsi à l’ensemble des créanciers. Le fait que le législateur a choisi de dresser une liste d’exemples de nature tellement différente d’une charge super prioritaire démontre qu’il avait sûrement à l’esprit une garantie fort différente au moment où il a rédigé

could not agree more with Professor Wood about the limited class of interests that Parliament had in mind:

[Court-ordered super-priority charges] are fundamentally different in nature from security interests that arise by way of agreement between the parties and from non-consensual security interests that arise by operation of law. Court-ordered charges are unlike conventional consensual and non-consensual security interests in that they are integrally connected to insolvency proceedings that operate for the benefit of the creditors as a group. Given the fundamentally different character of court-ordered charges, it would be reasonable to expect that they would be specifically mentioned in the ITA definition of a security interest if they were to be included. [Emphasis added; p. 98.]

[63] My colleagues Brown and Rowe JJ. allege that this interpretation of s. 224(1.3) is contrary to our Court’s decision in *Caisse populaire Desjardins de l’Est de Drummond*, where Rothstein J. wrote that the provided examples “do not diminish the broad scope of the words ‘any interest in property’ (para. 15; see also para. 14). With respect, I disagree with my colleagues. As Justice Rothstein explained at para. 40, his comments were made in response to the argument that the list of examples of security interests was exhaustive. I agree with him that the list of examples provided is not exhaustive. However, the examples remain illustrative of the types of interests that Parliament had in mind and are clearly united by a common theme or class because Parliament employed a compound “means . . . and includes” structure to establish its definition: “*security interest means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes . . .*”. In my view, this structure evidences Parliament’s intent that the list have limiting effect, such that only the instruments enumerated and instruments that are similar in nature fall within the definition. The critical difference between the listed security interests and super-priority charges ordered under s. 11 of the CCAA or any of the sections that follow it explains both why the latter are excluded from the list of specific instruments and why there can be no suggestion that they may be included in the broader term “encumbrance” at

le par. 224(1.3). Je suis tout à fait d’accord avec le professeur Wood au sujet du nombre limité de garanties qu’avait en tête le législateur :

[TRADUCTION] [Les charges super prioritaires d’origine judiciaire] sont d’une nature radicalement différente de celle des garanties résultant de l’accord intervenu entre les parties ou des garanties non consensuelles découlant de l’application de la loi. Elles se distinguent des garanties consensuelles et non consensuelles classiques en ce qu’elles sont intimement liées aux procédures d’insolvabilité qui se déroulent au profit de l’ensemble des créanciers. Étant donné le caractère radicalement différent des charges d’origine judiciaire, il serait raisonnable de s’attendre à ce qu’elles soient expressément mentionnées dans la définition de « garantie » qui figure dans la LIR si elles devaient en faire partie. [Je souligne; p. 98.]

[63] Mes collègues les juges Brown et Rowe soutiennent que l’interprétation exposée ci-dessus du par. 224(1.3) va à l’encontre de l’arrêt *Caisse populaire Desjardins de l’Est de Drummond* de notre Cour, où le juge Rothstein a écrit que les exemples donnés « n’[ont] pas pour effet de limiter la portée générale de l’expression “[d]roit sur un bien” » (par. 15; voir aussi par. 14). Avec égards, je ne suis pas d’accord avec mes collègues. Comme l’a expliqué le juge Rothstein au par. 40, il a fait ses commentaires en réponse à l’argument selon lequel la liste des exemples de garanties était exhaustive. Je conviens avec lui que la liste des exemples fournis ne l’était pas. Cependant, les exemples illustrent toujours les types de garantie qu’avait à l’esprit le législateur et celles-ci sont clairement unies par une catégorie ou un thème commun parce que, dans la version anglaise du texte de loi, le législateur a structuré sa définition autour des termes « *means [. . .] and includes* » : « *security interest means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes . . .* » À mon avis, cette formulation témoigne de l’intention du législateur de restreindre la portée de l’énumération, si bien que seuls les instruments énumérés ou les instruments de nature similaire répondent à la définition. La différence essentielle entre les garanties énumérées et les charges super prioritaires constituées en vertu de l’art. 11 de la LACC ou de l’un ou l’autre des articles qui le suivent explique

the end of that list. The *ejusdem generis* principle supports this position by limiting the generality of the final words on the basis of the narrow enumeration that precedes them (*National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, at p. 1040). All of the other instruments arise by agreement or by operation of law. Therefore, court-ordered super-priority charges under s. 11 or any of the sections that follow it are different in kind from anything on the list.

[64] Using the list of specific examples to ascertain Parliament's intent in this case is also consistent with the presumption against tautology. In *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846, McLachlin C.J. defined this presumption in the following way:

It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain: Sullivan, at p. 158. Thus, “[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose” (p. 158). This principle is often invoked by courts to resolve ambiguity or to determine the scope of general words.

(Para. 36, quoting R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 158; see also *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715, at para. 45.)

[65] The *ITA* contains two definitions of “security interest”, in s. 224(1.3) and s. 18(5). For the purposes of computing taxpayer income, Parliament chose to define “security interest” in s. 18(5) in nearly the same manner as in s. 224(1.3), but without listing the ten specific security instruments: “*security interest*, in respect of a property, means an interest in, or for civil law a right in, the property that secures payment of an obligation”. The presumption

à la fois leur exclusion de la liste des instruments spécifiques et le fait qu’elles ne sauraient être visées par la définition plus large du terme « charge » à la fin de cette liste. La règle *ejusdem generis* appuie cette position en limitant la portée générale des derniers termes sur la base de l’énumération des exemples précis qui les précède (*Banque nationale de Grèce (Canada) c. Katsikonouris*, [1990] 2 R.C.S. 1029, p. 1040). Tous les autres instruments sont le résultat d’un accord ou de l’application de la loi. Par conséquent, les charges super prioritaires ordonnées par un tribunal en vertu de l’art. 11 ou de l’un ou l’autre des articles qui le suivent sont d’un type différent de toutes les garanties figurant dans l’énumération.

[64] Recourir à la liste d’exemples précis pour établir l’intention du législateur en l’espèce s’accorde aussi avec la présomption d’absence de tautologie. Dans l’arrêt *McDiarmid Lumber Ltd. c. Première Nation de God’s Lake*, 2006 CSC 58, [2006] 2 R.C.S. 846, la juge en chef McLachlin définit ainsi cette présomption :

Le législateur est présumé ne pas utiliser de mots superflus ou dénués de sens, ne pas se répéter inutilement ni s’exprimer en vain : Sullivan, p. 158. Partant, [TRADUCTION] « [c]haque mot d’une loi est présumé avoir un sens et jouer un rôle précis dans la réalisation de l’objectif du législateur » (p. 158). Les tribunaux recourent souvent à ce principe pour résoudre une ambiguïté ou déterminer la portée d’un terme général.

(Par. 36, citant R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4^e éd. 2002), p. 158; voir aussi *Placer Dome Canada Ltd. c. Ontario (Ministre des Finances)*, 2006 CSC 20, [2006] 1 R.C.S. 715, par. 45.)

[65] On retrouve dans la *LIR* deux définitions du terme « garantie », au par. 224(1.3) et au par. 18(5). Pour les besoins du calcul des revenus des contribuables, le législateur a choisi de définir au par. 18(5) le mot « garantie » d’une manière presque identique qu’au par. 224(1.3), sans toutefois énumérer les dix mêmes instruments de garantie spécifiques : « *garantie* Est une garantie relative à un bien tout intérêt ou, pour l’application du droit civil, tout droit sur le bien

against tautology means that we must presume that Parliament included the specific additional words in s. 224(1.3) because they “have a specific role to play in advancing the legislative purpose” (*Placer Dome*, at para. 45, quoting R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 159). Applying the presumption against tautology demonstrates that Parliament intended interpretive weight to be placed on the examples.

[66] To come back to *Caisse populaire Desjardins de l’Est de Drummond*, I agree with Rothstein J. that the definition of “security interest” in s. 224(1.3) of the *ITA* is expansive such that it “does not require that the agreement between the creditor and debtor take any particular form” (para. 15). However, I am of the view that there is a key restriction in this expansive definition. The definition focuses on interests created either by consensual agreement or by operation of law, and these types of interests are usually designed to protect the rights of a single creditor, usually to the detriment of other creditors. In that case, the Court was considering whether a right to compensation conferred on a single creditor by a contract entered into between that creditor and the debtor was a security interest within the meaning of s. 224(1.3). The situation at issue in that case was completely different than the one at issue in the present case. Indeed, in the present case, the interest of the participants in the restructuring is created by a court order, not by an agreement or by operation of law. As I have said above, when a judge orders a super-priority charge in *CCAA* proceedings, it is quite a different type of interest as the *CCAA* restructuring process benefits all creditors and not one in particular.

[67] Finally, if Parliament had wanted to include court-ordered super-priority charges in the definition of “security interest”, it would have said so specifically. Parliament must be taken to have legislated with the operation of the *CCAA* in mind. In the words of Professor Sullivan, “[t]he legislature is presumed to know its own statute book and to draft

qui garantit le paiement d’une obligation ». Selon la présomption d’absence de tautologie, il nous faut présumer que le législateur a inséré certains termes précis au par. 224(1.3) parce qu’ils « joue[nt] un rôle précis dans la réalisation de l’objectif du législateur » (*Placer Dome*, par. 45, citant R. Sullivan, *Driedger on the Construction of Statutes* (3^e éd. 1994), p. 159). L’application de la présomption d’absence de tautologie démontre que le législateur voulait que l’on attribue une valeur interprétative aux exemples.

[66] Pour revenir à l’arrêt *Caisse populaire Desjardins de l’Est de Drummond*, je conviens avec le juge Rothstein que la définition de « garantie » figurant au par. 224(1.3) de la *LIR* est large de sorte qu’elle « n’exige pas que l’entente entre le créancier et le débiteur revête une forme particulière » (par. 15). Mais si large soit-elle, elle contient à mon sens une limite importante. La définition est axée sur les intérêts créés par accord consensuel ou par application de la loi, et ces types d’intérêts visent habituellement à protéger les droits d’un seul créancier, en général au détriment des autres créanciers. Dans cette affaire, la Cour se demandait si un droit de compensation accordé à un seul créancier au moyen d’une convention intervenue entre ce créancier et la débitrice était une garantie au sens du par. 224(1.3). La situation en cause dans cette affaire était tout à fait différente de celle en l’espèce. En effet, dans la présente affaire, l’intérêt des participants à la restructuration est créé par ordonnance judiciaire, et non par accord ou par application de la loi. Comme je l’ai dit précédemment, lorsqu’un juge ordonne une charge super prioritaire dans une procédure intentée sous le régime de la *LACC*, il s’agit d’un type d’intérêt très différent, car le processus de restructuration prévu par cette loi bénéficie à tous les créanciers, et non à un seul en particulier.

[67] Enfin, si le législateur avait voulu inclure les charges super prioritaires d’origine judiciaire dans la définition de « garantie », il l’aurait dit expressément. Il faut tenir pour acquis que le législateur a légiféré en tenant compte de l’application de la *LACC*. Pour citer la professeure Sullivan, [TRADUCTION] « [l]e législateur est présumé connaître ses propres lois et

each new provision with regard to the structures, conventions, and habits of expression as well as the substantive law embodied in existing legislation” (Sullivan (2014), at p. 422 (footnote omitted)). Given that, in *Indalex*, this Court has already found that granting super-priority charges is critical as “a key aspect of the debtor’s ability to attempt a workout”, one would expect Parliament to use clearer language where such a definition could jeopardize the operation of another one of its Acts. I am therefore in total disagreement with my colleagues Justices Brown and Rowe that “nothing in the definition of security interest in the *ITA* precludes the inclusion of an interest that is designed to operate to the benefit of all creditors” (para. 210). To the contrary, everything hints at priming charges being excluded from the definition of security interest.

[68] In conclusion, a court-ordered super-priority charge under the *CCAA* is not a security interest within the meaning of s. 224(1.3) of the *ITA*. As a result, there is no conflict between s. 227(4.1) of the *ITA* and the Initial Order made in this case. I therefore respectfully disagree with my colleague Justice Moldaver’s suggestion that there may be a conflict between s. 11 of the *CCAA* and the *ITA* (para. 258). The Initial Order’s super-priority charges prevail over the deemed trust.

C. *Was It Necessary for the Initial Order to Subordinate Her Majesty’s Claim Protected by a Deemed Trust in This Case?*

[69] Finally, I must now identify the provision in which the Initial Order here should be grounded. While the initial order under consideration in *Indalex* was based on the court’s equitable jurisdiction, in most instances, orders in *CCAA* proceedings should be considered an exercise of statutory power (*Century Services*, at paras. 65-66).

[70] As discussed above, a supervising court’s authority to order super-priority charges is grounded

rédiger chaque nouvelle disposition en tenant compte des structures, des conventions et des formules d’expression, de même que du droit substantif exprimé dans la législation existante » (Sullivan (2014), p. 422 (note en bas de page omise)). Puisque, dans l’arrêt *Indalex*, notre Cour a déjà statué que l’octroi d’une charge super prioritaire « constitue un élément clé de la capacité du débiteur de tenter de conclure un arrangement », on s’attendrait à ce que le législateur utilise des termes plus clairs dans les cas où une telle définition pourrait compromettre l’application d’une autre de ses propres lois. Je suis donc en total désaccord avec mes collègues les juges Brown et Rowe quand ils affirment que « rien dans la définition de “garantie” qui figure dans la *LIR* ne permet d’exclure une garantie conçue pour fonctionner au profit de tous les créanciers » (par. 210). Au contraire, tout tend à démontrer que les charges super prioritaires sont exclues de la définition de « garantie ».

[68] En conclusion, une charge super prioritaire ordonnée par un tribunal en vertu de la *LACC* n’est pas une garantie au sens du par. 224(1.3) de la *LIR*. Il n’y a donc pas de conflit entre le par. 227(4.1) de la *LIR* et l’ordonnance initiale rendue en l’espèce. Avec égards, je ne souscris pas à l’idée de mon collègue le juge Moldaver suivant laquelle il y a peut-être un conflit entre l’art. 11 de la *LACC* et la *LIR* (par. 258). Les charges super prioritaires constituées aux termes de l’ordonnance initiale l’emportent sur la fiducie réputée.

C. *Était-il nécessaire que l’ordonnance initiale subordonne la réclamation de Sa Majesté protégée par une fiducie réputée en l’espèce?*

[69] Enfin, je dois maintenant déterminer sur quelle disposition l’ordonnance initiale devrait reposer. Bien que l’ordonnance examinée dans l’arrêt *Indalex* était fondée sur la compétence du tribunal en equity, dans la plupart des cas, les ordonnances rendues dans le cadre des procédures engagées sous le régime de la *LACC* devraient être considérées comme découlant de l’exercice d’un pouvoir conféré par la loi (*Century Services*, par. 65-66).

[70] Comme nous l’avons vu plus haut, le pouvoir du tribunal de surveillance d’ordonner des charges

in its broad discretionary power under s. 11 of the CCAA and also in the more specific grants of authority under ss. 11.2, 11.4, 11.51 and 11.52. Those provisions authorize the court to grant certain priming charges that rank ahead of the claims of “any secured creditor”. While I have already concluded that Her Majesty does not have a proprietary interest as a result of Her deemed trust, it is less certain whether Her Majesty is a “secured creditor” under the CCAA. Professor Wood is of the view that Her Majesty is not a “secured creditor” under the CCAA by virtue of Her deemed trust interest; rather, ss. 37 to 39 of the CCAA create “two distinct approaches — one that applies to a deemed trust, the other that applies when a statute gives the Crown the status of a secured creditor” (p. 96). Therefore, the ranking of a priming charge ahead of the deemed trust would fall outside the scope of the express priming charge provisions. I do not need to definitively determine if Her Majesty falls within the definition of “secured creditor” under the CCAA by virtue of Her trust. Instead, I would ground the supervising court’s power in s. 11, which “permits courts to create priming charges that are not specifically provided for in the CCAA” (p. 98). I respectfully disagree with the suggestion of my colleagues Brown and Rowe JJ. that Professor Wood or any other author has suggested that s. 11 is limited by the specific provisions that follow it (para. 228). To the contrary, this Court said in *Century Services*, at paras. 68-70, that s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders.

[71] My colleagues Brown and Rowe JJ. also argue that “priming charges cannot supersede the Crown’s deemed trust claim because they may attach *only to the property of the debtor’s company*” (para. 223 (emphasis in original)). With respect, this argument cannot stand because, although ss. 11.2, 11.51 and 11.52 of the CCAA contain this restriction, there is

super prioritaires est fondé sur le vaste pouvoir discrétionnaire que lui confère l’art. 11 de la LACC, ainsi que sur les pouvoirs plus spécifiques que lui accordent les art. 11.2, 11.4, 11.51 et 11.52. Ces dispositions autorisent le tribunal à accorder certaines charges prioritaires qui prennent rang devant les créances de « tout créancier garanti ». Bien que j’aie déjà conclu que Sa Majesté ne possède pas d’intérêt à titre de propriétaire du fait de sa fiducie présumée, il est moins sûr qu’elle soit un « créancier garanti » au sens de la LACC. Selon le professeur Wood, la fiducie présumée dont bénéficie Sa Majesté ne lui confère pas la qualité de « créancier garanti » au sens de la LACC. Les articles 37 à 39 de la LACC créent plutôt [TRADUCTION] « deux approches distinctes : l’une qui s’applique à la fiducie réputée, l’autre qui entre en jeu lorsque la loi reconnaît à la Couronne la qualité de “créancier garanti” » (p. 96). Par conséquent, le fait de faire passer une charge prioritaire devant la fiducie réputée déborderait le cadre des dispositions portant expressément sur les charges prioritaires. Je n’ai pas à trancher de façon définitive la question de savoir si Sa Majesté répond à la définition de « créancier garanti » au sens de la LACC du fait de sa fiducie. Je ferais plutôt reposer le pouvoir du tribunal de surveillance sur l’art. 11, qui « permet aux tribunaux de constituer des charges prioritaires qui ne sont pas expressément prévues par la LACC » (p. 98). Avec égards, je ne suis pas d’accord avec la suggestion de mes collègues les juges Brown et Rowe suivant laquelle le professeur Wood ou d’autres auteurs auraient laissé entendre que la portée de l’art. 11 est limitée par les dispositions spécifiques qui le suivent (par. 228). Au contraire, notre Cour a déclaré aux par. 68-70 de l’arrêt *Century Services* que la possibilité pour le tribunal de rendre des ordonnances plus spécifiques n’avait pas pour effet de restreindre le vaste pouvoir conféré par l’art. 11.

[71] Mes collègues les juges Brown et Rowe affirment également que « les charges super prioritaires ne peuvent pas prendre rang devant la réclamation de la Couronne au titre de la fiducie réputée puisqu’elles peuvent se rattacher *uniquement aux biens de la compagnie débitrice* » (par. 223 (en italiques dans l’original)). Avec égards, cet argument ne peut être retenu,

no such restriction in s. 11. As Lalonde J. recognized, [TRANSLATION] “[i]n exercising the authority conferred by the CCAA, including inherent powers, the courts have not hesitated to use this jurisdiction to intervene in contractual relationships between a debtor and its creditors, even to make orders affecting the rights of third parties” (*Triton Électronique*, at para. 31). There may be circumstances where it is appropriate for a court to attach charges to property that does not belong to the debtor — if, for instance, this deemed trust were to be equivalent to a proprietary interest. However, that circumstance does not arise in this case because the property subject to Her Majesty’s deemed trust remains the property of the debtor, as the deemed trust does not create a proprietary interest. My colleagues’ reliance on s. 37(2) of the CCAA is similarly ill-founded. As I said earlier, s. 37(2) simply preserves the status quo. It does not alter Her Majesty’s interest. It merely continues that interest and excludes it from the operation of s. 37(1), which would otherwise downgrade it to the interest of an ordinary creditor.

[72] That said, courts should still recognize the distinct nature of Her Majesty’s interest and ensure that they grant a charge with priority over the deemed trust only when necessary. In creating a super-priority charge, a supervising judge must always consider whether the order will achieve the objectives of the CCAA. When there is the spectre of a claim by Her Majesty protected by a deemed trust, the judge must also consider whether a super priority is necessary. The record before us contains no reasons for the Initial Order, so this is difficult to determine in this case. Given that Her Majesty has been paid and that the case is in fact moot, it is not critical for us to determine whether the supervising judge believed it was necessary to subordinate Her Majesty’s claim to the super-priority charges. Based on Justice Topolniski’s reasons for denying the Crown’s motion to vary the Initial Order, it is clear that she would have found that the super-priority charges deserved priority over Her Majesty’s interest (paras. 100-104). However, I wish to say a few words on when it may be necessary for a supervising

car, bien que les art. 11.2, 11.51 et 11.52 de la LACC renferment cette restriction, aucune restriction de ce genre ne figure à l’art. 11. Tel que l’a reconnu le juge Lalonde, « [e]n exerçant l’autorité conférée par la LACC, incluant les pouvoirs inhérents, les tribunaux n’ont pas hésité à faire usage de cette compétence pour intervenir dans les rapports contractuels entre une débitrice et ses créanciers, voire à rendre des ordonnances ayant pour effet d’affecter les droits de tiers » (*Triton Électronique*, par. 31). Il peut exister des circonstances dans lesquelles il convient pour le tribunal de grever de charges des biens qui n’appartiennent pas au débiteur si, par exemple, cette fiducie réputée équivalait à un intérêt à titre de propriétaire. Toutefois, ce n’est pas le cas en l’espèce, car les biens visés par la fiducie réputée de Sa Majesté demeurent la propriété du débiteur, étant donné que la fiducie réputée ne crée pas d’intérêt à titre de propriétaire. Le recours de mes collègues au par. 37(2) de la LACC est également mal fondé. Comme je l’ai déjà expliqué, le par. 37(2) préserve simplement le statu quo. Il ne modifie pas l’intérêt de Sa Majesté. Il ne fait que le maintenir et le soustraire à l’application du par. 37(1), qui ramènerait sinon l’intérêt de la Couronne à celui d’un simple créancier chirographaire.

[72] Cela dit, les tribunaux devraient tout de même reconnaître le caractère distinct de l’intérêt de Sa Majesté et n’accorder une charge ayant priorité sur la fiducie réputée que dans les cas où c’est nécessaire. Lorsqu’il s’agit de constituer une charge super prioritaire, le juge surveillant doit toujours se demander si cette mesure favorisera la réalisation des objectifs de la LACC. Lorsqu’il est possible qu’une créance de Sa Majesté soit protégée par une fiducie réputée, le juge doit également se demander s’il est nécessaire d’accorder une super priorité. Le dossier dont nous disposons ne nous permet pas de connaître les motifs à l’appui de l’ordonnance initiale et il est donc difficile de répondre à la question en l’espèce. Puisque Sa Majesté a été payée et que l’affaire est en fait devenue théorique, il n’est pas essentiel de nous prononcer sur la question de savoir si le juge surveillant croyait qu’il était nécessaire de subordonner la créance de Sa Majesté à des charges super prioritaires. Si l’on se reporte aux motifs exposés par la juge Topolniski pour rejeter la requête présentée par la Couronne en vue de faire modifier l’ordonnance

judge to subordinate Her Majesty's interest to super-priority charges.

[73] It may be necessary to subordinate Her Majesty's deemed trust where the supervising judge believes that, without a super-priority charge, a particular professional or lender would not act. This may often be the case. On the other hand, I agree with Professor Wood that, although subordinating super-priority charges to Her Majesty's claim will often increase the costs and complexity of restructuring, there will be times when it will not. For instance, when Her Majesty's claim is small or known with a high degree of certainty, commercial parties will be able to manage their risks and will not need a super priority. After all, there is an order of priority even amongst super-priority charges, and therefore it is clear that these parties are willing to have their claims subordinated to some fixed claims. A further example of where different considerations may be in play is in so-called liquidating CCAA proceedings. As this Court recently recognized, CCAA proceedings whose fundamental objective is to liquidate — rather than to rescue a going concern — have a legitimate place in the CCAA regime and have been accepted by Parliament through the enactment of s. 36 (*Callidus Capital*, at paras. 42-45). Liquidating CCAA proceedings often aim to maximize returns for creditors, and thus the subordination of Her Majesty's interest has less justification beyond potential unjust enrichment arguments.

VI. Disposition

[74] I would dismiss the appeal with costs in this Court in accordance with the tariff of fees and

initiale, il est évident qu'elle aurait conclu que les charges super prioritaires méritaient d'avoir priorité sur l'intérêt de Sa Majesté (par. 100-104). Je tiens toutefois à dire quelques mots au sujet des cas où il peut s'avérer nécessaire pour le juge surveillant de subordonner l'intérêt de Sa Majesté à des charges super prioritaires.

[73] Il peut s'avérer nécessaire de subordonner la fiducie réputée de Sa Majesté à d'autres charges lorsque le juge surveillant estime que, sans la charge super prioritaire, un professionnel ou un prêteur donné refuserait de s'engager, ce qui peut se produire assez souvent. Par contre, je suis d'accord avec le professeur Wood pour dire que, même si la subordination des charges super prioritaires à la créance de Sa Majesté aura souvent pour effet d'augmenter les coûts et la complexité de la restructuration, il existe des situations où ce ne sera pas le cas. Par exemple, lorsque la créance de Sa Majesté est peu élevée ou qu'elle est connue avec une grande certitude, les entités commerciales pourront gérer leurs risques et n'auront pas besoin d'une super priorité. Après tout, il existe un ordre de collocation même parmi les charges super prioritaires et il est donc évident que ces créanciers sont disposés à ce que leurs créances soient assujetties à certains plafonds fixes. Un autre exemple où des considérations différentes peuvent entrer en jeu est celui de la procédure dite de liquidation prévue par la LACC. Ainsi que notre Cour l'a récemment reconnu, les procédures prévues par la LACC dont l'objectif fondamental est la liquidation — et non de porter secours à une entreprise en exploitation — occupent une place légitime au sein du régime de la LACC et ont été acceptées par le législateur par l'adoption de l'art. 36 (*Callidus Capital*, par. 42-45). Les procédures de liquidation prévues par la LACC visent souvent à maximiser le rendement au profit des créanciers, de sorte que la subordination de l'intérêt de Sa Majesté s'en trouve moins justifiée, hormis les cas de présumé enrichissement sans cause.

VI. Dispositif

[74] Je suis d'avis de rejeter le pourvoi avec dépens devant notre Cour, selon le tarif des honoraires

disbursements set out in Schedule B of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

The reasons of Karakatsanis and Martin JJ. were delivered by

KARAKATSANIS J. —

I. Overview

[75] When a company seeks to restructure its affairs in order to avoid bankruptcy, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA), allows the court to order charges in favour of parties that are necessary to the restructuring process: lenders who provide interim financing, the monitor who administers the company's restructuring, and directors and officers who captain the sinking ship (among others). These charges, often referred to as "priming charges", are meant to encourage investment in the company as it undergoes reorganization. A company's reorganization, as an alternative to the devastating effects of bankruptcy, serves the public interest by benefitting creditors, employees, and the health of the economy more generally.

[76] In this case, the CCAA judge ordered priming charges over the estates of Canada North Group and six related companies (Debtor Companies) in favour of an interim lender, the monitor, and directors. Property of two of the Debtor Companies, however, was also subject to a deemed trust in favour of the Crown, under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (*ITA*), for unremitted source deductions consisting of employees' income tax, Canada Pension Plan contributions, and employment insurance premiums. While this appeal is moot because there are sufficient assets to satisfy both the Crown's deemed trust claim and the priming charges, this Court is asked to determine which has priority in the restructuring: the priming charges under the CCAA or the deemed trust under the *ITA*.

et débours fixé à l'annexe B des *Règles de la Cour suprême du Canada*, DORS/2002-156.

Version française des motifs des juges Karakatsanis et Martin rendus par

LA JUGE KARAKATSANIS —

I. Aperçu

[75] Lorsqu'une compagnie cherche à restructurer ses affaires afin d'éviter la faillite, la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (*LACC*), permet au tribunal d'ordonner des charges en faveur des parties qui sont nécessaires au processus de restructuration : les prêteurs qui fournissent un financement temporaire, le contrôleur qui administre la restructuration de la compagnie, et les dirigeants et administrateurs qui gèrent la compagnie en déroute (entre autres). Ces charges, souvent appelées « charges super prioritaires », visent à encourager les investissements dans la compagnie alors qu'elle procède à sa restructuration. La restructuration d'une compagnie — une solution de rechange aux effets dévastateurs d'une faillite — sert l'intérêt public puisqu'elle profite aux créanciers, aux employés et à la santé de l'économie en général.

[76] En l'espèce, le juge chargé d'appliquer la *LACC* a grevé le patrimoine de Canada North Group et de six compagnies apparentées (compagnies débitrices) de charges super prioritaires en faveur d'un prêteur temporaire, du contrôleur et des administrateurs. Toutefois, les biens de deux des compagnies débitrices étaient aussi assujettis à une fiducie réputée créée en faveur de la Couronne, en vertu de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, c. 1 (5^e suppl.) (« *LIR* »), à cause du non-versement de retenues à la source (impôt sur le revenu des employés, cotisations au Régime de pensions du Canada et cotisations d'assurance-emploi). Bien que le présent pourvoi soit théorique du fait que les actifs sont suffisants pour couvrir à la fois la réclamation de la Couronne au titre de la fiducie réputée et les charges super prioritaires, notre Cour est appelée à déterminer ce qui est prioritaire dans la restructuration : les charges super prioritaires établies sous le régime de la *LACC* ou la fiducie réputée établie sous le régime de la *LIR*.

[77] Section 227(4.1) of the *ITA* provides that, when an employer fails to remit source deductions to the Crown, a deemed trust attaches to the property of the employer to the extent of the unremitted source deductions. The deemed trust operates “notwithstanding any security interest in such property” and “[n]otwithstanding . . . any other enactment of Canada”. Sections 11.2, 11.51 and 11.52 of the *CCAA* give the court authority to order priming charges over a company’s property in favour of interim lenders, directors and officers, and estate administrators. Priming charges can rank ahead of any other secured claim. Read on their own, these provisions appear to give different parties super-priority in an insolvency. This issue of statutory interpretation has been described as the collision of an unstoppable force with an immovable object (R. J. Wood, “Irresistible Force Meets Immovable Object: *Canada v. Canada North Group Inc.*” (2020), 63 *Can. Bus. L.J.* 85).

[78] The appellant, the Crown, argues that s. 227(4.1) of the *ITA* creates a proprietary right in the Crown because, through the mechanism of a deemed trust, it gives the Crown beneficial ownership of the amount of the unremitted source deductions. In other words, that *amount* is the Crown’s property and a *CCAA* judge cannot, therefore, order a charge over it; it should be taken out of the estate and can play no role in the restructuring process.

[79] In contrast, the respondents argue that s. 227(4.1) creates a security interest in the Crown squarely contemplated by ss. 11.2, 11.51 and 11.52 of the *CCAA*. They further submit that there is no conflict between the relevant provisions because the policies underlying both Acts can be harmonized in favour of giving effect to the *CCAA* provisions.

[80] For the reasons below, I conclude that there is no conflict between the *ITA* and *CCAA* provisions. The right that attaches to “beneficial ownership” under s. 227(4.1) of the *ITA* must be interpreted in the specific statutory context in which it arises. Here,

[77] Le paragraphe 227(4.1) de la *LIR* prévoit que, lorsqu’un employeur omet de verser des retenues à la source à la Couronne, une fiducie réputée s’attache aux biens de l’employeur jusqu’à concurrence de la valeur des retenues à la source non versées. La fiducie réputée fonctionne « malgré toute autre garantie sur ces biens » et « [m]algré [. . .] tout autre texte législatif fédéral ». Aux termes des art. 11.2, 11.51 et 11.52 de la *LACC*, un tribunal peut, par ordonnance, déclarer que les biens d’une compagnie sont grevés de charges super prioritaires en faveur de prêteurs temporaires, de dirigeants et d’administrateurs, et d’administrateurs de patrimoine. Les charges super prioritaires peuvent avoir priorité sur toute autre réclamation garantie. Prises individuellement, ces dispositions semblent accorder une super priorité à différentes parties en cas d’insolvabilité. Cette question d’interprétation législative a été décrite comme le choc entre une force irrésistible et un objet inamovible (R. J. Wood, « Irresistible Force Meets Immovable Object : *Canada v. Canada North Group Inc.* » (2020), 63 *Rev. can. dr. comm.* 85).

[78] L’appelante, la Couronne, soutient que le par. 227(4.1) de la *LIR* lui confère un droit propriétaire puisque, par le mécanisme d’une fiducie réputée, il accorde à la Couronne un droit de bénéficiaire sur le montant des retenues à la source non versées. Autrement dit, ce *montant* est la propriété de la Couronne, et un juge chargé d’appliquer la *LACC* ne peut donc pas grever ce montant d’une charge; il devrait être soustrait du patrimoine et il ne peut jouer aucun rôle dans le processus de restructuration.

[79] En revanche, les intimées affirment que le par. 227(4.1) confère à la Couronne une garantie nettement visée par les art. 11.2, 11.51 et 11.52 de la *LACC*. Elles ajoutent qu’il n’existe aucun conflit entre les dispositions en cause parce que les politiques qui sous-tendent les deux lois peuvent être harmonisées en faveur de l’application des dispositions de la *LACC*.

[80] Pour les raisons exposées ci-dessous, je conclus qu’il n’existe aucun conflit entre les dispositions de la *LIR* et celles de la *LACC*. Le « droit de bénéficiaire » prévu au par. 227(4.1) de la *LIR* doit être interprété dans le contexte législatif précis où il

the Crown's right to unremitted source deductions in a CCAA restructuring is protected by the requirement that the plan of compromise pay the Crown in full. Because I do not conclude that the Crown's interest fits within the relevant statutory definition of "secured creditor" under the CCAA, it is not captured by the court's authority to order priming charges under ss. 11.2, 11.51 and 11.52 of the CCAA. However, in my view, the broad discretionary power under s. 11 of the CCAA permits a court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions. This conclusion harmonizes the purposes of both federal statutes. I would dismiss the appeal.

II. Facts

[81] In July 2017, the Court of Queen's Bench of Alberta issued an order granting the Debtor Companies protection under the CCAA (Alta. Q.B., No. 1703-12327, July 5, 2017 (Initial Order)). The Initial Order provided for priming charges in the following order of priority: (1) an Administration Charge of \$500,000 in favour of the court-appointed Monitor, Ernst & Young Inc.; (2) an Interim Lender's Charge of \$1,000,000 in favour of the interim lender, Business Development Bank of Canada (BDBC); and (3) a Directors' Charge of \$150,000 (together, Priming Charges). The Interim Lender's Charge was later increased to \$3,500,000 and the Administration Charge to \$950,000.

[82] Paragraph 44 of the Initial Order provided that the Priming Charges have priority over the claims of secured creditors:

Each of the Directors' Charge, Administration Charge and the Interim Lender's Charge . . . shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise . . . in favour of any Person.

se manifeste. En l'espèce, le droit de la Couronne sur des retenues à la source non versées dans le cadre d'une restructuration sous le régime de la LACC est protégé par l'exigence qu'un plan de transaction prévoit le paiement intégral à la Couronne. Puisque je ne conclus pas que l'intérêt de la Couronne entre dans la définition applicable de « créancier garanti » contenue dans la LACC, il ne relève pas du pouvoir du tribunal d'ordonner des charges super prioritaires en vertu des art. 11.2, 11.51 et 11.52 de la LACC. Cependant, je suis d'avis que le vaste pouvoir discrétionnaire conféré par l'art. 11 de la LACC permet au tribunal de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées. Cette conclusion harmonise les objectifs des deux lois fédérales. Je rejeterais le pourvoi.

II. Faits

[81] En juillet 2017, la Cour du Banc de la Reine de l'Alberta a rendu une ordonnance accordant aux compagnies débitrices la protection de la LACC (B.R. Alb., n° 1703-12327, 5 juillet 2017 (ordonnance initiale)). L'ordonnance initiale établissait les charges super prioritaires selon l'ordre de priorité suivant : (1) une charge administrative de 500 000 \$ en faveur du contrôleur nommé par le tribunal, Ernst & Young Inc.; (2) une charge de 1 000 000 \$ en faveur du prêteur temporaire, la Banque de développement du Canada (BDC); (3) une charge de 150 000 \$ en faveur des administrateurs (collectivement, les charges super prioritaires). La charge en faveur du prêteur temporaire a par la suite été portée à 3 500 000 \$ et la charge administrative, à 950 000 \$.

[82] Le paragraphe 44 de l'ordonnance initiale indiquait que les charges super prioritaires prenaient rang devant les réclamations des créanciers garantis :

[TRADUCTION] Chacune des charges relatives à l'administration, aux administrateurs et au prêteur temporaire [. . .] grèvent les biens et, sous réserve du paragraphe 34(11) de la LACC, toutes ces charges ont priorité sur tous les autres privilèges, garanties, fiducies, charges et sûretés, créances de créanciers garantis, d'origine législative ou autre [. . .] détenus par quiconque.

[83] Paragraph 46 of the Initial Order provided that the Priming Charges “shall not otherwise be limited or impaired in any way by . . . (d) the provisions of any federal or provincial statutes”.

[84] At the time of the Initial Order, two of the Debtor Companies had failed to remit source deductions and owed the Crown \$685,542.93. The Crown applied to vary the Priming Charges in the Initial Order on the basis that paras. 44 and 46(d) failed to recognize the Crown’s legislated interest in unremitted source deductions. The Crown argued that s. 227(4.1) of the *ITA*, s. 23(4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (*CPP*), and s. 86(2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23 (*EIA*), require the Crown’s claims for unremitted source deductions to have priority over the claims of all other creditors of a debtor, notwithstanding any other federal statute, including the *CCAA*. In these reasons, I will only refer to s. 227(4.1) of the *ITA* as the relevant *ITA*, *CPP* and *EIA* provisions are identical and the latter two statutes cross-reference the *ITA*.

III. Decisions Below

A. *Court of Queen’s Bench of Alberta, 2017 ABQB 550, 60 Alta. L.R. (6th) 103 (Topolniski J.)*

[85] The application judge held that court-ordered priming charges under ss. 11.2, 11.51 and 11.52 of the *CCAA* have priority over the Crown’s deemed trust for unremitted source deductions. First, she concluded that the Crown’s deemed trust under s. 227(4.1) of the *ITA* creates a security interest rather than a proprietary interest because the definition of “security interest” in the *ITA* includes an interest created by a deemed or actual trust, and it would be inconsistent to interpret the Crown’s interest under s. 227(4.1) contrary to its enabling statute. She also reasoned that the deemed trust is a security interest

[83] Le paragraphe 46 de l’ordonnance initiale indiquait que les charges super prioritaires [TRANSLATION] « ne sont pas autrement limitées ou compromises de quelque façon que ce soit par [. . .] (d) les dispositions de toute loi fédérale ou provinciale ».

[84] Au moment où a été rendue l’ordonnance initiale, deux des compagnies débitrices avaient omis de verser les retenues à la source et devaient à la Couronne 685 542,93 \$. La Couronne a présenté une demande visant à faire modifier les charges super prioritaires établies dans l’ordonnance initiale au motif que les par. 44 et 46d) ne reconnaissaient pas l’intérêt accordé par la loi à la Couronne dans les retenues à la source non versées. La Couronne a soutenu que le par. 227(4.1) de la *LIR*, le par. 23(4) du *Régime de pensions du Canada*, L.R.C. 1985, c. C-8 (*RPC*), et le par. 86(2.1) de la *Loi sur l’assurance-emploi*, L.C. 1996, c. 23 (*LAE*), exigent que les réclamations de la Couronne à l’égard des retenues à la source non versées prennent rang devant les réclamations de tout autre créancier d’un débiteur, malgré toute autre loi fédérale, y compris la *LACC*. Dans les présents motifs, je me reporterai uniquement au par. 227(4.1) de la *LIR* parce que les dispositions pertinentes de la *LIR*, du *RPC* et de la *LAE* sont identiques et que le *RPC* et la *LAE* renvoient à la *LIR*.

III. Décisions des juridictions inférieures

A. *Cour du Banc de la Reine de l’Alberta, 2017 ABQB 550, 60 Alta. L.R. (6th) 103 (la juge Topolniski)*

[85] La juge de première instance a déclaré que les charges super prioritaires ordonnées par le tribunal en vertu des art. 11.2, 11.51 et 11.52 de la *LACC* ont priorité sur la fiducie réputée créée en faveur de la Couronne à l’égard des retenues à la source non versées. En premier lieu, la juge a conclu que la fiducie réputée créée en faveur de la Couronne en vertu du par. 227(4.1) de la *LIR* créait une garantie plutôt qu’un intérêt propriétaire puisque la définition de « garantie » contenue dans la *LIR* comprend tout intérêt créé par une fiducie réputée ou véritable, et qu’il serait incohérent d’interpréter l’intérêt de la

because it lacks certainty of subject matter and is therefore not a true trust.

[86] Second, the application judge concluded that s. 227(4.1) of the *ITA* and ss. 11.2, 11.51 and 11.52 of the *CCAA* are not inconsistent because any conflict can be avoided by interpretation. She reasoned that the policy objectives of both Acts have to be respected because they were enacted by the same government. On the one hand, the collection of source deductions is at the heart of the *ITA*. On the other, the *CCAA* aims to facilitate business survival. The application judge concluded that, without the court's ability to order priming charges, interim lending "would simply end", along with "the hope of positive *CCAA* outcomes" (para. 102). The goals of both Acts can therefore only be achieved if priority is given "to those charges necessary for restructuring", while the deemed trust ranks in priority to all other secured creditors (para. 112).

B. *Court of Appeal of Alberta, 2019 ABCA 314, 93 Alta. L.R. (6th) 29 (Rowbotham and Schutz J.J.A., Wakeling J.A. Dissenting)*

[87] A majority of the Court of Appeal dismissed the Crown's appeal. It agreed with the application judge that the Crown's deemed trust under s. 227(4.1) of the *ITA* creates a security interest rather than a proprietary interest. It also agreed that the Crown's position failed to reconcile the objectives of the *ITA* and *CCAA*, and given the importance of interim lending, concluded that absurd consequences could follow if the Crown's position prevailed.

[88] Wakeling J.A. disagreed. He concluded that s. 227(4.1) of the *ITA* makes two unequivocal statements: first, that the Crown is the beneficial owner of the debtor's property to the extent of the unremitted

Couronne au titre du par. 227(4.1) à l'encontre de sa loi habilitante. Elle a également opiné que la fiducie réputée constituait une garantie en raison de l'absence de certitude quant à sa matière; elle ne constituait donc pas une fiducie véritable.

[86] En second lieu, la juge de première instance a conclu que le par. 227(4.1) de la *LIR* ainsi que les art. 11.2, 11.51 et 11.52 de la *LACC* ne sont pas incompatibles puisque tout conflit peut être évité par l'interprétation. Elle a expliqué que les objectifs de politique générale des deux lois doivent être respectés puisque ces dernières ont été édictées par le même gouvernement. D'une part, la perception des retenues à la source sont au cœur de la *LIR*. D'autre part, la *LACC* vise à favoriser la survie des entreprises. La juge de première instance a conclu que, si les tribunaux n'avaient pas la capacité d'ordonner des charges super prioritaires, les prêts temporaires [TRADUCTION] « disparaîtraient tout simplement », de même que « l'espoir de voir des résultats positifs découler de la *LACC* » (par. 102). Les objectifs des deux lois ne peuvent toutefois être atteints que si la priorité est accordée [TRADUCTION] « aux charges nécessaires à la restructuration », alors que la fiducie réputée prend rang devant toutes les autres réclamations garanties (par. 112).

B. *Cour d'appel de l'Alberta, 2019 ABCA 314, 93 Alta. L.R. (6th) 29 (les juges Rowbotham et Schutz, le juge Wakeling, dissident)*

[87] La Cour d'appel a rejeté, à la majorité, l'appel de la Couronne. Tout comme la juge de première instance, elle a jugé que la fiducie réputée créée en faveur de la Couronne en vertu du par. 227(4.1) de la *LIR* créait une garantie plutôt qu'un intérêt propriétaire. Elle a aussi convenu que la position de la Couronne ne conciliait pas les objectifs de la *LIR* et de la *LACC*. Enfin, compte tenu de l'importance du financement temporaire, elle a conclu que retenir la thèse de la Couronne pourrait entraîner des conséquences absurdes.

[88] Le juge Wakeling n'était pas de cet avis. Il a conclu que le par. 227(4.1) de la *LIR* contenait deux déclarations sans équivoque : premièrement, la Couronne a un droit de bénéficiaire sur les biens

source deductions; and second, that this amount must be paid to the Crown notwithstanding the security interests of any other secured creditors, including, in his opinion, the holders of a priming charge. As a result, it was unnecessary to reconcile policy objectives. In his view, the notwithstanding clause in s. 227(4.1) was conclusive because the relevant CCAA provisions lacked the same language. As a result, there was “no need to look beyond the four corners of s. 227(4.1) to determine the scope of the unassailable priority it creates” (para. 135). Finally, Wakeling J.A. noted that there is perfect correlation between the purpose of the *ITA* and the plain meaning of s. 227(4.1).

IV. Parties’ Submissions

A. *The Appellant the Crown*

[89] The Crown’s submissions before this Court echo the dissent at the Court of Appeal: the text of s. 227(4.1) unequivocally states that unremitted source deductions become the property of the Crown. The Crown argues that the plain meaning of s. 227(4.1) aligns with its purpose, which is to protect the largest source of government revenue.

[90] The Crown makes two principal submissions. First, it submits that the Crown’s interest under s. 227(4.1) of the *ITA* is a proprietary interest rather than a security interest because the text of s. 227(4.1) causes the unremitted source deductions to become the property of the Crown. There is no need to rely on the “notwithstanding clause” in s. 227(4.1) because the *ITA* and CCAA provisions work harmoniously; the priming charges can only attach to a company’s property and s. 227(4.1) provides that the unremitted source deductions are beneficially owned by the Crown.

[91] Second, the Crown submits in the alternative that, even if its interest is a security interest, it ranks ahead of the priming charges. This is because

du débiteur jusqu’à concurrence du montant des retenues à la source non versées; deuxièmement, ce montant doit être payé à la Couronne malgré les garanties accordées à tout autre créancier garanti, y compris, selon lui, les titulaires d’une charge super prioritaire. Par conséquent, il n’était pas nécessaire de concilier les objectifs de politique générale. À son avis, la disposition de dérogation du par. 227(4.1) était concluante puisque les dispositions pertinentes de la *LACC* ne contenaient pas le même libellé. Il n’était donc [TRADUCTION] « pas nécessaire d’aller au-delà des contours du par. 227(4.1) pour déterminer la portée de la priorité inattaquable qu’il établit » (par. 135). Enfin, le juge Wakeling a souligné qu’il existait une corrélation parfaite entre l’objectif de la *LIR* et le sens ordinaire du par. 227(4.1).

IV. Observations des parties

A. *L’appelante, la Couronne*

[89] Les arguments présentés par la Couronne devant notre Cour font écho à l’opinion dissidente exprimée en Cour d’appel : le texte du par. 227(4.1) indique sans équivoque que les retenues à la source non versées deviennent la propriété de la Couronne. La Couronne soutient que le sens ordinaire du par. 227(4.1) s’aligne avec son objectif, qui est de protéger la plus grande source de revenus du gouvernement.

[90] La Couronne avance deux arguments principaux. Premièrement, elle affirme que l’intérêt de la Couronne au titre du par. 227(4.1) de la *LIR* est un intérêt propriétaire plutôt qu’une garantie puisque, selon ce paragraphe, les retenues à la source non versées deviennent la propriété de la Couronne. Il n’est pas nécessaire de recourir à la « disposition de dérogation » du par. 227(4.1) puisque les dispositions de la *LIR* et de la *LACC* s’appliquent de façon harmonieuse; les charges super prioritaires ne peuvent se rattacher qu’aux biens d’une compagnie, et le par. 227(4.1) prévoit que la Couronne a un droit de bénéficiaire sur les retenues à la source non versées.

[91] Deuxièmement, la Couronne soutient à titre subsidiaire que même si son intérêt est une garantie, il prend rang devant les charges super prioritaires

a priming charge under the *CCAA* is a security interest within the meaning of the *ITA*, and s. 227(4.1) specifically states that the deemed trust ranks ahead of all other security interests.

B. The Respondent Business Development Bank of Canada

[92] The respondent BDBC, urges this Court to follow the approach taken by the courts below. It submits that the Crown's interest under the deemed trust is a security interest because (1) the enabling statute, the *ITA*, defines a deemed trust as a security interest; (2) this Court, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, characterized the deemed trust as a "floating charge", which is a security interest; and (3) the opposite conclusion, that it is a proprietary interest, would be at odds with commercial reality. As the definition of "secured creditor" in the *CCAA* includes the holder of a deemed trust, that Act contemplates that a priming charge can rank ahead of the Crown's deemed trust. Thus, ss. 11.2, 11.51 and 11.52 of the *CCAA* contemplate that a priming charge can rank ahead of the Crown's deemed trust.

C. The Respondent Ernst & Young, in its Capacity as Monitor

[93] Both BDBC and Ernst & Young (together, Respondents) submit that the Crown's deemed trust is a security interest and that the statutes can be interpreted harmoniously to avoid a conflict. The Monitor submits that a court-ordered priming charge is not a security interest within the meaning of s. 227(4.1) of the *ITA* because it is not specifically listed in the definition of security interest under the *ITA*, and as a taxing statute, the *ITA* requires a strict, textual approach to interpretation.

[94] The Monitor also highlights that the Crown is a unique creditor because it has immediate information available to it respecting remittance and can certify and pursue amounts owing immediately.

du fait qu'une charge super prioritaire visée par la *LACC* est une garantie au sens de la *LIR* et que le par. 227(4.1) prévoit expressément que la fiducie réputée prend rang devant toutes les autres garanties.

B. L'intimée la Banque de développement du Canada

[92] L'intimée BDC exhorte notre Cour à suivre l'approche adoptée par les tribunaux d'instance inférieure. Elle soutient que l'intérêt de la Couronne au titre de la fiducie réputée est une garantie puisque (1) la loi habilitante, la *LIR*, définit une fiducie réputée comme une garantie; (2) dans l'arrêt *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720, notre Cour a qualifié la fiducie réputée de « charge flottante », qui est une garantie; (3) la conclusion opposée, à savoir qu'il s'agit d'un intérêt propriétaire, serait incompatible avec la réalité commerciale. Comme la définition de « créancier garanti » figurant dans la *LACC* englobe le détenteur d'une fiducie réputée, la *LACC* prévoit qu'une charge super prioritaire peut prendre rang devant la fiducie réputée créée en faveur de la Couronne. Ainsi, les art. 11.2, 11.51 et 11.52 de la *LACC* prévoient qu'une charge super prioritaire peut prendre rang devant la fiducie réputée créée en faveur de la Couronne.

C. L'intimée Ernst & Young, en sa qualité de contrôleur

[93] Tant la BDC qu'Ernst & Young (collectivement, les intimées) font valoir que la fiducie réputée créée en faveur de la Couronne est une garantie et que l'on peut interpréter les lois de façon harmonieuse afin d'éviter un conflit. Le contrôleur soutient qu'une charge super prioritaire d'origine judiciaire n'est pas une garantie au sens du par. 227(4.1) de la *LIR* puisqu'elle n'est pas expressément mentionnée dans la définition de garantie contenue dans la *LIR*, et qu'à titre de loi fiscale, la *LIR* commande une méthode d'interprétation stricte et textuelle.

[94] De plus, le contrôleur souligne que la Couronne est un créancier unique puisqu'elle dispose d'un accès immédiat aux renseignements concernant les remises et qu'elle peut certifier et percevoir les montants dus immédiatement.

V. Issue

[95] The issue on appeal is whether court-ordered priming charges under the *CCAA* can rank ahead of the Crown's deemed trust for unremitted source deductions, as created by s. 227(4.1) of the *ITA* and related provisions of the *CPP* and *EIA*. It is clear from the wording of s. 227(4.1) of the *ITA* that, if there is any conflict with a provision from another Act, s. 227(4.1) is to prevail. Accordingly, this appeal turns on whether, and to what extent, the *CCAA* regime conflicts with s. 227(4.1) of the *ITA*. In answering that question, I proceed in four steps:

1. What rights does s. 227(4.1) of the *ITA* confer on the Crown in respect of unremitted source deductions?
2. How is the Crown's deemed trust for unremitted source deductions treated in Parliament's insolvency regime?
3. Do ss. 11.2, 11.51 and 11.52 of the *CCAA* permit the court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions?
4. If not, does s. 11 of the *CCAA* allow the court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions?

VI. AnalysisA. *What Rights Does Section 227(4.1) of the ITA Confer on the Crown in Respect of Unremitted Source Deductions?*(1) General Scheme and Background of Sections 227(4) and 227(4.1) of the ITA

[96] Section 153(1) of the *ITA* requires employers to deduct and withhold amounts from their

V. Question en litige

[95] La question qui fait l'objet du pourvoi est celle de savoir si les charges super prioritaires ordonnées par un tribunal en vertu de la *LACC* peuvent prendre rang devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées, laquelle fiducie est établie en application du par. 227(4.1) de la *LIR* et des dispositions connexes du *RPC* et de la *LAE*. Il ressort clairement du libellé du par. 227(4.1) de la *LIR* qu'en cas de conflit avec une disposition d'une autre loi, le par. 227(4.1) prévaut. En conséquence, le présent pourvoi porte sur la question de savoir si, et dans quelle mesure, le régime de la *LACC* entre en conflit avec le par. 227(4.1) de la *LIR*. Pour répondre à cette question, je procéderai en quatre étapes :

1. Quel droit le par. 227(4.1) de la *LIR* confère-t-il à la Couronne relativement aux retenues à la source non versées?
2. De quelle façon la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées est-elle traitée dans le régime d'insolvabilité du législateur?
3. Les articles 11.2, 11.51 et 11.52 de la *LACC* permettent-ils au tribunal de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées?
4. Dans la négative, l'art. 11 de la *LACC* autorise-t-il le tribunal à faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées?

VI. AnalyseA. *Quels droits le par. 227(4.1) de la LIR confère-t-il à la Couronne relativement aux retenues à la source non versées?*(1) Économie générale et contexte des par. 227(4) et 227(4.1) de la LIR

[96] Le paragraphe 153(1) de la *LIR* exige qu'un employeur déduise ou retienne des montants sur les

employees' wages (source deductions) and remit those amounts to the Receiver General by a specified due date. When source deductions are made, s. 227(4) deems that they are held separate and apart from the property of the employer and from property held by any secured creditor of the employer, notwithstanding any security interest in that property. Source deductions are deemed to be held in trust for Her Majesty for payment by the specified due date.

[97] If source deductions are not paid by the specified due date, s. 227(4.1) extends the trust in s. 227(4). It deems that a trust attaches to the employer's property to the extent of any unremitted source deductions; that the trust existed from the moment the source deductions were made; and that the trust did not form part of the estate or property of the employer from the moment the source deductions were made (all regardless of whether the employer's property is subject to a security interest). It also deems that, to the extent of any unremitted source deductions, the employer's property is property "beneficially owned" by the Crown, notwithstanding any security interest in the employer's property:

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was so deducted or

salaires qu'il verse à ses employés (retenues à la source) et qu'il remette ces montants au receveur général au moment fixé par règlement. Une fois les retenues à la source faites, elles sont réputées être détenues, aux termes du par. 227(4), séparées des biens de l'employeur et des biens détenus par son créancier garanti, et ce, malgré toute autre garantie sur ces biens. Les retenues à la source sont réputées être détenues en fiducie pour Sa Majesté en vue de lui être versées au moment fixé par règlement.

[97] Si les retenues à la source ne sont pas versées au moment fixé par règlement, le par. 227(4.1) élargit la portée de la fiducie visée au par. 227(4). Une fiducie est réputée s'appliquer aux biens de l'employeur jusqu'à concurrence de la valeur des retenues à la source non versées. Cette fiducie est réputée exister depuis le moment où les retenues à la source ont été faites et n'avoir pas fait partie du patrimoine ou des biens de l'employeur depuis le moment où les retenues à la source ont été faites (peu importe si les biens de l'employeur sont assujettis à une garantie). Les biens de l'employeur jusqu'à concurrence de la valeur des retenues à la source non versées sont aussi réputés être des biens dans lesquels la Couronne a un « droit de bénéficiaire » malgré toute autre garantie sur ces biens :

(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, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) qui, en l'absence d'une garantie au sens du même paragraphe, seraient ceux 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, séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

(b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est

withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[98] The *ITA* defines “security interest” in s. 224(1.3):

security interest means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for

[99] As emphasized by the Crown, ss. 227(4) and 227(4.1) were amended to their current form — excerpted above — to reverse the effect of this Court’s decision in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411. The Crown submits that, in explicitly reversing *Sparrow Electric*’s result, Parliament meant to always give the Crown super-priority in an insolvency. I do not agree that such a broad conclusion can be drawn from this legislative history. In *Sparrow Electric*, the issue was who, between a lending bank and the Crown, had priority in the debtor’s bankruptcy. The bank had a general security agreement over all of the debtor’s property, which it entered into several months before successfully petitioning the debtor into bankruptcy. While the debtor also owed the Crown \$625,990.86 in unremitted source deductions at the time of the bankruptcy, the first instance of non-remittance to the Crown was *after* the bank entered its general security agreement.

déduit ou retenu, 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 une telle garantie.

Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre 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 une telle garantie.

[98] Le paragraphe 224(1.3) de la *LIR* définit « garantie » ainsi :

garantie Intérêt ou, pour l’application du droit civil, droit sur un bien qui garantit l’exécution d’une obligation, notamment un paiement. Sont en particulier des garanties les intérêts ou, pour l’application du droit civil, les droits nés ou découlant de débentures, hypothèques, privilèges, nantissements, sûretés, fiducies réputées ou réelles, cessions et charges, quelle qu’en soit la nature, de quelque façon ou à quelque date qu’elles soient créées, réputées exister ou prévues par ailleurs.

[99] Comme l’a souligné la Couronne, les par. 227(4) et 227(4.1) ont été modifiés en leur version actuelle — extraits précités — afin d’annuler l’effet de l’arrêt de notre Cour *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411. La Couronne soutient qu’en infirmant expressément l’arrêt *Sparrow Electric*, le législateur voulait toujours accorder à la Couronne une super priorité dans un cas d’insolvabilité. Je ne suis pas d’avis qu’une conclusion aussi générale puisse être tirée de cet historique législatif. Dans l’arrêt *Sparrow Electric*, la question était de savoir qui, de la banque prêteuse ou de la Couronne, avait la priorité dans le cadre de la faillite de la débitrice. La banque bénéficiait d’une convention de garantie générale portant sur tous les biens de la débitrice, convention que la banque avait signée plusieurs mois avant que sa requête en faillite contre la débitrice soit accueillie. Si la débitrice devait également à la Couronne 625 990,86 \$ en retenues à la source non versées au moment de sa faillite, le premier défaut de versement à la Couronne ne s’était produit qu’après que la banque eut signé sa convention de garantie générale.

[100] Iacobucci J., writing for a majority of the Court, held in favour of the bank. At that time, the deemed trust was worded differently, triggering only upon an event of “liquidation, assignment, receivership or bankruptcy”, and the amount of the unremitted source deductions was only deemed to be held “separate from and form no part of the estate in liquidation, assignment, receivership or bankruptcy” (para. 13 (emphasis added)). The majority therefore concluded that the deemed trust did not attach to the debtor’s property because, at the relevant time, that property was already “legally the [bank’s]” (para. 98). Because the bank had a fixed and specific charge over all of the debtor’s property, there was nothing left for the trust to attach to. The trust could not be effective unless there was some unencumbered asset in the bankruptcy out of which the trust could be deemed (para. 99).

[101] After *Sparrow Electric*, Parliament amended the deemed trust to ensure that, in a case like *Sparrow Electric*, the deemed trust attached notwithstanding any security interest held in the debtor’s property (*First Vancouver*, at para. 27). As Iacobucci J. explained in *First Vancouver*, Parliament intended “to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect” (para. 28).¹

[102] In this appeal, the Crown argues that a court-ordered priming charge under the CCAA is a security interest for the purposes of the Crown’s deemed

[100] Le juge Iacobucci, s’exprimant au nom de la majorité de la Cour, a tranché en faveur de la banque. À ce moment-là, les dispositions relatives à la fiducie réputée étaient formulées différemment, ne s’appliquant qu’en cas de « liquidation, cession, mise sous séquestre ou faillite », et le montant des retenues à la source non versées était seulement considéré comme tenu « séparé et ne formant pas partie du patrimoine visé par la liquidation, cession, mise sous séquestre ou faillite » (par. 13 (je souligne)). La majorité a donc conclu que la fiducie réputée ne s’attachait pas aux biens de la débitrice puisqu’au moment visé, ces biens appartenaient déjà « légalement à [la banque] » (par. 98). Étant donné que la banque bénéficiait d’un privilège fixe et spécifique sur tous les biens de la débitrice, la fiducie ne pouvait s’attacher à rien. La fiducie ne pouvait s’appliquer que s’il existait des éléments d’actifs libres de toute charge qui auraient pu faire l’objet d’une fiducie réputée (par. 99).

[101] À la suite de l’arrêt *Sparrow Electric*, le législateur a modifié les dispositions relatives à la fiducie réputée de sorte que, dans une affaire comme *Sparrow Electric*, la fiducie réputée s’applique malgré toute autre garantie grevant les biens du débiteur (*First Vancouver*, par. 27). Comme l’a expliqué le juge Iacobucci dans l’arrêt *First Vancouver*, le législateur voulait accorder « la priorité de rang à la fiducie réputée lorsque les biens sont par ailleurs grevés d’une garantie, que celle-ci ait pris effet avant ou après les retenues à la source ou l’application de la fiducie réputée » (par. 28).¹

[102] Dans le présent pourvoi, la Couronne affirme qu’une charge super prioritaire ordonnée par un tribunal en vertu de la LACC constitue une garantie

¹ It bears noting, however, that ss. 227(4) and 227(4.1) of the *ITA* do not give the Crown priority over all creditors. They explicitly carve out an exception for the rights of unpaid suppliers (*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 81.1) and the rights of farmers, fisherman, and aquaculturists (s. 81.2). In addition, s. 227(4.2) of the *ITA* carves out an exception for a prescribed security interest, defined in the *Income Tax Regulations*, C.R.C., c. 945, s. 2201. Broadly, a prescribed security interest is a mortgage in land or a building which is registered before the failure to remit the source deductions at issue (Regulatory Impact Analysis Statement, SOR/99-322, *Canada Gazette*, Part II, vol. 133, No. 17, August 18, 1999, at pp. 2041-42).

¹ Il convient toutefois de noter que les par. 227(4) et 227(4.1) de la *LIR* n’accordent pas à la Couronne la priorité sur tous les créanciers. Ils prévoient explicitement une exception pour les droits des fournisseurs impayés (*Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, c. B-3, art. 81.1) et les droits des agriculteurs, des pêcheurs et des aquiculteurs (art. 81.2). En outre, le par. 227(4.2) de la *LIR* prévoit une exception pour les garanties visées par règlement, définies dans le *Règlement de l’impôt sur le revenu*, C.R.C., c. 945, art. 2201. De façon générale, est une garantie visée par règlement une hypothèque qui greève un fond de terre ou un bâtiment, à condition que l’hypothèque ait été enregistrée avant le non-versement des retenues à la source en cause (Résumé de l’étude d’impact de la réglementation, DORS/99-322, *Gazette du Canada*, partie II, vol. 133, n° 17, 18 août 1999, p. 2041-2042).

trust. I agree that the definition of “security interest” in s. 224(1.3) of the *ITA* is broad, capturing “any interest in . . . property that secures payment or performance of an obligation and includes an interest . . . created by or arising out of a . . . charge . . . , however or whenever arising, created, deemed to arise or otherwise provided for”. However, Wood makes the observation that court-ordered charges are fundamentally different in nature from the security interests that arise by consensual agreement or by operation of law enumerated in s. 224(1.3) because “they are integrally connected to insolvency proceedings that operate for the benefit of the creditors as a group” (Wood (2020), at p. 98). As a result, he reasons that “it would be reasonable to expect that they would be specifically mentioned in the *ITA* definition of security interest if they were to be included” (p. 98).

[103] While s. 227(4.1) undeniably operates notwithstanding any security interest — and priming charge — over the debtor’s property, the legislative history post-*Sparrow Electric* says nothing about the Crown’s specific right to unremitted source deductions, pursuant to the deemed trust, when a company undergoes restructuring under the *CCAA*. Even if, as the Crown insists, a priming charge under the *CCAA* is a security interest for the purposes of the Crown’s deemed trust (and I do not settle that debate in these reasons), that does not define what *rights* the Crown has, in a *CCAA* restructuring, pursuant to its deemed trust. This Court has never considered how s. 227(4.1) of the *ITA* interacts with the *CCAA* regime in light of the seminal insolvency decisions in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, and *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271. This appeal calls on this Court to do so.

pour les besoins de la fiducie réputée créée en faveur de la Couronne. Je conviens que la définition du terme « garantie » figurant au par. 224(1.3) de la *LIR* est large et assimile « [un] intérêt sur un bien qui garantit l’exécution d’une obligation, notamment un paiement » et en précisant que « [s]ont en particulier des garanties les intérêts [. . .] droits nés ou découlant de charges, quelle qu’en soit la nature, de quelque façon ou à quelque date qu’elles soient créées, réputées exister ou prévues par ailleurs ». Cependant, Wood fait remarquer avec justesse que les charges constituées par un tribunal diffèrent fondamentalement des garanties énumérées au par. 224(1.3) qui prennent leur source dans un accord consensuel ou l’application de la loi, car [TRADUCTION] « elles sont intimement liées aux procédures d’insolvabilité qui fonctionnent au profit de l’ensemble des créanciers » (Wood (2020), p. 98). Par conséquent, il opine qu’« il serait raisonnable de s’attendre à ce qu’elles soient expressément mentionnées dans la définition de garantie qui figure dans la *LIR* si elles devaient en faire partie » (p. 98).

[103] Bien que le par. 227(4.1) s’applique indéniablement en dépit de l’existence de toute garantie — ou charge super prioritaire — grevant les biens du débiteur, l’évolution des textes législatifs depuis le prononcé de l’arrêt *Sparrow Electric* est muette à propos du droit spécifique de la Couronne sur les retenues à la source non versées, au titre de la fiducie réputée, lorsqu’une entreprise fait l’objet d’une restructuration sous le régime de la *LACC*. Même si, comme l’affirme avec insistance la Couronne, une charge super prioritaire au titre de la *LACC* est une garantie pour les besoins de la fiducie réputée créée en faveur de la Couronne (et je ne tranche pas cette question dans les présents motifs), cela ne définit pas les *droits* de la Couronne au titre de la fiducie réputée dans le cadre d’une restructuration sous le régime de la *LACC*. Notre Cour ne s’est jamais penchée sur la façon dont le par. 227(4.1) de la *LIR* interagit avec le régime de la *LACC* à la lumière des arrêts de principe en matière d’insolvabilité *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, et *Sun Indalex Finance, LLC c. Syndicat des Métallos*, 2013 CSC 6, [2013] 1 R.C.S. 271. Le présent pourvoi appelle notre Cour à le faire.

(2) The Right of Beneficial Ownership in Section 227(4.1) of the ITA

[104] The Crown argues that s. 227(4.1) creates a proprietary right in the Crown because it gives the Crown beneficial ownership of the amount of the unremitted source deductions. Because this is an *ownership* right, the amount of the unremitted source deductions is taken out of the debtor's estate, effectively giving the Crown super-priority. In other words, the Crown agrees with the dissent in the Court of Appeal: that property is the Crown's property and a CCAA judge cannot order a charge over it. The Respondents, in line with the Court of Appeal majority, submit that s. 227(4.1) creates a security interest and can therefore be subordinated to a priming charge under the CCAA.

[105] These submissions rely heavily on characterizing the Crown's interest as either a "security interest" or as "proprietary" in nature. However, in my view, defining an entitlement as one or the other does not resolve the issues on appeal because neither characterization has essential features in the abstract. Rather, a statutory entitlement takes its character from the statutory provision. General concepts of "proprietary right" and "security interest" — or of "property," "trust" and "beneficial ownership" — are of limited assistance in this analysis.

[106] This Court has noted that property is often understood as a "bundle of rights" and obligations (*Saulnier v. Royal Bank of Canada*, 2008 SCC 58, [2008] 3 S.C.R. 166, at para. 43). Depending on which rights someone holds, their "bundle of rights" can be viewed as a weak or robust proprietary interest. For this reason, the holder of a security interest has been described as having a proprietary right in its security. In *Sparrow Electric*, for example, both Iacobucci J., writing for the majority, and Gonthier J., writing for the dissent, explained the secured creditor in that case as having a proprietary right in, and effectively owning, the debtor's property that secured its debt (paras. 42 and 98).

(2) Le droit de bénéficiaire prévu au par. 227(4.1) de la LIR

[104] La Couronne soutient que le par. 227(4.1) lui confère un droit propriétaire puisqu'il lui accorde un droit de bénéficiaire sur le montant des retenues à la source non versées. Puisqu'il s'agit d'un droit *propriétal*, le montant des retenues à la source non versées est soustrait du patrimoine du débiteur, accordant ainsi à la Couronne une super priorité. Autrement dit, la Couronne souscrit à l'opinion dissidente exprimée en Cour d'appel : le bien est la propriété de la Couronne, et un juge chargé d'appliquer la LACC ne peut ordonner aucune charge sur ce bien. Les intimées, à l'instar des juges majoritaires de la Cour d'appel, font valoir que le par. 227(4.1) crée une garantie et que celle-ci peut donc être subordonnée à une charge super prioritaire au titre de la LACC.

[105] Ces prétentions sont fondées en grande partie sur la nature de l'intérêt de la Couronne, à savoir « garantie » ou « droit propriétaire ». Cependant, je suis d'avis que le fait de qualifier le droit de l'une ou l'autre façon ne permet pas de résoudre les questions en litige dans le pourvoi étant donné que ni l'une ni l'autre des qualifications ne possède de caractéristiques essentielles dans l'abstrait. La nature d'un droit est définie par la disposition législative qui le prévoit. Les concepts généraux de « droit propriétaire » et de « garantie » — ou de « bien », de « fiducie » et de « droit de bénéficiaire » — ne sont pas d'une grande utilité dans la présente analyse.

[106] Notre Cour a souligné qu'un bien est souvent interprété comme un « faisceau de droits » et d'obligations (*Saulnier c. Banque Royale du Canada*, 2008 CSC 58, [2008] 3 R.C.S. 166, par. 43). Selon les droits qu'a une personne, son « faisceau de droits » peut être considéré comme un « intérêt propriétaire » faible ou fort. Pour cette raison, on a dit que le titulaire d'une garantie a un droit propriétaire sur cette garantie. Dans l'arrêt *Sparrow Electric*, par exemple, le juge Iacobucci, au nom de la majorité, et le juge Gonthier, au nom des juges dissidents, ont expliqué que, dans cette affaire, le créancier garanti avait un droit propriétaire sur les biens de la débitrice qui servaient à garantir sa dette et qu'il était effectivement propriétaire de ces biens (par. 42 et 98).

[107] Similarly, Ronald C. C. Cuming, Catherine Walsh and Roderick J. Wood state that, in the context of personal property security legislation, a secured creditor holds a proprietary right in collateral. This is because, for these authors, “[t]he defining characteristic of a proprietary right . . . is that it is . . . enforceable against the world”, and the right of a secured creditor with a perfected security interest is enforceable against the world (*Personal Property Security Law* (2nd ed. 2012), at p. 613). Without an explanation for what the terms mean in a particular context, it is difficult to draw any conclusion from characterizing something as one or the other. (While there is a clear difference between a right *in rem* (available against the world at large) and a right *in personam* (available against a determinate set of individuals), whether the term “proprietary right” means a “right *in rem*” or the term “security interest” means a “right *in personam*” depends upon the statutory context. In any event, the submissions before this Court were not framed in these terms).

[108] This Court explained in *Saulnier* that, when analyzing the definition of property under a statute, there is little use in considering property in the abstract or even under the common law because “Parliament can and does create its own lexicon” for particular purposes (para. 16; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286, at paras. 11-12). Indeed, “interests unknown to the common law may be created by statute” (*Wotherspoon v. Canadian Pacific Ltd.*, [1987] 1 S.C.R. 952, at p. 999, citing Ross J. in *Town of Lunenburg v. Municipality of Lunenburg*, [1932] 1 D.L.R. 386 (N.S.S.C.), at p. 390). As a result, caution is required before importing definitions from other contexts, relying on statements or description from cases out of context, and employing general concepts like “proprietary right” and “security interest”. It is crucial in this appeal to stay within the bounds of the statutory provisions being interpreted.

[109] Section 227(4.1) states that the amount of the unremitted source deductions is “beneficially

[107] Dans le même ordre d’idées, Ronald C. C. Cuming, Catherine Walsh et Roderick J. Wood affirment que, dans le contexte des lois en matière de sûretés mobilières, un créancier garanti possède un droit propriétaire sur les biens donnés en garantie. La raison en est que, pour ces auteurs, [TRADUCTION] « [l]a caractéristique déterminante d’un droit propriétaire est [. . .] qu’il est [. . .] opposable à tous », et le droit d’un créancier garanti ayant une sûreté parfaite est opposable à tous (*Personal Property Security Law* (2^e éd. 2012), p. 613). Sans une explication de ce que signifient les termes dans un contexte donné, il est difficile de tirer quelque conclusion que ce soit de la qualification. (Bien qu’il existe une nette différence entre un droit réel (opposable à tous) et un droit personnel (opposable à un ensemble déterminé de personnes), la question de savoir si le terme « droit propriétaire » s’entend d’un « droit réel » ou si le terme « garantie » s’entend d’un « droit personnel » dépend du contexte législatif. Quoi qu’il en soit, les observations présentées devant notre Cour n’étaient pas formulées en ces termes).

[108] Dans l’arrêt *Saulnier*, notre Cour a expliqué qu’au moment d’analyser la définition d’un bien contenue dans une loi, il n’est pas utile d’examiner la notion de « bien » dans l’abstrait, ni même dans la common law parce que « le législateur peut, à des fins particulières, créer sa propre nomenclature, et il lui arrive effectivement de le faire » (par. 16; voir aussi *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286, par. 11-12). En effet, « des droits étrangers à la common law peuvent naître d’une loi » (*Wotherspoon c. Canadien Pacifique Ltée*, [1987] 1 R.C.S. 952, p. 999, citant le juge Ross dans *Town of Lunenburg c. Municipality of Lunenburg*, [1932] 1 D.L.R. 386 (C.S. N.-É.), p. 390). Par conséquent, une certaine prudence s’impose avant d’utiliser des définitions tirées d’autres contextes, de s’appuyer sur des déclarations ou des descriptions tirées d’affaires hors contexte et d’employer des concepts généraux comme le « droit propriétaire » et la « garantie ». Il est essentiel, dans le présent pourvoi, de ne pas déborder du cadre des dispositions législatives à interpréter.

[109] Aux termes du par. 227(4.1), la Couronne a un « droit de bénéficiaire » sur le montant des

owned” by the Crown. However, it does not follow that this right of beneficial ownership is absolute or that the term imports specific rights that flow from it. This is not a case where Parliament has used a term with an established legal meaning — leading to an inference that Parliament has given the term that meaning in the statute in question (*R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 20). The concept of beneficial ownership does not have a precise doctrinal meaning in the common law of Canada, and it does not exist in the civil law of Quebec. It is also not used consistently in the *ITA*. The meaning of “beneficially owned” in s. 227(4.1) can only be understood in the specific, relevant statutory context in which it arises. To that end, while s. 227(4.1) uses the mechanism of a trust and confers some type of beneficial ownership on the Crown, it modifies even those features of beneficial ownership that are widely associated with it under the common law.

[110] As a federal statute with national application, the *ITA* rests on the private law of the provinces. This relationship of complementarity is codified in s. 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21. However, the federal statute can derogate and dissociate itself from the private law when it legislates on a matter that falls within its jurisdiction: see M. Lamoureux, “*The Harmonization of Tax Legislation Dissociation: A Mechanism of Exception Part III*” (online). As I shall explain, the trust created by s. 227(4.1) disassociates itself from the requirements of a trust in both the provincial common law and civil law.

[111] I proceed as follows: (1) there is no settled doctrinal meaning of the term beneficial ownership; and (2) s. 227(4.1) does not create a true trust because there is no certainty of subject matter. A lack of certainty of subject matters means that the Crown cannot, through tracing, claim appreciation of trust value and the trustee (tax debtor) is free to dispose of trust property. These features render the Crown’s beneficial ownership weaker than generally understood at common law. The result is an interest “unknown to the common [or civil] law”. We cannot, therefore, look at s. 227(4.1) in isolation to define

retenues à la source non versées. Il ne s’ensuit toutefois pas que ce droit de bénéficiaire est absolu ni qu’il découle de ce terme des droits particuliers. Il ne s’agit pas en l’espèce d’un cas où le législateur a utilisé un terme ayant une signification juridique bien établie — menant à une inférence selon laquelle le législateur a donné cette signification précise au terme dans la loi en question (*R. c. D.L.W.*, 2016 CSC 22, [2016] 1 R.C.S. 402, par. 20). Le concept du droit de bénéficiaire n’a pas de signification doctrinale précise dans la common law canadienne, et il n’existe pas dans le droit civil québécois. Il n’est pas non plus utilisé de façon uniforme dans la *LIR*. Le sens du terme « droit de bénéficiaire » utilisé au par. 227(4.1) ne peut être saisi que dans le contexte législatif précis et pertinent où il est employé. À cet égard, bien que le par. 227(4.1) prévoit un mécanisme de fiducie et qu’il confère un certain droit de bénéficiaire à la Couronne, il modifie les caractéristiques qui sont généralement associées à ce droit de bénéficiaire dans la common law.

[110] En tant que loi fédérale d’application nationale, la *LIR* repose sur le droit privé des provinces. Ce rapport de complémentarité est établi à l’art. 8.1 de la *Loi d’interprétation*, L.R.C. 1985, c. I-21. La loi fédérale peut cependant déroger au droit privé et s’en dissocier lorsqu’elle porte sur une matière qui relève de sa compétence : voir M. Lamoureux, « *L’harmonisation des lois fiscales — La dissociation : Un mécanisme d’exception Partie III* » (en ligne). Comme je l’expliquerai, la fiducie créée en vertu du par. 227(4.1) se dissocie des conditions d’une fiducie tant en common law provinciale qu’en droit civil.

[111] Voici de quelle manière je vais procéder : (1) le terme « droit de bénéficiaire » n’a pas de signification établie dans la doctrine et (2) le par. 227(4.1) ne crée pas une fiducie véritable puisqu’il n’existe aucune certitude quant à sa matière. L’absence de certitude à cet égard signifie que la Couronne ne peut pas, au moyen du retraçage de l’origine des biens, réclamer l’appréciation de la valeur de la fiducie, et le fiduciaire (débitéur fiscal) est libre de disposer des biens de la fiducie. Ces caractéristiques font du droit de bénéficiaire de la Couronne un droit plus faible que le sens qui lui est généralement donné en

the way in which the Crown’s “beneficially owned” property under s. 227(4.1) should be treated in an insolvency — that clarification must come from, and indeed does come from, Parliament’s insolvency legislation.

(a) *No Settled Doctrinal Meaning*

[112] Beneficial ownership is most commonly used in the law of trusts to broadly distinguish between who has legal title to property (the trustee) and who has beneficial enjoyment of that property (the beneficiary). *Black’s Law Dictionary* (11th ed. 2019), for example, defines a “beneficial owner” as “[o]ne recognized in equity as the owner of something because use and title belong to that person, even though legal title may belong to someone else, esp. one for whom property is held in trust” (p. 1331).

[113] Despite this common usage, there is no clear definition of the rights flowing from the term “beneficial ownership” under the common law (see, e.g., C. Brown, “Beneficial Ownership and the Income Tax Act” (2003), 51 *Can. Tax J.* 401; M. D. Brender, “Beneficial Ownership in Canadian Income Tax Law: Required Reform and Impact on Harmonization of Quebec Civil Law and Federal Legislation” (2003), 51 *Can. Tax J.* 311, at p. 316). As well, the *Civil Code of Québec* does not have a concept of beneficial ownership (see *Canada (Attorney General) v. Caisse populaire d’Amos*, 2004 FCA 92, 324 N.R. 31, at paras. 48-49).

[114] The term itself is also contentious within the academy, giving rise to a heated debate about whether a trust beneficiary should be thought of as an owner at all (see, e.g., D. W. M. Waters, “The Nature of the Trust Beneficiary’s Interest” (1967), 45 *Can. Bar Rev.* 219; L. D. Smith, “Trust and Patrimony” (2008), 38 *R.G.D.* 379; B. McFarlane and R. Stevens,

common law. Il en résulte un droit « étrang[er] à la *common law* [ou au droit civil] ». Nous ne pouvons donc pas nous fier au seul par. 227(4.1) pour définir de quelle façon les biens dans lesquels la Couronne a un « droit de bénéficiaire » au titre du par. 227(4.1) devraient être traités en cas d’insolvabilité — cette précision doit venir, et elle vient effectivement, de la législation du Parlement en matière d’insolvabilité.

a) *Aucune signification établie dans la doctrine*

[112] Le concept du droit de bénéficiaire est plus couramment utilisé dans le domaine du droit des fiducies afin d’établir une distinction générale entre celui qui possède un titre en common law sur un bien (le fiduciaire) et celui qui a la jouissance de ce bien (le bénéficiaire). Selon le *Black’s Law Dictionary* (11^e éd. 2019), par exemple, le « *beneficial owner* » (propriétaire bénéficiaire) est défini comme [TRA-DUCTION] « [l]a personne reconnue en equity comme le propriétaire d’une chose parce que l’utilisation et le titre lui appartiennent, même si le titre juridique appartient peut-être à quelqu’un d’autre, surtout une personne pour qui des biens sont détenus en fiducie » (p. 1331).

[113] Malgré ce sens couramment donné, il n’existe pas de définition claire des droits qui découlent du « droit de bénéficiaire » en common law (voir, p. ex., C. Brown, « Propriété effective et Loi de l’impôt sur le revenu » (2003), 51 *Rev. fisc. can.* 454; M. D. Brender, « Propriété effective dans la législation fiscale canadienne : Réforme nécessaire et incidences sur l’harmonisation de la législation fédérale avec le droit civil du Québec » (2003), 51 *Rev. fisc. can.* 355, p. 360). En outre, le concept de « droit de bénéficiaire » ne figure pas dans le *Code civil du Québec* (voir *Canada (Procureur général) c. Caisse populaire d’Amos*, 2004 CAF 92, 324 N.R. 31, par. 48-49).

[114] Également sujet à controverse dans le milieu universitaire, le terme est à l’origine d’un débat houleux sur la question de savoir si le bénéficiaire d’une fiducie devrait être considéré comme un *propriétaire* (voir, p. ex., D. W. M. Waters, « The Nature of the Trust Beneficiary’s Interest » (1967), 45 *R. du B. can.* 219; L. D. Smith, « Trust and Patrimony » (2008),

“The nature of equitable property” (2010), 4 *J. Eq.* 1; J. E. Penner, “The (True) Nature of a Beneficiary’s Equitable Proprietary Interest under a Trust” (2014), 27 *Can. J.L. & Jur.* 473; Brender, at p. 316). The conventional view is that a trust beneficiary only has a right *in personam* against the trustee to enforce the terms of the trust, which is not a proprietary right in the trust property. A different view is that a trust beneficiary has equitable ownership of trust property, despite the existence of an intermediary with legal title (Brown, at pp. 413-14). Some suggest that there is a midway approach in Canada: depending on the context, a beneficiary’s right is either a personal right against the trustee or a proprietary right in trust property (Brender, at p. 316).

[115] In “Beneficial Ownership and the Income Tax Act”, Brown notes the debate in the academy and analyzes how the terms “beneficial ownership”, “beneficial owner”, and “beneficially owned” are used in the *ITA*. After examining 26 provisions invoking beneficial ownership in the *ITA*, she concludes that its meaning is “no longer obvious” (p. 452).

[116] This Court need not resolve the ongoing debate. However, it serves to highlight that “the real question is what is the nature of a beneficiary’s interest in a trust when considered in the context of the legislation that is sought to be applied” (Brown, at p. 419). In the *ITA* context, Brown concludes that “the matter of what ‘beneficial ownership’ means for tax purposes must be settled within the structure of the *ITA*” (p. 435). Further, whether the beneficiary’s rights within the *ITA* are *in rem* or *in personam* will often depend on a combination of factors, like the wording of the deeming provision, private law concepts, case law, and tax policy (see pp. 435-36).

[117] In my view, the works cited above belie the notion that s. 227(4.1) of the *ITA*, and its use of the

38 R. G. D. 379; B. McFarlane et R. Stevens, « The nature of equitable property » (2010), 4 *J. Eq.* 1; J. E. Penner, « The (True) Nature of a Beneficiary’s Equitable Proprietary Interest under a Trust » (2014), 27 *Can. J.L. & Jur.* 473; Brender, p. 360). On estime d’ordinaire que le bénéficiaire d’une fiducie n’a que le droit personnel d’exiger du fiduciaire qu’il exécute les conditions de la fiducie, lequel droit ne constitue pas un droit de propriété sur les biens de la fiducie. Un autre avis est que le bénéficiaire d’une fiducie a un droit de propriété en equity sur les biens de la fiducie, malgré l’existence d’un intermédiaire détenant un titre légal (Brown, p. 468-469). Certains suggèrent qu’il existe une approche intermédiaire au Canada : selon le contexte, le droit d’un bénéficiaire est soit un droit personnel à l’encontre du fiduciaire, soit un droit de propriété sur les biens de la fiducie (Brender, p. 360).

[115] Dans « Propriété effective et Loi de l’impôt sur le revenu », Brown souligne le débat qui divise les spécialistes du domaine et elle analyse la façon dont les termes « *beneficial ownership* », « *beneficial owner* » et « *beneficially owned* » (« droit de bénéficiaire » et « propriétaire bénéficiaire ») sont utilisés dans la *LIR*. Après avoir étudié 26 dispositions de la *LIR* contenant « *beneficial ownership* », elle en arrive à la conclusion que son sens « n’est plus aussi évident » (p. 512).

[116] Notre Cour n’a pas à résoudre le débat en cours. Toutefois, ce débat fait ressortir que « la vraie question est la suivante : quelle est la nature de l’intérêt du bénéficiaire à l’égard d’une fiducie dans le contexte de la loi applicable [. . .]? » (Brown, p. 474). Dans le contexte de la *LIR*, Brown conclut que « le sens du concept de propriété effective aux fins d’impôt doit être établi dans le contexte de la *LIR* » (p. 493). En outre, la question de savoir si les droits d’un bénéficiaire prévus par la *LIR* sont réels ou personnels (*in rem* ou *in personam*) dépendra souvent d’une combinaison de facteurs, comme le libellé des dispositions déterminatives, les concepts de droit privé, la jurisprudence et les politiques fiscales (voir p. 493-494).

[117] À mon avis, les ouvrages précités contredisent l’idée que le par. 227(4.1) de la *LIR*, et son

concept of beneficial ownership, is unequivocal in meaning. Not only is there no settled definition of beneficial ownership under the common law, there also appears to be no consistent meaning of the term in the *ITA*. And the concept does not exist in Quebec civil law. The meaning of beneficial ownership when used in a statute must always be construed within the context of the particular provision in which it occurs. What is necessary is careful scrutiny of s. 227(4.1), and specifically, the right of beneficial ownership it gives the Crown, particularly in the context of a statutory deemed trust with no specific subject matter.

(b) *Section 227(4.1) Does Not Create a “True” Trust*

[118] A statutory deemed trust is a unique legal vehicle. Unlike an express trust, which can be created by contract, will, or oral and written declarations, and unlike a trust that arises by operation of law, a statutory deemed trust “is a trust that legislation brings into existence by constituting certain property as trust property and a certain person as the trustee of that property” (*Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9, 144 O.R. (3d) 225, at para. 18; see also A. Grenon, “Common Law and Statutory Trusts: In Search of Missing Links” (1995), 15 *Est. & Tr. J.* 109, at p. 110).

[119] Being a creature of statute, a statutory deemed trust does not have to fulfill the ordinary requirements of trust law, namely, certainty of intention, certainty of subject matter, and certainty of object (*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; see also *Friends of Toronto Public Cemeteries Inc. v. Public Guardian and Trustee*, 2020 ONCA 282, 59 E.T.R. (4th) 174, at para. 163).

[120] Section 227(4.1), for example, does not fulfill the ordinary requirements of the common law of trusts (see R. J. Wood and R. T. G. Reeson, “The Continuing Saga of the Statutory Deemed Trust: *Royal Bank v. Tuxedo Transportation Ltd.*” (2000),

recours au concept de droit de bénéficiaire, a un sens sans équivoque. Non seulement il n’existe aucune définition établie du « droit de bénéficiaire » dans la common law, mais il appert également que la *LIR* ne lui donne pas un sens uniforme. En outre, le concept n’existe pas en droit civil québécois. Le sens du terme « droit de bénéficiaire », lorsqu’il est employé dans une loi, doit toujours être interprété dans le contexte de la disposition où il figure. Il est nécessaire de procéder à un examen minutieux du par. 227(4.1) et, plus particulièrement, du droit de bénéficiaire qu’il confère à la Couronne, notamment dans le cas d’une fiducie réputée créée par la loi sans certitude quant à sa matière.

b) *Le paragraphe 227(4.1) ne crée pas une fiducie « véritable »*

[118] Une fiducie réputée créée par la loi est un mécanisme juridique unique. Contrairement à une fiducie expresse, qui peut être établie par contrat, par testament ou par déclaration orale ou écrite, et contrairement à une fiducie qui découle de l’application de la loi, une fiducie réputée créée par la loi [TRADUCTION] « est une fiducie que crée la loi en constituant certains biens en biens de fiducie et en désignant une certaine personne comme fiduciaire de ces biens » (*Guarantee Company of North America c. Royal Bank of Canada*, 2019 ONCA 9, 144 O.R. (3d) 225, par. 18; voir aussi A. Grenon, « Common Law and Statutory Trusts : In Search of Missing Links » (1995), 15 *Est. & Tr. J.* 109, p. 110).

[119] Tirant son origine de la législation, la fiducie réputée créée par la loi n’a pas à satisfaire aux exigences ordinaires du droit des fiducies, soit la certitude quant à l’intention, la certitude quant à la matière et la certitude quant à l’objet (*Colombie-Britannique c. Henfrey Samson Belair Ltd.*, [1989] 2 R.C.S. 24; voir aussi *Friends of Toronto Public Cemeteries Inc. c. Public Guardian and Trustee*, 2020 ONCA 282, 59 E.T.R. (4th) 174, par. 163).

[120] Le paragraphe 227(4.1), par exemple, ne satisfait pas aux exigences ordinaires de la common law en matière de fiducies (voir R. J. Wood et R. T. G. Reeson, « The Continuing Saga of the Statutory Deemed Trust : *Royal Bank v. Tuxedo Transportation*

15 *B.F.L.R.* 515, at pp. 522-24). There is no identifiable trust property and therefore no certainty of subject matter (*Henfrey*, at p. 35). To use the terminology in *Henfrey*, s. 227(4.1) is not a “true” trust (p. 34). Moreover, without specific property being transferred to the trust patrimony, s. 227(4.1) does not satisfy the requirements of an autonomous patrimony contemplated by the *Civil Code of Québec* in arts. 1260, 1261 and 1278: see *Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31.

[121] This departure from a standard requirement of trust formation — certainty of subject matter — results in at least two features of s. 227(4.1) that are at odds with the operation of ordinary trusts. First, through equitable tracing, the beneficiary of a trust can claim appreciation in trust value, but this advantage is impossible without identifiable trust property (*Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, at pp. 79 and 92-93; *Foskett v. McKeown*, [2001] 1 A.C. 102 (H.L.), at pp. 129-31; L. D. Smith, *The Law of Tracing* (1997), at pp. 347-48). The tracing mechanism in s. 227(4.1) provides that the value of any unremitted source deductions continues to survive in the assets remaining in the tax debtor’s hands. Section 227(4.1) traces the *value* of the unremitted source deductions, necessarily capping the Crown’s right at that value. In *Sparrow Electric*, Gonthier J. explained that such a tracing mechanism is “antithetical to tracing in the traditional sense, to the extent that it requires no link at all between the subject matter of the trust and the fund or asset which the subject matter is being traced into” (para. 37; see also Wood and Reeson, at p. 518; Smith (1997), at pp. 310-20 and 347-48; R. J. Wood, “The Floating Charge in Canada” (1989), 27 *Alta. L. Rev.* 191, at p. 221).

[122] While s. 227(4.1) gives the Crown beneficial ownership in the value of unremitted source deductions, it does not allow the Crown to claim more than the value of the source deductions. In other words, it gives the Crown the right of beneficial ownership

Ltd. » (2000), 15 *B.F.L.R.* 515, p. 522-524). Les biens de la fiducie ne sont pas identifiables, et il n’y a donc aucune certitude quant à sa matière (*Henfrey*, p. 35). Pour reprendre la terminologie utilisée dans l’arrêt *Henfrey*, le par. 227(4.1) ne crée pas une fiducie « véritable » (p. 34). De plus, sans transfert de biens précis au patrimoine fiduciaire, le par. 227(4.1) ne satisfait pas aux conditions d’un patrimoine autonome prévues aux art. 1260, 1261 et 1278 du *Code civil du Québec* : voir *Banque de Nouvelle-Écosse c. Thibault*, 2004 CSC 29, [2004] 1 R.C.S. 758, par. 31.

[121] Cette dérogation à une exigence normale de la constitution d’une fiducie — la certitude quant à la matière — fait en sorte qu’au moins deux caractéristiques du par. 227(4.1) ne cadrent pas avec le fonctionnement des fiducies ordinaires. Premièrement, grâce aux règles de retraçage des biens en equity, le bénéficiaire d’une fiducie peut réclamer l’appréciation de la valeur de la fiducie, mais cet avantage ne représente rien si les biens de la fiducie ne sont pas identifiables (*Rawluk c. Rawluk*, [1990] 1 R.C.S. 70, p. 79 et 92-93; *Foskett c. McKeown*, [2001] 1 A.C. 102 (H.L.), p. 129-131; L. D. Smith, *The Law of Tracing* (1997), p. 347-348). Le mécanisme de retraçage exposé au par. 227(4.1) prévoit que la valeur des retenues à la source non versées subsiste dans les actifs qui demeurent en la possession du débiteur fiscal. Le paragraphe 227(4.1) permet d’établir la *valeur* des retenues à la source non versées, limitant automatiquement le droit de la Couronne à cette valeur. Dans l’arrêt *Sparrow Electric*, le juge Gonthier a expliqué qu’un tel mécanisme permettant de retracer l’origine d’un bien était « à l’opposé du sens traditionnel du mot “retracer”, dans la mesure où il ne nécessite aucun lien entre l’objet de la fiducie et le fonds ou l’actif auquel on rattache cet objet » (par. 37; voir aussi Wood et Reeson, p. 518; Smith (1997), p. 310-320 et 347-348; R. J. Wood, « The Floating Charge in Canada » (1989), 27 *Alta. L. Rev.* 191, p. 221).

[122] Si le par. 227(4.1) confère à la Couronne un droit de bénéficiaire sur la valeur des retenues à la source non versées, il ne permet pas à la Couronne de réclamer davantage que la valeur de ces retenues. Autrement dit, il confère à la Couronne un droit de

without at least some of the advantages that beneficial ownership often entails.

[123] Second, a trustee cannot normally dispose of trust property in the ordinary course of the trustee's business. Section 227(4.1), however, allows the tax debtor to dispose of its property, conveying clear title to property subject to the trust.

[124] This was the point made by Iacobucci J. in *First Vancouver* when he likened the deemed trust in s. 227(4.1) to a floating charge. Because a floating charge is a security interest, the Respondents rely on Iacobucci J.'s analogy to argue that s. 227(4.1) only creates a security interest as opposed to a proprietary right. I disagree with the Respondents' submission — the limited analogy to a floating charge in that context cannot be relied on in this case to liken the Crown's interest to a security interest for the purposes of the CCAA.

[125] One of the issues in *First Vancouver* was whether the deemed trust in s. 227(4.1) continued to attach to property that had been sold by the tax debtor to a third-party purchaser for value. The Court concluded that, in the event of a sale to a third party, "the trust property is replaced by the proceeds of sale of such property" (para. 40). This is because the deemed trust "does not attach specifically to any particular assets of the tax debtor so as to prevent their sale" and the tax debtor is thereby "free to alienate its property in the ordinary course" (para. 40). In this way, "the deemed trust is in principle similar to a floating charge over all the assets of the tax debtor" (para. 40). As a result, the deemed trust in s. 227(4.1) would not override the rights of third-party purchasers for value (para. 44).

[126] In short, the deemed trust in s. 227(4.1) clearly "anticipate[s] that the character of the tax debtor's property will change over time" (*First Vancouver*, at para. 41). In making these statements, Iacobucci J. did not, however, equate the

bénéficiaire sans certains des avantages qui y sont souvent rattachés.

[123] Deuxièmement, un fiduciaire ne peut généralement pas disposer des biens de la fiducie dans le cours normal de ses activités. Le paragraphe 227(4.1) permet toutefois au débiteur fiscal de disposer de ses biens, traduisant un titre de propriété incontestable sur les biens assujettis à la fiducie.

[124] C'est le raisonnement qu'a exprimé le juge Iacobucci dans l'arrêt *First Vancouver* quand il a comparé la fiducie réputée prévue au par. 227(4.1) à une charge flottante. Puisqu'une charge flottante est une garantie, les intimées s'appuient sur l'analogie du juge Iacobucci pour soutenir que le par. 227(4.1) crée seulement une garantie et non un droit propriétaire. Je ne souscris pas à l'affirmation des intimées — la comparaison restreinte avec une charge flottante faite dans ce contexte ne peut pas être invoquée en l'espèce pour assimiler le droit de la Couronne à une garantie pour l'application de la LACC.

[125] Une des questions soulevées dans l'arrêt *First Vancouver* était celle de savoir si la fiducie réputée prévue au par. 227(4.1) s'attachait toujours aux biens vendus à titre onéreux à un tiers par le débiteur fiscal. La Cour a conclu que, si le bien est vendu à un tiers, « ce bien [est] alors remplacé par le produit de la vente » (para. 40). Il en est ainsi parce que la fiducie réputée « ne vise pas certains biens en particulier du débiteur fiscal de façon à en empêcher la vente », le débiteur est donc « libre de se départir d'un bien détenu en fiducie dans le cadre normal de ses activités » (para. 40). De cette façon, la fiducie réputée « s'apparent[e], sur le plan des principes, à une charge flottante grevant [...] l'ensemble des éléments d'actif du débiteur fiscal » (para. 40). Par conséquent, la fiducie réputée prévue au par. 227(4.1) ne l'emporterait pas sur le respect des droits de l'acquéreur à titre onéreux (para. 44).

[126] En résumé, dans le cas d'une fiducie réputée prévue au par. 227(4.1), « il est [clairement] à prévoir que la nature des biens du débiteur fiscal changera avec le temps » (*First Vancouver*, par. 41). Le juge Iacobucci n'a toutefois pas assimilé la fiducie réputée

deemed trust in s. 227(4.1) to a floating charge for all purposes. Otherwise, the trust would not attach until an event of crystallization, and s. 227(4.1) clearly contemplates that the trust attaches from the moment source deductions are made or withheld (see s. 227(4.1)(a) and (b); see also A. Duggan and J. Ziegel, “Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security” (2007), 57 *U.T.L.J.* 227, at p. 246; Wood (1989), at p. 195).

[127] The Court’s limited analogy to a floating charge in *First Vancouver* helps explain why “beneficial ownership” in s. 227(4.1) again means something narrower than it does outside of that statutory context. The Crown’s right of beneficial ownership does not prevent the trustee from disposing of trust property until the Canada Revenue Agency (CRA) enforces the deemed trust (Canada Revenue Agency, *Tax collections policies* (online); see also *ITA*, ss. 222, 223(1) to (3), (5) and (6) and 224(1)). Freely disposing of trust property, including for one’s own business purposes, is obviously not something a trustee can do under the common law.

[128] The Crown’s reliance on s. 227(4.1)(b) of the *ITA* is misplaced for similar reasons. That clause specifies that the amount of the unremitted source deductions is deemed to “form no part of the estate or property of the person from the time the amount was so deducted or withheld”. The Crown argues that this is further clarification that a *CCAA* judge cannot order a charge over that amount. Again, the deeming words of s. 227(4.1)(b) must be interpreted in the context of a trust without certainty of subject matter. To say that a certain *amount* does not form part of the debtor’s estate or property reiterates that the Crown has an interest in that amount; it also clarifies that the debtor’s interest in its estate is reduced by that amount. However, it does not change the *makeup* of the estate itself — it does not change the specific property that constitutes the debtor’s estate. So long as the thing that is deemed not to form part of the debtor’s estate or property is an amount or value of money rather than property with a specific subject

prévue au par. 227(4.1) à une charge flottante à toutes les fins. Sinon, la fiducie ne s’appliquerait pas avant la cristallisation du droit, et le par. 227(4.1) indique clairement que la fiducie s’applique dès le moment où les retenues à la source sont faites ou détenues (voir les al. 227(4.1)a) et b); voir aussi A. Duggan et J. Ziegel, « Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security » (2007), 57 *U.T.L.J.* 227, p. 246; Wood (1989), p. 195).

[127] L’analogie restreinte avec une charge flottante faite par la Cour dans l’arrêt *First Vancouver* aide à expliquer pourquoi le « droit de bénéficiaire » prévu au par. 227(4.1) a une signification plus étroite dans son contexte législatif qu’en dehors de celui-ci. Le droit de bénéficiaire de la Couronne n’empêche pas le fiduciaire de disposer des biens de la fiducie jusqu’à ce que l’Agence du revenu du Canada (ARC) fasse exécuter la fiducie réputée (Agence du revenu du Canada, *Politiques de recouvrement de l’impôt* (en ligne); voir aussi la *LIR*, art. 222 et par. 223(1) à (3), par. 223 (5) et (6) et par. 224(1)). Disposer librement des biens d’une fiducie, y compris pour ses propres activités commerciales, n’est manifestement pas une chose qu’un fiduciaire peut faire selon les règles de la common law.

[128] C’est à tort, pour des raisons semblables, que la Couronne s’appuie sur l’al. 227(4.1)b) de la *LIR*. Cette disposition précise que le montant des retenues à la source non versées est réputé « ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est déduit ou retenu ». La Couronne plaide que cette disposition vient renforcer la thèse selon laquelle le juge chargé d’appliquer la *LACC* ne peut pas ordonner de charge sur ce montant. Une fois de plus, la disposition déterminative de l’al. 227(4.1)b) doit être interprétée dans le contexte d’une fiducie créée sans certitude quant à sa matière. Dire qu’un certain *montant* ne fait pas partie du patrimoine ou des biens d’un débiteur confirme que la Couronne a un intérêt à l’égard de ce montant; cela confirme également que ce montant est soustrait de l’intérêt du débiteur dans son patrimoine. Cependant, cela ne change rien à la *constitution* du patrimoine lui-même — les biens précis qui font partie du patrimoine du débiteur ne changent pas. Tant que ce

matter, the debtor's estate remains unchanged and the debtor continues to have control over it.

[129] To conclude, beneficial ownership under s. 227(4.1) is a manipulation of the concept of beneficial ownership under ordinary principles of trust law. The logical incoherence of s. 227(4.1) has prompted some scholars to criticize the provision as using inappropriate legal concepts. For example, Wood and Reeson state:

... we believe that the design of [s. 227(4.1) of the *ITA*] is deeply flawed. ... In large measure, the difficulties have as their source the use of inappropriate legal concepts. The concept of a trust is used in the legislation, but in virtually every respect the characteristics of a trust are lacking. The employer is not actually required to hold the money separate and apart, the usual fiduciary obligations of a trustee are absent, and the trust exists without a *res*. The law of tracing is similarly corrupted. The tracing exercise does not seek to identify a chain of substitutions, and a proprietary claim is available without the need for a proprietary base.

...

The misuse of the trust concept and the perversion of conventional tracing principles empty these concepts of meaning and will pose a threat to the rationality of the law. [Footnote omitted; pp. 531-33.]

[130] Others have similarly commented that, in substance, s. 227(4.1) only creates a security interest (J. S. Ziegel, "Crown Priorities, Deemed Trusts and Floating Charges: *First Vancouver Finance v. Minister of National Revenue*" (2004), 45 C.B.R. (4th) 244, at p. 248; Duggan and Ziegel, at pp. 239 and 245-46; M. J. Hanlon, V. Tickle and E. Csiszar, "Conflicting Case Law, Competing Statutes, and the Confounding Priority Battle of the Interim Financing Charge and the Crown's Deemed Trust for Source

qui est réputé ne pas faire partie du patrimoine ou des biens du débiteur est un montant d'argent — et non des biens qui ont une matière précise — le patrimoine du débiteur demeure inchangé et le débiteur en conserve la maîtrise.

[129] En conclusion, le droit de bénéficiaire prévu au par. 227(4.1) constitue une manipulation du concept du droit de bénéficiaire selon les principes ordinaires du droit des fiducies. L'incohérence logique du par. 227(4.1) a mené certains auteurs à critiquer la disposition, faisant valoir qu'elle emploie des concepts juridiques inappropriés. Par exemple, Wood et Reeson affirment ce qui suit :

[TRADUCTION] ... nous croyons que la conception du [par. 227(4.1) de la *LIR*] comporte de graves lacunes. [...] Dans une large mesure, les lacunes découlent de l'emploi de concepts juridiques inappropriés. On recourt au concept de fiducie, mais à pratiquement tous les égards, les caractéristiques d'une fiducie ne sont pas présentes. L'employeur n'est, en réalité, pas tenu de détenir l'argent séparément de ses propres biens, les obligations qui incombent généralement à un fiduciaire sont absentes, et la fiducie existe sans certitude quant à la matière. En outre, les règles de retraçage des biens ne sont pas respectées. Le retraçage des biens ne vise pas à déterminer une chaîne de substitutions, et une réclamation fondée sur un droit de propriété est possible sans qu'il soit nécessaire qu'il y ait droit de propriété.

...

Le recours erroné au concept de fiducie et le détournement des principes ordinaires d'établissement de l'origine des biens vident ces concepts de leur sens et compromettent la rationalité du droit. [Note en bas de page omise; p. 531-533.]

[130] D'autres ont également dit qu'en substance, le par. 227(4.1) crée uniquement une garantie (J. S. Ziegel, « Crown Priorities, Deemed Trusts and Floating Charges : *First Vancouver Finance v. Minister of National Revenue* » (2004), 45 C.B.R. (4^e) 244, p. 248; Duggan et Ziegel, p. 239 et 245-246; M. J. Hanlon, V. Tickle et E. Csiszar, « Conflicting Case Law, Competing Statutes, and the Confounding Priority Battle of the Interim Financing Charge and the Crown's Deemed Trust for Source Deductions »,

Deductions”, in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 897).

[131] Similarly, in *Caisse populaire Desjardins de Montmagny*, this Court rejected the Crown’s argument that s. 222(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (*ETA*), which is nearly identical to s. 227(4.1) of the *ITA*, created a proprietary right in the Crown (paras. 20-27). In that case, the debtor companies owed goods and services tax (GST) at the time of their respective bankruptcies. As the Crown’s GST claims are unsecured in bankruptcy, the tax authorities took the position that amounts owing up to the date of the bankruptcy were the Crown’s property. This Court unanimously disagreed with that position, concluding that the manner and mechanism of collecting GST was not consistent with a proprietary right (paras. 21-23).

[132] In any event, treating s. 227(4.1) as only effectively creating a security interest would not resolve the issues in this appeal without reference to how the Crown’s interest arises under the *CCAA*. As noted above, broad general characterizations do not help in defining the specific attributes of this deemed trust. This Court must grapple with the fact that s. 227(4.1) is both structured as a security interest, like a charge, but also uses the mechanism of a deemed trust.

[133] The takeaway for this appeal is that the structure of s. 227(4.1), on its own, does not shed light on what to do with the Crown’s beneficial ownership of unremitted source deductions in the insolvency regimes. Although the provision is clear that the Crown’s right operates notwithstanding other security interests, the content of that right for the purposes of insolvency cannot be inferred solely from the text of the *ITA*. The unique statutory device manipulates private law concepts and cannot be carried through to a logical conclusion for the purposes of insolvency. For this reason, it is not surprising that the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) and the *CCAA* specifically articulate

dans J. P. Sarra et autres, dir., *Annual Review of Insolvency Law 2018* (2019), 897).

[131] De la même façon, dans l’arrêt *Caisse populaire Desjardins de Montmagny*, notre Cour a rejeté l’argument de la Couronne selon lequel le par. 222(3) de la *Loi sur la taxe d’accise*, L.R.C. 1985, c. E-15 (*LTA*), quasi identique au par. 227(4.1) de la *LIR*, conférait à la Couronne un droit propriétaire (par. 20-27). Dans cette affaire, les compagnies débitrices devaient des montants de taxe sur les produits et services (TPS) au moment de leurs faillites respectives. Puisque les réclamations de la Couronne à l’égard de la TPS ne sont pas garanties en cas de faillite, les autorités fiscales ont soutenu que les montants dus à la date de la faillite appartenaient à la Couronne. Notre Cour a rejeté à l’unanimité cet argument, concluant que le mode et le mécanisme de perception de la TPS ne concordaient pas avec un droit de propriété (par. 21-23).

[132] Quoi qu’il en soit, considérer que le par. 227(4.1) ne crée en réalité qu’une garantie, sans examiner la façon dont l’intérêt de la Couronne découle de la *LACC*, ne résoudrait pas les questions en litige dans le présent pourvoi. Comme je l’ai mentionné précédemment, les qualifications générales n’aident pas à définir les attributs précis de la fiducie réputée en cause. Notre Cour doit composer avec le fait que le par. 227(4.1) est structuré comme une garantie (p. ex., une charge), mais qu’il utilise également le mécanisme d’une fiducie réputée.

[133] Ce qu’il faut retenir pour le présent pourvoi, c’est que la structure du par. 227(4.1) ne permet pas à elle seule de faire la lumière sur ce qu’il convient de faire, dans le cadre des régimes d’insolvabilité, avec le droit de bénéficiaire que détient la Couronne sur les retenues à la source non versées. Bien que la disposition indique clairement que le droit de la Couronne s’applique malgré toute autre garantie, la teneur de ce droit dans un contexte d’insolvabilité ne peut être déduite uniquement du texte de la *LIR*. Le mécanisme unique créé par la loi adapte les concepts de droit privé et ne peut mener à une conclusion logique dans un contexte d’insolvabilité. Pour cette raison, il n’est pas étonnant que la *Loi sur la faillite*

how the deemed trust for unremitted source deductions should be treated.

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

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

(1) Parliament's Insolvency Regime

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

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

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

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

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

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

(1) Régime d'insolvabilité du législateur

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

source deductions under the *ITA*, *CPP* or *EIA*. Thus, while s. 67(2) provides in general terms an exception to s. 67(1)(a), that exception does not apply to the Crown's deemed trust for unremitted source deductions by virtue of s. 67(3).

[146] The result of this scheme is that the debtor's estate — to the extent of the unremitted source deductions — is not “property of a bankrupt divisible among his creditors” (*BIA*, s. 67(1)). For the purposes of the *BIA*'s liquidation regime, it is effectively the Crown's *property*. Together, ss. 67(1)(a) and 67(3) give content to the Crown's right of beneficial ownership under s. 227(4.1) of the *ITA*: the amount of the unremitted source deductions is taken out of the pool of money that is distributed to creditors in a *BIA* liquidation.

[147] In the *CCAA*, the Crown's deemed trust appears in ss. 37(2) and 6(3), alongside other deemed trusts and devices. Section 37(2) explicitly preserves the operation of s. 227(4.1) in *CCAA* proceedings:

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

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

par. 32-33). Le paragraphe 67(3) mentionne que le par. 67(2) ne s'applique pas à la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées en vertu de la *LIR*, du *RPC* ou de la *LAE*. Par conséquent, même si le par. 67(2) prescrit en termes généraux une exception à l'al. 67(1)a), cette exception ne s'applique pas à la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées par application du par. 67(3).

[146] Il en résulte que le patrimoine du débiteur — jusqu'à concurrence du montant des retenues à la source non versées — ne fait pas partie des « biens d'un failli, constituant le patrimoine attribué à ses créanciers » (*LFI*, par. 67(1)). Pour les besoins du régime de liquidation prévu par la *LFI*, ce sont effectivement des *biens* de la Couronne. Ensemble, l'al. 67(1)a) et le par. 67(3) déterminent la teneur du droit de bénéficiaire de la Couronne prévu au par. 227(4.1) de la *LIR* : le montant des retenues à la source non versées est soustrait des fonds qui sont distribués aux créanciers dans le cadre d'une liquidation sous le régime de la *LFI*.

[147] Dans la *LACC*, il est question de la fiducie réputée de la Couronne aux par. 37(2) et 6(3), qui traitent également d'autres fiducies réputées et d'autres mécanismes. Le paragraphe 37(2) protège explicitement l'application du par. 227(4.1) dans le cadre de procédures engagées sous le régime de la *LACC* :

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.

(2) 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

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.

[148] Due to this language, the Court in *Century Services* variously described the s. 227(4.1) trust as “surviv[ing]”, “continu[ing]”, and “remain[ing] effective” in the *CCCA* (see paras. 38, 45, 49, 53 and 79). The Crown relies on these observations to argue that the deemed trust remains fully intact in the *CCAA*, conferring a proprietary right on the Crown that cannot be subordinated to any other party.

[149] In my view, the Crown’s submission over-extends the analysis in *Century Services*. The issue in that case was whether the deemed trust under s. 222(3) of the *ETA* for unremitted GST was effective in the *CCAA*. As mentioned, s. 222(3) is almost identical in wording to s. 227(4.1) of the *ITA*, providing that the deemed trust extends to property of the tax debtor equal in value to the amount of the unremitted GST and extends to property otherwise held by a secured creditor pursuant to a security interest.

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.

[148] Compte tenu de ce libellé, la Cour, dans l’arrêt *Century Services*, a notamment dit des fiducies établies en application du par. 227(4.1) qu’elles « survivent » et qu’elles « continuent de s’appliquer » sous le régime de la *LACC* (voir les par. 38, 45, 49, 53 et 79). La Couronne s’appuie sur ces observations pour faire valoir que la fiducie réputée demeure parfaitement intacte sous le régime de la *LACC*, ce qui lui confère un droit propriétaire ne pouvant être subordonné à aucun autre droit.

[149] À mon avis, la prétention de la Couronne déborde l’analyse faite dans l’arrêt *Century Services*. Dans cette affaire, la question en litige était celle de savoir si la fiducie réputée créée en vertu du par. 222(3) de la *LTA* à l’égard de la TPS non versée s’appliquait sous le régime de la *LACC*. Comme je l’ai mentionné, le libellé du par. 222(3), quasi identique à celui du par. 227(4.1) de la *LIR*, prévoit que la fiducie réputée s’étend aux biens du débiteur fiscal jusqu’à concurrence du montant de la TPS

Section 222(3) of the *ETA* also provides that the deemed trust operates despite any other enactment of Canada, except the *BIA*. Thus, under the *BIA*, the Crown priority for unremitted GST is lost. However, under the *CCAA*, s. 37(1) provides that statutory deemed trusts in favour of the Crown should not be regarded as trusts unless they would qualify as trusts absent the deeming language. The Court in *Century Services* grappled with the apparent conflict between s. 222(3) of the *ETA* and s. 37(1) (then s. 18.3(1)) of the *CCAA*.

[150] A majority of the Court reasoned that, through statutory interpretation, the apparent conflict could be resolved in favour of the *CCAA* (*Century Services*, at para. 44). Parliament had shown a tendency to move away from asserting Crown priority in insolvency. Under both the *BIA* and *CCAA*, it had enacted a general rule that deemed trusts in favour of the Crown are ineffective in insolvency. It had also explicitly carved out an exception to that general rule for unremitted source deductions. The logic of the *CCAA* suggested that only the deemed trust for unremitted source deductions survived (paras. 45-46).

[151] Thus, while the Court emphasized that the deemed trust in s. 227(4.1) “survives” in the *CCAA*, it did not comment on *how* it survives. This Court has never considered the scope of the deemed trust under the *CCAA*, especially in light of the purposes of the *CCAA* and the equivocal nature of the beneficial ownership conferred through the deeming provision. For this appeal, it is necessary to probe into ss. 37(2) and 6(3) to determine *how* the *CCAA* construes the Crown’s right to unremitted source deductions.

[152] To that end, although s. 37(2) of the *CCAA* is almost identical to s. 67(3) of the *BIA*, it does not have the same effect because it is not nested under

non versée et aux biens détenus, par ailleurs, par un créancier garanti en vertu d’une garantie. Le paragraphe 222(3) de la *LTA* prévoit également que la fiducie réputée s’applique malgré tout autre texte législatif fédéral, sauf la *LFI*. Par conséquent, sous le régime de la *LFI*, la priorité de la Couronne à l’égard de la TPS non versée n’existe plus. Cependant, sous le régime de la *LACC*, le par. 37(1) prévoit que les fiducies réputées établies par la loi en faveur de la Couronne ne devraient pas être considérées comme des fiducies à moins qu’elles le soient en l’absence des dispositions déterminatives. Dans l’arrêt *Century Services*, la Cour s’est attaquée au conflit apparent entre le par. 222(3) de la *LTA* et le par. 37(1) (alors le par. 18.3(1)) de la *LACC*.

[150] À la majorité, la Cour a estimé, par une interprétation législative, que le conflit apparent pouvait être résolu en faveur de la *LACC* (*Century Services*, par. 44). Le législateur avait tendance à ne pas faire valoir la priorité accordée à la Couronne en situation d’insolvabilité. À la fois dans la *LFI* et dans la *LACC*, il avait adopté une règle générale selon laquelle les fiducies réputées créées en faveur de la Couronne ne s’appliquaient pas en situation d’insolvabilité. Il avait aussi explicitement établi une exception à cette règle générale pour les retenues à la source non versées. La logique de la *LACC* tendait à indiquer que seules les fiducies réputées visant les retenues à la source non versées continuaient de produire leurs effets (par. 45-46).

[151] Donc, si la Cour a souligné que la fiducie réputée prévue au par. 227(4.1) « survit » sous le régime de la *LACC*, elle n’a pas précisé *comment* elle survit. Notre Cour n’a jamais examiné la portée de la fiducie réputée sous le régime de la *LACC*, plus particulièrement à la lumière des objectifs de la *LACC* et de la nature équivoque du droit de bénéficiaire conféré au moyen de la disposition déterminative. Pour les besoins du présent pourvoi, il est nécessaire de se pencher sur les par. 37(2) et 6(3) pour déterminer *de quelle façon* la *LACC* interprète le droit de la Couronne sur les retenues à la source non versées.

[152] À cette fin, bien que le par. 37(2) de la *LACC* soit quasi identique au par. 67(3) de la *LFI*, il n’a pas le même effet puisqu’il n’est pas subordonné à une

a provision like s. 67(1)(a). Section 37(2) of the CCAA carves out an exception to s. 37(1), which is different from s. 67(1)(a). While s. 67(1)(a) excludes trust property from property of the bankrupt divisible among creditors, s. 37(1) only provides that “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”. Unlike the *BIA*, the CCAA is silent on how trust property should be treated and silent on what constitutes property of the debtor in a restructuring context — indeed, there is no definition of property in the CCAA at all. This is in keeping with the CCAA’s comparatively skeletal nature.

[153] The result is that s. 37(2) provides that the Crown continues to beneficially own the debtor’s property equal in value to the unremitted source deductions; the unremitted source deductions “shall . . . be regarded as being held in trust for Her Majesty”. However, although this signals that, unlike deemed trusts captured by s. 37(1), the Crown’s deemed trust continues and confers a stronger right, s. 37(2) does not explain what to do with that right for the purposes of a CCAA proceeding. It does not, for example, provide that trust property should be put aside, as it would be in the *BIA* context. In keeping with the CCAA’s flexibility, s. 37(2) says little about what the Crown’s unique right of beneficial ownership under s. 227(4.1) of the *ITA* requires. But as I shall explain, s. 11 gives the court broad discretion to consider and give effect to the Crown’s interest recognized in s. 37(2).

[154] In addition, s. 6(3) of the CCAA gives specific effect to the Crown’s right under the deemed trust. Under that provision, the court cannot sanction a plan of compromise unless it pays the Crown in full for unremitted source deductions within six months of the plan’s sanction (assuming the Crown does not agree otherwise):

disposition comme l’al. 67(1)a). Le paragraphe 37(2) de la *LACC* établit une exception au par. 37(1), une disposition différente de l’al. 67(1)a). Alors que cet alinéa exclut les biens de la fiducie du patrimoine d’un failli, constituant le patrimoine attribué à ses créanciers, le par. 37(1) prévoit seulement qu’« aucun des biens de la compagnie débitrice ne peut être considéré comme [un bien détenu en fiducie pour Sa Majesté] par le seul effet d’une telle disposition ». Contrairement à la *LFI*, la *LACC* est muette à propos de la façon dont les biens de la fiducie devraient être traités de même qu’au sujet de ce qui fait partie des biens du débiteur dans un contexte de restructuration. En effet, la *LACC* ne contient aucune définition du terme « bien », ce qui est conforme à sa nature plutôt schématique.

[153] Ainsi, le par. 37(2) prévoit que la Couronne conserve un droit de bénéficiaire sur les biens du débiteur jusqu’à concurrence du montant des retenues à la source non versées, lesquelles sont « assimil[ées] [. . .] à des biens détenus en fiducie pour Sa Majesté ». Toutefois, bien que cela indique que, contrairement aux fiducies réputées visées par le par. 37(1), la fiducie réputée de la Couronne est maintenue et confère un droit plus fort, le par. 37(2) n’explique pas quoi faire de ce droit dans le cadre d’une procédure engagée sous le régime de la *LACC*. Il ne prévoit pas, par exemple, que les biens de la fiducie devraient être écartés, comme ce serait le cas dans le contexte de la *LFI*. Conformément à la souplesse qui caractérise la *LACC*, le par. 37(2) est peu loquace quant à ce que requiert le droit de bénéficiaire unique que confère à la Couronne le par. 227(4.1) de la *LIR*. Mais comme je vais l’expliquer, l’art. 11 confère au tribunal un vaste pouvoir discrétionnaire pour examiner l’intérêt reconnu à la Couronne par le par. 37(2) et lui donner effet.

[154] En outre, le par. 6(3) de la *LACC* donne explicitement effet au droit que possède la Couronne en vertu de la fiducie réputée. Aux termes de cette disposition, le tribunal ne peut homologuer un plan de transaction qui ne prévoit pas le paiement intégral à la Couronne des retenues à la source non versées dans les six mois suivant l’homologation (à supposer que la Couronne n’en ait pas convenu autrement) :

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act* . . .

[155] Pursuant to s. 6(3), then, the Crown's right under s. 227(4.1) includes a right *not to have to compromise*. The Crown can demand to be paid in full under the plan "in priority to all . . . security interests". The right is therefore different in kind than a security interest. While there may be some risk to the Crown that the plan may fail, and the Crown may not be paid in full if the restructuring dissolves into liquidation and the estate is depleted in the interim, the CCAA recognizes that there is societal value in helping a company remain a going concern. This remedial goal is at the forefront of providing flexibility in preserving the Crown's right to unremitted source deductions in s. 37(2), and in giving a concrete effect to that right in s. 6(3) of the CCAA.

[156] In my view, the reason for this difference between the BIA and CCAA is straightforward. The purpose of a BIA liquidation is to give the debtor a fresh start and pay out creditors to the extent possible. The debtor's property has to be divided according to the statute's rigid priority scheme. To begin the process of distribution, it is necessary to pool together the debtor's funds and determine what is, and is not, available for creditors. A comprehensive definition of property of the debtor is necessary, and no flexibility is needed in the regime to facilitate the liquidation process. There is also no other overarching goal, like facilitating the debtor's restructuring, that requires an institution like interim financing or requires modifying entitlements.

(3) Le tribunal ne peut, sans le consentement de Sa Majesté, homologuer la transaction ou l'arrangement qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'homologation, de toutes les sommes qui étaient dues lors de la demande d'ordonnance visée aux articles 11 ou 11.02 et qui pourraient, de par leur nature, faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* . . .

[155] Donc, selon le par. 6(3), le droit que possède la Couronne en vertu du par. 227(4.1) inclut le droit de *ne pas avoir à transiger*. La Couronne peut exiger que le plan prévoit le paiement intégral de sa créance « par priorité sur [les] garantie[s] ». Ce droit diffère donc d'une garantie par sa nature. Il y a peut-être un risque que le plan échoue et que la Couronne ne soit pas payée intégralement si la restructuration se solde par une liquidation et que le patrimoine a été épuisé en cours de route, mais la LACC reconnaît qu'il est bénéfique pour la société d'aider une compagnie à poursuivre ses activités. Cet objectif réparateur joue un rôle de premier plan lorsqu'il s'agit de prévoir la souplesse nécessaire pour protéger le droit que le par. 37(2) confère à la Couronne sur les retenues à la source non versées et pour donner concrètement effet à ce droit au par. 6(3) de la LACC.

[156] À mon avis, la raison de cette différence entre la LFI et la LACC est simple. L'objectif d'une liquidation sous le régime de la LFI est de permettre au débiteur de prendre un nouveau départ et de rembourser ses créanciers dans la mesure du possible. Les biens du débiteur doivent être répartis en fonction de l'ordre de priorité strict établi par la loi. Pour commencer le processus de répartition, il est nécessaire de regrouper les fonds du débiteur et de déterminer ce qui peut, ou ne peut pas, être attribué aux créanciers. Une énumération complète des biens du débiteur est nécessaire, et aucune souplesse n'est requise dans le régime pour faciliter le processus de liquidation. Il n'y a pas non plus d'autre objectif général — comme faciliter la restructuration des activités du débiteur — qui nécessite, par exemple, un financement temporaire ou une modification des droits.

[157] In a restructuring proceeding under the CCAA, however, there is no rigid formula for the division of assets. Certain debt might be restructured; other debt might be paid out. When a debtor's restructuring is on the table, the goal pivots, and interim financing is introduced to facilitate the restructuring. Entitlements and priorities shift to accommodate the presence of the interim lender — a new and necessary player who is absent from the liquidation scene.

[158] The fact that the Crown's right under s. 227(4.1) of the *ITA* is treated differently between the two statutes is therefore consistent with the different schemes and purposes of the Acts. This is not a circumstance where Parliament attempted to harmonize entitlements across the regimes (see, e.g., *Indalex*, at para. 51, per Deschamps J.). The CCAA gives the deemed trust meaning for its purposes. The concrete meaning given is that a plan of compromise must pay the Crown in full within six months of approval.

C. *Do Sections 11.2, 11.51 and 11.52 of the CCAA Permit the Court to Rank Priming Charges Ahead of the Crown's Deemed Trust for Unremitted Source Deductions?*

[159] In this case, the Initial Order subordinated the Crown's deemed trust to the Priming Charges. The courts below found that this authority is derived from ss. 11.2, 11.51 and 11.52 of the CCAA, which allow the court to order priming charges over a company's property in favour of interim lenders, directors and officers, and estate administrators. Priming charges can rank ahead of any other secured claim. For example, the relevant portions of s. 11.2, which are substantially similar to the relevant portions of ss. 11.51 and 11.52, read as follows:

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

[157] Cependant, dans le cadre d'une restructuration sous le régime de la *LACC*, il n'existe pas de formule stricte de répartition des actifs. Certaines dettes peuvent être restructurées, d'autres peuvent être remboursées. Lorsqu'il est question de restructurer les affaires d'un débiteur, l'objectif change, et le financement temporaire est introduit pour faciliter la restructuration. Les droits et les priorités changent du fait de l'entrée en scène d'un acteur essentiel, le prêteur temporaire, lequel ne joue aucun rôle dans la liquidation.

[158] Le fait que les deux lois traitent différemment le droit que confère à la Couronne le par. 227(4.1) de la *LIR* est donc conforme aux régimes et aux objectifs différents de celles-ci. Il ne s'agit pas d'un cas où le législateur a tenté d'harmoniser les droits conférés par les différents régimes (voir, p. ex., *Indalex*, par. 51, la juge Deschamps). La *LACC* donne à la fiducie réputée le sens qui convient à ses fins. Le sens concret donné est qu'un plan de transaction doit prévoir le paiement intégral des sommes dues à la Couronne dans les six mois suivant l'homologation du plan.

C. *Les articles 11.2, 11.51 et 11.52 de la LACC confèrent-ils au tribunal le pouvoir de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées?*

[159] En l'espèce, l'ordonnance initiale subordonnait la fiducie réputée de la Couronne aux charges super prioritaires. Les tribunaux d'instance inférieure ont conclu que ce pouvoir découlait des art. 11.2, 11.51 et 11.52 de la *LACC*, aux termes desquels un tribunal peut, par ordonnance, déclarer que les biens d'une compagnie sont grevés de charges super prioritaires en faveur de prêteurs temporaires, de dirigeants et d'administrateurs, et d'administrateurs de patrimoine. Les charges super prioritaires peuvent avoir préséance sur toute réclamation garantie. Par exemple, les passages pertinents de l'art. 11.2, qui sont à peu près semblables aux passages pertinents des art. 11.51 et 11.52, sont ainsi rédigés :

11.2 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés

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.

[160] As priming charges can “rank in priority over the claim of any secured creditor”, the definition of “secured creditor” in s. 2(1) is key:

secured creditor means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds . . .

[161] The Respondents submit, in line with the courts below, that the Crown is a “secured creditor” under the CCAA in respect of its interest in unremitted source deductions because the enabling statute, the ITA, itself defines the holder of a deemed trust as holding a “security interest” (see *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274). The Respondents also rely on the analogy in *First Vancouver* likening the Crown's deemed trust to a floating charge (which is a security interest). Accordingly, the Respondents argue that ss. 11.2, 11.51 and 11.52 give the court authority to rank priming charges ahead of the Crown's deemed trust.

par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

(2) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

[160] Comme les charges super prioritaires peuvent avoir « priorité sur toute réclamation des créanciers garantis », la définition de « créancier garanti » au par. 2(1) est primordiale :

créancier garanti Détenteur d'hypothèque, de gage, charge, nantissement ou privilège sur ou contre l'ensemble ou une partie des biens d'une compagnie débitrice, ou tout transport, cession ou transfert de la totalité ou d'une partie de ces biens, à titre de garantie d'une dette de la compagnie débitrice, ou un détenteur de quelque obligation d'une compagnie débitrice garantie par hypothèque, gage, charge, nantissement ou privilège sur ou contre l'ensemble ou une partie des biens de la compagnie débitrice, ou un transport, une cession ou un transfert de tout ou partie de ces biens, ou une fiducie à leur égard, que ce détenteur ou bénéficiaire réside ou soit domicilié au Canada ou à l'étranger. Un fiduciaire en vertu de tout acte de fiducie ou autre instrument garantissant ces obligations est réputé un créancier garanti pour toutes les fins de la présente loi sauf la votation à une assemblée de créanciers relativement à ces obligations...

[161] Les intimées soutiennent, à l'instar des tribunaux d'instance inférieure, que la Couronne est un « créancier garanti » au sens de la LACC à l'égard de son intérêt sur les retenues à la source non versées puisque la loi habilitante, la LIR, dit elle-même que le détenteur d'une fiducie réputée détient une « garantie » (voir *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274). En outre, les intimées s'appuient sur l'analogie faite dans l'arrêt *First Vancouver*, où la fiducie réputée de la Couronne est assimilée à une charge flottante (qui constitue une garantie). Les intimées affirment donc que les art. 11.2, 11.51 et 11.52 confèrent au tribunal le pouvoir de faire passer les charges super prioritaires devant la fiducie réputée de la Couronne.

[162] The Crown, like the dissent at the Court of Appeal, argues that the Crown is not a “secured creditor” because the definition of “secured creditor” in the *CCAA* does not list the holder of a deemed trust and because ss. 37 to 39 of the *CCAA* clearly draw a distinction between the Crown’s deemed trust for unremitted source deductions, on the one hand, and the Crown’s secured and unsecured claims on the other. Accordingly, the Crown argues that ss. 11.2, 11.51 and 11.52 do *not* give the court authority to rank priming charges ahead of the Crown’s deemed trust.

[163] As I shall detail, I conclude that ss. 11.2, 11.51 and 11.52 do not give the court the authority to rank priming charges ahead of the Crown’s deemed trust for unremitted source deductions.

[164] First, I agree with the Respondents that the general definition of security interest under the *ITA* includes the holder of a deemed or actual trust (s. 224(1.3)). However the reference to security interest in s. 227(4.1) is not to the Crown’s interest but to others’ interest in the debtor’s property. In my view, any definition of security interest in the *ITA* is not relevant to defining the Crown’s interest since it serves an entirely different purpose. What matters is whether the *CCAA* provisions give the court authority to rank priming charges ahead of the Crown’s deemed trust for unremitted source deductions. This is determined by interpreting the words of the *CCAA* and how the *CCAA* defines secured creditor.

[165] I also agree with the Crown that the definition of “secured creditor” in the *CCAA* does not specifically list the holder of a deemed or actual trust. In addition, the Crown’s interest cannot simply be called a “charge”. As explained above, although the Crown’s deemed trust has some parallels with a floating charge, the provision also employs some

[162] La Couronne, à l’instar du juge dissident de la Cour d’appel, soutient qu’elle n’est pas un « créancier garanti » étant donné que la définition de ce terme contenue dans la *LACC* ne fait pas mention du détenteur d’une fiducie réputée et que les art. 37 à 39 de la *LACC* établissent clairement une distinction entre la fiducie réputée créée en faveur de la Couronne à l’égard des retenues à la source non versées, d’une part, et les réclamations garanties et non garanties de la Couronne, d’autre part. Par conséquent, la Couronne affirme que les art. 11.2, 11.51 et 11.52 *ne* confèrent *pas* au tribunal le pouvoir de faire passer les charges super prioritaires devant la fiducie réputée de la Couronne.

[163] Comme je l’explique en détail ci-dessous, je conclus que les art. 11.2, 11.51 et 11.52 ne confèrent pas au tribunal le pouvoir de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l’égard des retenues à la source non versées.

[164] En premier lieu, je conviens avec les intimées que la définition générale du terme « garantie » contenue dans la *LIR* comprend le détenteur d’une fiducie réputée ou réelle (par. 224(1.3)). Cependant, le renvoi à une garantie fait au par. 227(4.1) ne concerne pas l’intérêt de la Couronne, mais plutôt l’intérêt d’autres parties à l’égard des biens du débiteur. À mon avis, aucune des définitions du terme « garantie » contenues dans la *LIR* n’est pertinente pour définir l’intérêt de la Couronne puisqu’elles servent un objectif tout à fait différent. L’important est de savoir si les dispositions de la *LACC* confèrent au tribunal le pouvoir de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l’égard des retenues à la source non versées. On peut répondre à cette question en interprétant le libellé de la *LACC* et la façon dont la *LACC* définit créancier garanti.

[165] En deuxième lieu, je conviens avec la Couronne que la définition de « créancier garanti » contenue dans la *LACC* ne mentionne pas explicitement le détenteur d’une fiducie réputée ou réelle. En outre, l’intérêt de la Couronne ne peut pas simplement être qualifié de « charge ». Comme je l’ai expliqué précédemment, bien que la fiducie réputée

aspects of beneficial ownership. I would also hesitate to draw analogies with any of the other terms listed in the *CCAA* definition. The holders of several of these instruments are often described as having proprietary rights in their security. It was a legislative choice to define them as secured creditors for the purposes of the *CCAA*. It is difficult to shoehorn the Crown's deemed trust into the definition of "secured creditor" in the *CCAA*, particularly as the *CCAA* specifically refers to the deemed trust in s. 37(2).

[166] Moreover, I agree with the Crown that ss. 37 to 39 of the *CCAA* treat the Crown's deemed trust and the Crown's secured claims as distinct interests. After s. 37 of the *CCAA*, dealing with deemed trusts, s. 38(1) provides a general rule that secured claims of the Crown rank as unsecured claims. Section 38(2) contains an exemption from s. 38(1) for consensual security interests that are granted to the Crown. Section 38(3) contains an exemption for the CRA's enhanced requirement to pay. Finally, s. 39(1) preserves the Crown's secured creditor status if it registers before the commencement of a *CCAA* proceeding, and s. 39(2) subordinates a Crown security or charge to prior perfected security interests.

[167] As Wood notes, "[t]hese provisions adopt two distinct approaches — one that applies to a deemed trust, the other that applies when a statute gives the Crown the status of a secured creditor" (Wood (2020), at p. 96). If s. 227(4.1) of the *ITA* gave the Crown the status of a secured creditor, then the CRA would presumably need to comply with ss. 38 and 39 by registering its security interest. No one suggests that the Crown has to register its claim for unremitted source deductions. In my view, ss. 37 to 39 draw a distinction between deemed trusts on the one hand and secured and unsecured claims on the other, and the Crown is not, therefore, a "secured

de la Couronne ait des points communs avec une charge flottante, la disposition renvoie aussi à certains aspects du droit de bénéficiaire. J'hésiterais à établir des analogies avec les autres termes énoncés dans la définition contenue dans la *LACC*. Les détenteurs de plusieurs de ces instruments sont souvent décrits comme détenant un droit propriétaire sur leur garantie. La décision de les assimiler à des créanciers garantis pour l'application de la *LACC* était celle du législateur. Il est difficile de faire cadrer la fiducie réputée de la Couronne dans la définition de « créancier garanti » contenue dans la *LACC*, d'autant plus que la *LACC* fait précisément mention de la fiducie réputée au par. 37(2).

[166] Enfin, je conviens avec la Couronne que les art. 37 à 39 de la *LACC* traitent la fiducie réputée de la Couronne et les réclamations garanties de la Couronne comme des intérêts distincts. Après l'art. 37 de la *LACC*, qui porte sur les fiducies réputées, le par. 38(1) prévoit une règle générale selon laquelle les réclamations garanties de la Couronne prennent rang comme réclamations non garanties. Le paragraphe 38(2) soustrait à l'application du par. 38(1) les garanties consensuelles accordées à la Couronne. Le paragraphe 38(3) prévoit une exception pour les demandes péremptoires de paiement renforcées de l'ARC. Enfin, le par. 39(1) protège les réclamations garanties de la Couronne si elles ont été enregistrées avant l'introduction d'une procédure intentée sous le régime de la *LACC*, et le par. 39(2) subordonne une garantie ou une charge de la Couronne aux garanties parfaites antérieures.

[167] Comme le fait remarquer Wood, [TRADUCTION] « [c]es dispositions adoptent deux approches différentes — l'une s'applique à la fiducie réputée, l'autre s'applique lorsqu'une loi donne à la Couronne le statut de créancier garanti » (Wood (2020), p. 96). Si le par. 227(4.1) de la *LIR* donnait à la Couronne le statut de créancier garanti, l'ARC devrait vraisemblablement se conformer aux art. 38 et 39 en enregistrant sa garantie. Personne ne laisse entendre que la Couronne doit enregistrer sa réclamation à l'égard des retenues à la source non versées. À mon avis, les art. 37 à 39 établissent une distinction entre les fiducies réputées, d'une part, et les réclamations

creditor” under the CCAA for its right to unremitted source deductions.

[168] This is dispositive for the purposes of ss. 11.2, 11.51 and 11.52 of the CCAA. These sections do not give the court the authority to rank priming charges ahead of the Crown’s deemed trust for unremitted source deductions.

D. *Does Section 11 of the CCAA Allow the Court to Rank Priming Charges Ahead of the Crown’s Deemed Trust for Unremitted Source Deductions?*

[169] The remaining issue is whether another provision in the CCAA, namely s. 11, confers that jurisdiction. As noted above, s. 11 allows the court to make any order that it considers appropriate in the circumstances, subject to the restrictions set out in the Act:

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.

[170] In *9354-9186 Québec inc.*, this Court explained that the discretionary authority in s. 11 is broad, but not boundless (para. 49). There are three “baseline considerations”: (1) the order sought must be appropriate; (2) the applicant must be acting in good faith; and (3) the applicant must demonstrate due diligence (*Century Services*, at para. 70; *9354-9186 Québec inc.*, at para. 49). Appropriateness is assessed by inquiring whether the order sought advances the remedial objectives of the CCAA. The general language of s. 11 should not, however, be “restricted by the availability of more specific orders” (*Century Services*, at para. 70).

garanties et non garanties, d’autre part. La Couronne n’est donc pas un « créancier garanti » au sens de la LACC pour ce qui est de son droit sur les retenues à la source non versées.

[168] Cela est décisif pour l’application des art. 11.2, 11.51 et 11.52 de la LACC. Ces articles ne confèrent pas au tribunal le pouvoir de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l’égard des retenues à la source non versées.

D. *L’article 11 de la LACC confère-t-il au tribunal le pouvoir de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l’égard des retenues à la source non versées?*

[169] Il reste à décider si une autre disposition de la LACC, à savoir l’art. 11, confère ce pouvoir. Comme je l’ai mentionné plus haut, l’art. 11 permet au tribunal de rendre toute ordonnance qu’il estime indiquée, sous réserve des restrictions prévues par la loi :

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.

[170] Dans l’arrêt *9354-9186 Québec inc.*, notre Cour a expliqué que le pouvoir discrétionnaire prévu à l’art. 11 est vaste, mais non sans limites (par. 49). Il y a trois « considérations de base » qu’il faut garder à l’esprit : (1) l’ordonnance demandée doit être indiquée; (2) le demandeur doit agir de bonne foi; (3) le demandeur doit faire preuve de la diligence voulue (*Century Services*, par. 70; *9354-9186 Québec inc.*, par. 49). L’opportunité de l’ordonnance demandée est évaluée en déterminant si elle favorisera la réalisation des objectifs réparateurs de la LACC. Cependant, « [l]a possibilité [. . .] de rendre des ordonnances plus spécifiques n’a pas pour effet de restreindre » la portée des termes généraux utilisés à l’art. 11 (*Century Services*, par. 70).

[171] In keeping with its broad language, s. 11 of the *CCAA* has been used to make a wide array of orders. Most recently, for example, this Court clarified that it can be used to bar a creditor from voting on a plan where the creditor has acted for an improper purpose (*9354-9186 Québec inc.*, at paras. 56 and 66).

[172] The issue in this case is whether s. 11 can be used to rank an interim lender's loan, or other priming charge, ahead of the Crown's deemed trust for unremitted source deductions. In my view, it can, for two reasons.

[173] First, given my conclusion about the content of the Crown's right under s. 227(4.1) of the *ITA* for the purposes of the *CCAA* (requiring that it at least be paid in full under a plan of compromise), ranking a priming charge ahead of the Crown's deemed trust does not conflict with the *ITA* provision. So long as the Crown is paid in full under a plan of compromise, the Crown's right under s. 227(4.1) remains intact "notwithstanding any security interest" in the amount of the unremitted source deductions. For this reason, it is irrelevant whether a priming charge under ss. 11, 11.2, 11.51 or 11.52 of the *CCAA* is a "security interest" within the meaning of s. 227(4) and (4.1) of the *ITA*. The analysis above does not depend on finding that a priming charge is not captured within the *ITA* definition.

[174] In addition, depending on the circumstances, such an order may further the remedial objectives of the *CCAA*. For example, interim financing is often crucial to the restructuring process. If there is evidence that interim lending cannot be obtained without ranking the interim loan ahead of the Crown's deemed trust, such an order could, again depending on the circumstances, further the remedial objectives of the *CCAA*. In general, the court should have flexibility to order super-priority charges in favour of parties whose function is to facilitate the proposal

[171] Conformément à la portée large de son libellé, l'art. 11 de la *LACC* a été utilisé pour rendre un vaste éventail d'ordonnances. Plus récemment, par exemple, notre Cour a précisé qu'il pouvait être utilisé pour empêcher un créancier de voter sur un plan d'arrangement lorsqu'il agit dans un but illégitime (*9354-9186 Québec inc.*, par. 56 et 66).

[172] En l'espèce, la question est de savoir si l'art. 11 peut être utilisé pour faire passer le prêt d'un prêteur temporaire, ou toute autre charge super prioritaire, devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées. À mon avis, il peut l'être, et ce, pour deux raisons.

[173] Premièrement, étant donné ma conclusion quant à la teneur du droit que confère le par. 227(4.1) de la *LIR* à la Couronne pour l'application de la *LACC* (le droit d'exiger que le plan de transaction prévoie à tout le moins le paiement intégral des sommes dues), le fait de faire passer une charge super prioritaire devant la fiducie réputée de la Couronne n'entre pas en conflit avec la disposition de la *LIR*. Dès lors que les sommes qui lui sont dues lui sont payées intégralement dans le cadre d'un plan de transaction, le droit que possède la Couronne en vertu du par. 227(4.1) demeure intact « malgré toute autre garantie » sur le montant des retenues à la source non versées. Pour cette raison, il importe peu de savoir si une charge super prioritaire constituée en vertu des art. 11, 11.2, 11.51 ou 11.52 de la *LACC* est une « garantie » au sens des par. 227(4) et (4.1) de la *LIR*. L'analyse qui précède n'est pas tributaire de la conclusion selon laquelle une charge super prioritaire n'est pas visée par la définition contenue dans la *LIR*.

[174] En outre, selon les circonstances, une telle ordonnance peut favoriser la réalisation des objectifs réparateurs de la *LACC*. Par exemple, le financement temporaire est souvent crucial pour le processus de restructuration. S'il est démontré que le financement temporaire ne peut être obtenu sans que le prêt temporaire prenne rang devant la fiducie réputée de la Couronne, pareille ordonnance pourrait, là encore selon les circonstances, favoriser la réalisation des objectifs réparateurs de la *LACC*. En général, les tribunaux devraient disposer de la latitude nécessaire

of a plan of compromise that, in any event, will be required to pay the Crown in full.

[175] Second, I do not accept the Crown’s argument that s. 11 is unavailable because other CCAA provisions, namely ss. 11.2, 11.51 and 11.52, confer more specific jurisdiction (see 9354-9186 *Québec inc.*, at paras. 67-68).

[176] While I agree that s. 11 is restricted by the provisions set out in the CCAA and cannot be used to violate specific provisions in the Act, s. 11 is not “restricted by the availability of more specific orders”. The fact that specific provisions of the CCAA allow the court to rank priming charges ahead of a secured creditor does not mean that the court can *only* rank priming charges ahead of a secured creditor. Such an interpretation would amount to reading words into ss. 11.2, 11.51 and 11.52 that do not exist. An order that ranks a priming charge ahead of the beneficiary of the deemed trust is different in kind than the orders contemplated by ss. 11.2, 11.51 and 11.52, which contemplate the subordination of secured creditors. There is no provision in the CCAA stipulating what the court can do with trust property and no provision in the CCAA conferring more specific jurisdiction on whether a priming charge can rank ahead of the beneficiary of a deemed trust. So long as the order does not conflict with other provisions in the Act, namely ss. 37(2) and 6(3), and so long as it fulfills the “baseline considerations” of appropriateness, good faith, and due diligence, an order ranking a priming charge ahead of the Crown’s deemed trust would fall under the jurisdiction conferred by s. 11 (*Century Services*, at para. 70; 9354-9186 *Québec inc.*, at para. 49). As explained above, there would be no conflict with ss. 37(2) and 6(3) of the CCAA.

pour ordonner des charges super prioritaires en faveur des parties dont la fonction est de faciliter la proposition d’un plan de transaction qui, dans tous les cas, devra prévoir le paiement intégral des sommes dues à la Couronne.

[175] Deuxièmement, je n’accepte pas l’argument de la Couronne selon lequel il est impossible de recourir à l’art. 11 parce que d’autres dispositions de la LACC, à savoir les art. 11.2, 11.51 et 11.52, confèrent plus précisément compétence (voir 9354-9186 *Québec inc.*, par. 67-68).

[176] Bien que je convienne que la portée de l’art. 11 soit limitée par les dispositions énoncées dans la LACC et que cet article ne puisse être utilisé en contravention d’autres dispositions précises de cette loi, « [l]a possibilité [...] de rendre des ordonnances plus spécifiques n’a pas pour effet de restreindre » la portée de l’art. 11. Le fait que des dispositions précises de la LACC permettent au tribunal de faire passer des charges super prioritaires devant les réclamations des créanciers garantis ne signifie pas que le tribunal peut *seulement* faire passer des charges super prioritaires devant les réclamations des créanciers garantis. Une telle interprétation reviendrait à ajouter aux art. 11.2, 11.51 et 11.52 des mots qui n’existent pas. Une ordonnance accordant à une charge super prioritaire la préséance sur le bénéficiaire de la fiducie réputée est, par sa nature, différente des ordonnances visées par les art. 11.2, 11.51 et 11.52, qui prévoient la subordination des réclamations des créanciers garantis. Aucune disposition de la LACC n’indique ce que le tribunal peut faire avec les biens de la fiducie et aucune disposition de la LACC ne confère plus précisément compétence pour décider si une charge super prioritaire peut prendre rang devant le bénéficiaire de la fiducie réputée. Tant qu’elle n’entre pas en conflit avec d’autres dispositions de la LACC, à savoir les par. 37(2) et 6(3), et tant qu’elle respecte les « considérations de base » que sont l’opportunité, la bonne foi et la diligence voulue, une ordonnance faisant passer une charge super prioritaire devant la fiducie réputée de la Couronne relèverait du pouvoir conféré par l’art. 11 (*Century Services*, par. 70; 9354-9186 *Québec inc.*, par. 49). Comme je l’ai expliqué précédemment, il n’y aurait aucun conflit avec les par. 37(2) et 6(3) de la LACC.

[177] Both parties invoked policy concerns to assist in the interpretative exercise. I do not find it necessary to resort to such arguments. However, it is far from evident that interim lending would simply end if the Crown's deemed trust had super-priority in an appropriate case. It is also far from evident that the Crown would suffer significantly if the priming charges had super-priority in an appropriate case, given the existence of s. 6(3) of the *CCAA* requiring full payment, and the Crown's favourable treatment in the *BIA* liquidation regime in the event the restructuring failed. What is clear is that interim lending is crucial to the restructuring process, and the Crown's deemed trust for unremitted source deductions is crucial to tax collection. It will be up to the *CCAA* judge to weigh and balance the moving pieces.

[178] To that end, s. 11 of the *CCAA* gives the court discretion and flexibility to weigh several considerations in ranking a priming charge ahead of the Crown's deemed trust for unremitted source deductions. It requires the court to take a focused look at the specific facts of a case to determine whether such an order is necessary and appropriate. Where relevant, the court will consider the Crown's interest in the deemed trust as a result of s. 37(2). Courts may no doubt look to the factors already listed in s. 11.2(4) — the likely duration of *CCAA* proceedings, plans for managing the company during those proceedings, views of the company's major creditors and the monitor, and the company's ability to benefit from interim financing, among others — for guidance. Section 11.2(4) of the *CCAA* states:

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

[177] Les deux parties ont invoqué des considérations de politique pour faciliter l'exercice d'interprétation. Je n'estime pas nécessaire de recourir à de tels arguments. Cependant, il est loin d'être évident que le financement temporaire prendrait tout simplement fin si une super priorité était accordée à la fiducie réputée de la Couronne dans une affaire qui s'y prête. Il est également loin d'être évident que la Couronne subirait un préjudice important si la présence était accordée aux charges super prioritaires dans une affaire donnée, compte tenu de l'existence du par. 6(3) de la *LACC* exigeant le paiement intégral des sommes dues et du traitement favorable de la Couronne dans le régime de liquidation de la *LFI* en cas d'échec de la restructuration. Chose certaine, le financement temporaire est crucial pour le processus de restructuration, et la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées est cruciale pour le recouvrement des créances fiscales. Il reviendra au juge chargé d'appliquer la *LACC* de soupeser et de pondérer les différents facteurs.

[178] À cette fin, l'art. 11 de la *LACC* donne au tribunal le pouvoir discrétionnaire et la latitude nécessaires pour soupeser les diverses considérations pour se prononcer sur l'opportunité de faire passer une charge super prioritaire devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées. Le tribunal doit examiner attentivement les faits propres à l'affaire pour décider si une telle ordonnance est nécessaire et appropriée. Le cas échéant, le tribunal tient compte de l'intérêt que possède la Couronne dans la fiducie réputée en raison du par. 37(2). Pour ce faire, le tribunal peut sans aucun doute s'appuyer, entre autres, sur les facteurs déjà énoncés au par. 11.2(4) — la durée probable des procédures intentées sous le régime de la *LACC*, les plans d'administration de la compagnie au cours de ces procédures, les opinions des créanciers les plus importants de la compagnie et du contrôleur et la capacité de la compagnie d'obtenir un financement temporaire. Le paragraphe 11.2(4) de la *LACC* dispose :

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

(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.

a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;

b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

e) la nature et la valeur des biens de la compagnie;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;

g) le rapport du contrôleur visé à l'alinéa 23(1)b).

[179] In addition, it seems to me that courts may consider:

- whether the interim lender has indicated, in good faith, that it will not lend to the debtor without ranking ahead of the Crown's deemed trust;
- the relative amounts of the interim loan and the unremitted source deductions (if the amount of the unremitted source deductions is a small fraction of the amount of the interim loan, the interim lender may not be significantly prejudiced without super-priority);
- whether, and for how long, the Crown allowed source deductions to go unremitted without taking action (see, e.g., *Hanlon, Tickle and Csiszar*); and
- finally, the prospects of success of a restructuring; and whether the CCAA is likely to be used to sell the debtor's assets.

[180] Finally, different considerations will apply if a court is considering ranking a different party's

[179] De plus, je suis d'avis que le tribunal peut également tenir compte de ce qui suit :

- la question de savoir si le prêteur temporaire a indiqué, de bonne foi, qu'il n'accordera pas de prêt au débiteur à moins que ce prêt prenne rang devant la fiducie réputée de la Couronne;
- les montants relatifs du prêt temporaire et des retenues à la source non versées (si le montant des retenues à la source non versées ne représente qu'une petite fraction du montant du prêt temporaire, le prêteur temporaire ne subirait pas nécessairement de préjudice important si une super priorité ne lui était pas accordée);
- la question de savoir si, et pendant combien de temps, la Couronne a permis le non-versement des retenues à la source sans prendre de mesures (voir, p. ex., *Hanlon, Tickle et Csiszar*);
- enfin, les probabilités de succès d'une restructuration et la question de savoir si la LACC est susceptible d'être invoquée pour liquider les actifs du débiteur.

[180] Enfin, différentes considérations entreront en jeu si un tribunal envisage de faire passer la charge

charge, like the Monitor's or Directors' Charge, ahead of the Crown's deemed trust.

VII. Conclusion

[181] I would dismiss the appeal and clarify that the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions is derived from s. 11 of the *CCAA* rather than ss. 11.2, 11.51 and 11.52. The Crown's interest under s. 227(4.1) of the *ITA* is a deemed trust interest, but beneficial ownership of deemed trust property is a manipulation of private law concepts, without settled meaning. Accordingly, the specific nature of beneficial ownership of deemed trust property must be determined in the relevant context in which it is asserted. Here, the Crown's right to unremitted source deductions in a *CCAA* restructuring is protected by both ss. 37(2) and 6(3). The former is flexible, requiring the Crown's deemed trust property to be considered when appropriate under the Act; the latter specifically requires that a plan of compromise provide for payment in full of the Crown's deemed trust claims within six months of the plan's approval. The Crown's right differs under the *BIA*, in keeping with the different goals and schemes of liquidation and restructuring. Given the content of the Crown's right to unremitted source deductions in a *CCAA* restructuring, there is no conflict between s. 227(4.1) of the *ITA* and s. 11 of the *CCAA*. The schemes of both federal Acts can be harmonized and the objectives of both statutes furthered.

[182] The Respondents will have their costs in accordance with the tariff of fees and disbursements set out in Schedule B of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

d'une autre partie, comme la charge du contrôleur ou des dirigeants, devant la fiducie réputée de la Couronne.

VII. Conclusion

[181] Je suis d'avis de rejeter le pourvoi et je précise que le pouvoir de faire passer des charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées découle de l'art. 11 de la *LACC* plutôt que des art. 11.2, 11.51 et 11.52. L'intérêt de la Couronne au titre du par. 227(4.1) de la *LIR* est une fiducie réputée, mais le droit de bénéficiaire sur les biens d'une fiducie réputée constitue une adaptation de concepts de droit privé sans signification établie. Par conséquent, la nature particulière du droit de bénéficiaire sur les biens de la fiducie réputée doit être déterminée dans le contexte pertinent où il est invoqué. En l'espèce, le droit de la Couronne sur les retenues à la source non versées dans le cadre d'une restructuration sous le régime de la *LACC* est protégé tant par le par. 37(2) que par le par. 6(3). Le premier est souple et exige que l'on tienne compte des biens réputés détenus en fiducie par la Couronne lorsque cela est approprié dans le cadre de la loi; le deuxième exige spécifiquement que le plan de transaction prévoie le paiement intégral des créances de la Couronne visées par la fiducie réputée dans les six mois suivant l'homologation du plan. Le droit de la Couronne diffère sous le régime de la *LFI*, conformément aux objectifs et aux régimes différents de la liquidation et de la restructuration. Étant donné la teneur du droit de la Couronne sur les retenues à la source non versées dans le cadre d'une restructuration sous le régime de la *LACC*, il n'y a pas de conflit entre le par. 227(4.1) de la *LIR* et l'art. 11 de la *LACC*. Les régimes des deux lois fédérales peuvent être harmonisés et leurs objectifs, réalisés.

[182] Les intimées ont droit à leurs dépens selon le tarif des honoraires et débours fixé à l'annexe B des *Règles de la Cour suprême du Canada*, DORS/2002-156.

The reasons of Abella, Brown and Rowe JJ. were delivered by

BROWN AND ROWE JJ. (dissenting) —

I. Overview

[183] At issue in this appeal is whether the Crown's deemed trust claim for unremitted source deductions under s. 227(4) and (4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), s. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"), and ss. 23(4) and 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*") (collectively, the "Fiscal Statutes"), have priority over court-ordered priming charges under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

[184] The present iteration of the deemed trust provision, s. 227(4.1) of the *ITA*, was the result of a 1997 amendment enacted by Parliament directly in response to this Court's interpretation of the provision's predecessor in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (Department of Finance Canada, *Unremitted Source Deductions and Unpaid GST* (April 7, 1997)). That provision was itself the result of several amendments, beginning in 1942, with the amendment introducing the deemed trust in s. 92(6) and (7) of the *Income War Tax Act*, R.S.C. 1927, c. 97 (previously S.C. 1917, c. 28) (*An Act to amend the Income War Tax Act*, S.C. 1942-43, c. 28, s. 31). The provision and the historical amendments demonstrate Parliament's intention to safeguard its ability to collect employee source deductions under the relevant statutes, in priority to all other claims against a debtor's property.

[185] The Crown appeals from the decision of the Court of Appeal of Alberta which, like the chambers judge, held that the *CCAA* court could subordinate the deemed trust claims under the Fiscal Statutes

Version française des motifs des juges Abella, Brown et Rowe rendus par

LES JUGES BROWN ET ROWE (dissidents) —

I. Aperçu

[183] Dans le présent pourvoi, la question est de savoir si la réclamation de la Couronne au titre de la fiducie réputée créée à l'égard des retenues à la source non versées en vertu des par. 227(4) et (4.1) de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, c. 1 (5^e suppl.) (« *LIR* »), des par. 23(3) et (4) du *Régime de pensions du Canada*, L.R.C. 1985, c. C-8 (« *RPC* »), et des par. 23(4) et 86(2) et (2.1) de la *Loi sur l'assurance-emploi*, L.C. 1996, c. 23 (« *LAE* ») (collectivement, les « lois fiscales »), a préséance sur les charges super prioritaires ordonnées par un tribunal en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« *LACC* »).

[184] La version actuelle de la disposition concernant la fiducie réputée, soit le par. 227(4.1) de la *LIR*, est le résultat d'une modification adoptée en 1997 par le législateur en réponse directe à l'interprétation faite par notre Cour de la version antérieure de la disposition dans l'arrêt *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411 (Ministère des Finances Canada, *Retenues à la source non versées et TPS impayée* (7 avril 1997)). Cette disposition était elle-même le résultat de plusieurs modifications, à commencer, en 1942, par celle qui a introduit la fiducie réputée aux par. 92(6) et (7) de la *Loi de l'impôt de guerre sur le revenu*, S.R.C. 1927, c. 97 (auparavant S.C. 1917, c. 28) (*Loi modifiant la Loi de l'impôt de guerre sur le revenu*, L.C. 1942-1943, c. 28, art. 31). La disposition et l'historique des modifications démontrent l'intention du législateur de protéger sa capacité de percevoir les retenues à la source en vertu des lois applicables, par priorité sur toute autre réclamation visant les biens d'un débiteur.

[185] La Couronne se pourvoit contre la décision de la Cour d'appel de l'Alberta qui, comme le juge en cabinet, a conclu que le tribunal chargé d'appliquer la *LACC* avait le pouvoir de subordonner les

to the priming charges (2019 ABCA 314, 93 Alta. L.R. 29, aff'g 2017 ABQB 550, 60 Alta. L.R. (6th) 103). Having examined the pertinent provisions of the Fiscal Statutes, and for the reasons that follow, we find ourselves in respectful disagreement with that conclusion, and prefer the view of the dissenting judge, Wakeling J.A. The Crown's deemed trust claims under the Fiscal Statutes have ultimate priority and cannot be subordinated by priming charges.

[186] In our view, the text of the impugned provisions in the Fiscal Statutes is clear: the Crown's deemed trust operates "[n]otwithstanding . . . any other enactment of Canada" (*ITA*, s. 227(4.1)).² Parliament used unequivocal language — indeed, *the very language suggested by this Court in Sparrow Electric* — to give ultimate priority to the Crown's claim. Further, and again in clear and unequivocal text, Parliament imposed limits on the broad grant of authority by which a court can prioritize priming charges, thereby making plain the superiority of deemed trust claims. Finally, no provision of the CCAA is rendered meaningless by this interpretation. Unlike in other contexts such as the legislative scheme governing the GST/HST, Parliament has left no room for subordinating the deemed trusts under the Fiscal Statutes in pursuit of other legislative objectives. We would, therefore, allow the appeal.

II. Analysis

A. *General Comments on the Nature of the Deemed Trusts Under the Fiscal Statutes*

[187] The deemed trust created by the *ITA* is an essential instrument to collect source deductions (*First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002]

² The wording of the deemed trust provisions in the relevant provisions of the Fiscal Statutes is materially identical. This decision focuses on the deemed trusts in s. 227(4) and (4.1) of the *ITA*. The reasoning herein, however, applies with equal force to each of the other statutes.

réclamations relatives à une fiducie réputée créée par les lois fiscales aux charges super prioritaires (2019 ABCA 314, 93 Alta. L.R. 29, conf. 2017 ABQB 550, 60 Alta. L.R. (6th) 103). Après avoir examiné les dispositions applicables des lois fiscales, et pour les motifs qui suivent, nous ne partageons pas ce point de vue et nous nous rangeons plutôt à l'avis du juge dissident, le juge Wakeling. Les réclamations de la Couronne relatives à une fiducie réputée créée par les lois fiscales ont priorité absolue et ne peuvent pas être subordonnées aux charges super prioritaires.

[186] À notre avis, le libellé des dispositions contestées des lois fiscales est clair : la fiducie réputée de la Couronne produit ses effets « [m]algré [. . .] tout autre texte législatif fédéral » (*LIR*, par. 227(4.1))². Le législateur a employé des termes non équivoques — *les termes mêmes proposés par notre Cour* dans l'arrêt *Sparrow Electric* — pour accorder une priorité absolue à la réclamation de la Couronne. En outre, toujours dans un langage clair et non équivoque, le législateur a imposé des limites aux larges pouvoirs par lesquels un tribunal peut accorder la priorité à des charges super prioritaires, établissant ainsi clairement la supériorité des réclamations relatives à une fiducie réputée. Enfin, cette interprétation ne fait perdre son sens à aucune des dispositions de la *LACC*. Contrairement à d'autres contextes, comme dans celui du régime législatif régissant la TPS/TVH, le législateur n'a pas ouvert la porte à la subordination de la fiducie réputée créée par les lois fiscales en vue de réaliser d'autres objectifs législatifs. Nous sommes donc d'avis d'accueillir le pourvoi.

II. Analyse

A. *Observations générales sur la nature de la fiducie réputée créée par les lois fiscales*

[187] La fiducie réputée créée par la *LIR* est un instrument essentiel à la perception des retenues à la source (*First Vancouver Finance c. M.R.N.*, 2002

² Les dispositions pertinentes des lois fiscales en matière de fiducie réputée ont un libellé sensiblement identique. La présente décision met l'accent sur les fiducies réputées prévues aux par. 227(4) et (4.1) de la *LIR*. Le raisonnement exposé ici vaut cependant tout autant pour chacune des autres lois.

2 S.C.R. 720, at para. 22). The *ITA* grants special priority to the Crown to collect unremitted source deductions, reflecting its status as an “involuntary creditor” (*First Vancouver*, at para. 23).

[188] Section 227(4) and (4.1) of the *ITA* reads:

(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property

CSC 49, [2002] 2 R.C.S. 720, par. 22). La *LIR* accorde à la Couronne la priorité de rang pour la perception des retenues à la source non versées, étant donné son statut de « créancier involontaire » (*First Vancouver*, par. 23).

[188] Les paragraphes 227(4) et (4.1) de la *LIR* prévoient ce qui suit :

(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.

(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, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) qui, en l’absence d’une garantie au sens du même paragraphe, seraient ceux 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, séparés des propres biens de la personne, qu’ils soient ou non assujettis à une telle garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est déduit ou retenu, 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 une telle garantie.

Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ou sur le produit en découlant, et le produit découlant

shall be paid to the Receiver General in priority to all such security interests.

[189] These sections describe two relevant events. First, at the time of the deduction, a trust is deemed in favour of the Crown, binding every person (the “tax debtor”) who collects source deductions in the amount withheld until the person remits the source deductions (*ITA*, s. 227(4)). Section 227(4) deems the tax debtor to hold the source deductions “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”.

[190] The second event occurs where the tax debtor has failed to remit the source deductions in accordance with the manner and time provided by the *ITA*. Section 227(4.1) extends the deemed trust to all “property of the person and property held by any secured creditor . . . equal in value to the amount so deemed to be held in trust”. This is achieved by deeming the source deductions to be held “in trust for Her Majesty” from the moment the amount was “deducted or withheld by the person, separate and apart from the property of the person”. Parliament further provided that the unremitted source deductions under the Fiscal Statutes “form no part of the estate or property of the person” from the time of deduction or withholding, and is “property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests”.

[191] This Court has held that the deemed trust is a “creatur[e] of statute” and “is not in truth a real [trust], as the subject matter of the trust cannot be identified from the date of creation of the trust” (*Sparrow Electric*, at para. 31, per Gonthier J., citing D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at p. 117, and adopted in *First Vancouver*, at para. 37). This statement fuelled a debate in this appeal about whether the deemed trust is a security interest or a proprietary interest, with the respondents arguing that the Crown cannot hold a proprietary

de ces biens est payé au receveur général par priorité sur une telle garantie.

[189] Ces paragraphes décrivent deux événements pertinents. Premièrement, dès le moment où le montant est retenu, une fiducie réputée est créée en faveur de la Couronne, contraignant chaque personne (le « débiteur fiscal ») qui effectue des retenues à la source à retenir le montant en vue de le verser à Sa Majesté (*LIR*, par. 227(4)). Aux termes du par. 227(4), le débiteur fiscal est réputé détenir le montant des retenues à la source « séparé de ses propres biens et des biens détenus par son créancier garanti au sens [du paragraphe 224(1.3)] ».

[190] Le deuxième événement se produit lorsque le débiteur fiscal fait défaut de verser les retenues à la source selon les modalités et dans le délai prévus par la *LIR*. Le paragraphe 227(4.1) étend la fiducie réputée à tous « les biens de la personne, et les biens détenus par son créancier garanti [. . .] d’une valeur égale [au montant réputé être détenu en fiducie] ». Ainsi, les retenues à la source sont réputées être détenues « en fiducie pour Sa Majesté » à compter du moment où le montant est « déduit ou retenu », « sépar[ées] des propres biens de la personne ». Le législateur a également prévu que les retenues à la source non versées au titre des lois fiscales sont réputées « ne pas faire partie du patrimoine ou des biens de la personne » à compter du moment où le montant est déduit ou retenu, et qu’elles constituent des « biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre 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 une telle garantie ».

[191] Notre Cour a jugé que la fiducie réputée « tire son origine de la législation » et qu’elle « n’est pas réelle, étant donné que son objet ne peut être identifié à compter de la date de création de la fiducie » (*Sparrow Electric*, par. 31, le juge Gonthier, citant D. W. M. Waters, *Law of Trusts in Canada* (2^e éd. 1984), p. 117, et adopté dans *First Vancouver*, par. 37). Cette déclaration a donné lieu, dans le cadre du présent pourvoi, à un débat sur la question de savoir si la fiducie réputée crée une garantie ou un intérêt propriétaire. Les intimées soutiennent que la

interest in the debtor's property because there is a lack of certainty in the subject matter.

[192] We agree with each of our colleagues Justices Karakatsanis and Côté that the deemed trust is not a “true” trust and that it does not confer an ownership interest or the rights of a beneficiary on the Crown as they are understood at common law or within the meaning of the *Civil Code of Québec* (Karakatsanis J.'s reasons, at paras. 119-20; Côté J.'s reasons, at paras. 43 and 49). Respectfully, however, our colleagues miss the point of the *deemed* quality of the trust. The matters of a property interest, certainty of subject matter and autonomous patrimony that arise from attempts to describe the operation of the deemed trust are entirely irrelevant and do not assist in deciding this appeal, nor in understanding Parliament's intent. The deemed trust is a legal fiction, with *sui generis* characteristics that are described in s. 227(4) and (4.1) of the *ITA*. As noted in *First Vancouver*, at para. 34, “it is open to Parliament to characterize the trust in whatever way it chooses; it is not bound by restraints imposed by ordinary principles of trust law”. While *First Vancouver* considered the contrast between a statutory trust and a common law trust, the same applies to our colleague Côté J.'s reference to the *Civil Code (Canada (Attorney General) v. Caisse populaire d'Amos*, 2004 FCA 92, 324 N.R. 31, at para. 49). What matters here is not *the characterization* of the deemed trust that is at issue, but its *operation*. And as we explain, it *operates* to give the Crown a statutory right of access to the debtor's property to the extent of its *corpus* and a right to be paid in priority to all security interests.

[193] Further, no concerns regarding certainty of subject matter or autonomous patrimony arise here. It is of course true that, in common law Canada, for a trust to come into existence there must be certainty of intention, certainty of subject matter, and certainty of object (D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (4th ed. 2012), at p. 140; E. E. Gillese, *The Law of Trusts*

Couronne ne peut pas détenir un intérêt propriétaire sur les biens des débitrices en raison de l'incertitude quant aux biens sujets à la fiducie.

[192] Nous convenons avec chacune de nos collègues les juges Karakatsanis et Côté que la fiducie réputée n'est pas une fiducie « véritable » et qu'elle ne confère pas à la Couronne un intérêt propriétaire ou des droits de bénéficiaire tel qu'on les entend en common law ou au sens du *Code civil du Québec* (motifs de la juge Karakatsanis, par. 119-120; motifs de la juge Côté, par. 43 et 49). En tout respect, cependant, nos collègues ne saisissent pas le caractère *réputé* de la fiducie. Les questions de l'intérêt propriétaire, de la certitude quant aux biens sujets à la fiducie et du patrimoine autonome qui découlent des tentatives d'expliquer le fonctionnement de la fiducie réputée sont dénuées de toute pertinence et n'aident pas à trancher le présent pourvoi, ni à comprendre l'intention du législateur. La fiducie réputée est une fiction juridique assortie de caractéristiques *sui generis* décrites aux par. 227(4) et 227(4.1) de la *LIR*. Comme il a été souligné au par. 34 de l'arrêt *First Vancouver*, « le législateur peut qualifier la fiducie comme il l'entend; il n'est pas lié par les contraintes découlant des principes habituels du droit des fiducies ». Bien que l'arrêt *First Vancouver* ait traité du contraste entre une fiducie créée en vertu de la loi et une fiducie en common law, ses enseignements valent pour le renvoi de notre collègue la juge Côté au *Code civil (Canada (Procureur général) c. Caisse populaire d'Amos*, 2004 CAF 92, 324 N.R. 31, par. 49). Ce qui importe en l'espèce n'est pas *la qualification* de la fiducie réputée en cause, mais son *fonctionnement*. Comme nous l'expliquerons, elle a *pour effet* de conférer à la Couronne un droit d'accès aux biens du débiteur jusqu'à concurrence de la masse fiduciaire ainsi que le droit d'être payée par priorité sur toute garantie.

[193] En outre, il n'existe aucune préoccupation concernant la certitude quant à la matière ou le patrimoine autonome en l'espèce. Certes, il est vrai qu'en common law au Canada, la certitude quant à l'intention de créer une fiducie, la certitude quant aux biens sujets à la fiducie et la certitude quant à l'objet sont nécessaires pour qu'une fiducie prenne naissance (D. W. M. Waters, M. R. Gillen et L. D.

(3rd ed. 2014), at p. 41). Similarly, under the Quebec civil law, “[t]hree requirements must . . . be met in order for a trust to be constituted: property must be transferred from an individual’s patrimony to another patrimony by appropriation; the property must be appropriated to a particular purpose; and the trustee must accept the property” (*Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31). And, again, it is also true that the subject matter of the deemed trust under s. 227(4.1) cannot be identified from the date of creation of the trust and does not constitute an autonomous patrimony to which specific property is transferred.

[194] But again, none of this remotely matters here. Statutory text, not ordinary principles of trust law, determines the nature of, and rights conferred by, deemed trusts (*First Vancouver*, at para. 34). And this Court has recognized that Parliament, through the trust deemed by s. 227(4.1) of the *ITA*, has “revitaliz[ed] the trust whose subject matter has lost all identity” (*Sparrow Electric*, at para. 31, per Gonthier J., adopted in *First Vancouver*, at para. 37). This is because the subject matter of the deemed trust is ascertained *ex post facto*, corresponding to the property of the tax debtor and property held by any secured creditor equal in value to the amount deemed to be held in trust by s. 227(4) that, but for the security interest, would be property of the tax debtor. In short, the subject matter is whatever assets the employer then has from which to realize the original trust debt. Hence Iacobucci J.’s description in *First Vancouver* of the operation of s. 227(4.1) as “similar in principle to a floating charge” (para. 4). Parliament also circumvented the traditional requirements of the *Civil Code* for constituting a trust by requiring the amount of the unremitted source deductions to be held “separate and apart from the property of the [debtor]” and to “form no part of the estate [*patrimoine*, in the French version] or property of the [debtor]” (s. 227(4.1)).

Smith, dir., *Waters’ Law of Trusts in Canada* (4^e éd. 2012), p. 140; E. E. Gillese, *The Law of Trusts* (3^e éd. 2014), p. 41). De même, en droit civil québécois, « [t]rois conditions sont [. . .] nécessaires pour la constitution d’une fiducie : le transfert de biens du patrimoine d’une personne à un patrimoine d’affectation, l’affectation des biens à une fin particulière et l’acceptation par un fiduciaire » (*Banque de Nouvelle-Écosse c. Thibault*, 2004 CSC 29, [2004] 1 R.C.S. 758, par. 31). Par ailleurs, il est également vrai que la matière de la fiducie réputée créée par le par. 227(4.1) ne peut être identifiée à compter de la date de création de la fiducie et qu’elle ne constitue pas un patrimoine autonome auquel sont transférés des biens en particulier.

[194] Mais là encore, rien de ce qui précède n’est d’une quelconque pertinence en l’espèce. C’est le texte législatif, et non les principes habituels du droit des fiducies, qui détermine la nature des fiducies réputées et les droits qu’elles confèrent (*First Vancouver*, par. 34). De plus, notre Cour a reconnu que le législateur avait, au moyen de la fiducie réputée prévue au par. 227(4.1) de la *LIR*, « revitalis[é] la fiducie dont l’objet a perdu toute identité » (*Sparrow Electric*, par. 31, le juge Gonthier, adopté dans *First Vancouver*, par. 37). Il en est ainsi parce que les biens sujets à la fiducie réputée sont établis après coup; ils correspondent aux biens du débiteur fiscal et aux biens détenus par un créancier garanti d’une valeur équivalente au montant réputé être détenu en fiducie en vertu du par. 227(4) qui, en l’absence de la garantie, seraient ceux du débiteur fiscal. Bref, les biens sujets à la fiducie correspondent à tous les biens, quels qu’ils soient, que l’employeur possède alors et au moyen desquels la fiducie initiale peut être réalisée. C’est pourquoi le juge Iacobucci, dans l’arrêt *First Vancouver*, a déclaré que la fiducie réputée prévue au par. 227(4.1) « s’apparent[ait] sur le plan des principes à une charge flottante » (par. 4). Le législateur a aussi contourné les conditions classiques établies dans le *Code civil* pour la constitution d’une fiducie en exigeant que le montant des retenues à la source non versées soit détenu « sépar[é] des propres biens d[u] débiteur » et « ne [fasse pas] partie du patrimoine ou des biens d[u] débiteur » (par. 227(4.1)).

[195] In short, the requirements of “true” trusts of civil and common law are irrelevant to ascertaining the operation of a statutorily deemed trust. Parliament did not legislate a “true” trust. Instead, it legislated a deeming provision which “artificially imports into a word or an expression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used” (*R. v. Verrette*, [1978] 2 S.C.R. 838, at p. 845).

[196] On this point, and contrary to the view of the majority at the Court of Appeal, Iacobucci J. *did not* hold that the deemed trust *is* a floating charge — nor that it was “of the same nature” (Côté J.’s reasons, at para. 51) — but rather that it operated *similarly*, by permitting a debtor in the interim to alienate property in the normal course of business. They are distinct legal concepts; whereas the deemed trust takes “priority over existing and future security interests”, a floating charge would be overridden by a subsequent fixed charge (*Toronto-Dominion Bank v. Canada*, 2020 FCA 80, [2020] 3 F.C.R. 201, at para. 62; see also *First Vancouver*, at para. 28).

[197] Significantly, the s. 227(4.1) deemed trust does not encompass the whole of the tax debtor’s interest in property, but only the amount deemed to be held in trust by s. 227(4). But this does not mean the Crown cannot have a property interest in the debtor’s property. It merely limits that interest to the extent of the unremitted source deductions. This makes sense. The Crown may collect only what it is owed.

B. *The Deemed Trust Under the Fiscal Statutes Have Absolute Priority Over All Other Claims in CCAA Proceedings*

[198] The text, context, and purpose of s. 227(4.1) of the *ITA* support the conclusion that s. 227(4.1) of the *ITA* and the related deemed trust provisions under the Fiscal Statutes bear only one plausible

[195] En somme, les conditions des fiducies « véritables » en droit civil et en common law ne sont d’aucune utilité pour déterminer le fonctionnement d’une fiducie réputée créée en application de la loi. Le législateur n’a pas créé une fiducie « véritable ». Il a plutôt adopté une disposition déterminative qui « donne à un mot ou à une expression un sens autre que celui qu’on leur reconnaît habituellement et qu’il conserve là où on l’utilise » (*R. c. Verrette*, [1978] 2 R.C.S. 838, p. 845).

[196] Sur ce point, et contrairement à l’avis des juges majoritaires de la Cour d’appel, le juge Iacobucci *n’a pas* jugé que la fiducie réputée *constituait* une charge flottante — ni qu’elle [TRADUCTION] « particip[ait] de la nature d’une “charge flottante” » (motifs de la juge Côté, par. 51) — mais plutôt qu’elle fonctionnait de manière *semblable* en permettant à un débiteur, dans l’intervalle, de se départir d’un bien détenu en fiducie dans le cadre normal de ses activités. Ce sont là des concepts juridiques distincts; alors que la fiducie réputée a la « priorité de rang sur les garanties actuelles et futures », une charge flottante serait supplantée par une sûreté ultérieure (*Banque Toronto-Dominion c. Canada*, 2020 CAF 80, [2020] 3 R.C.F. 201, par. 62; voir aussi *First Vancouver*, par. 28).

[197] Fait important à signaler, la fiducie réputée prévue au par. 227(4.1) ne comprend pas l’ensemble des biens du débiteur fiscal, mais seulement les biens d’une valeur équivalente au montant réputé être détenu en fiducie en vertu du par. 227(4). Cela ne signifie pas que la Couronne ne peut pas détenir un intérêt propriétaire sur les biens du débiteur, mais seulement que cet intérêt se limite à la valeur des retenues à la source non versées, ce qui est logique. La Couronne ne peut percevoir que ce qui lui est dû.

B. *La fiducie réputée créée par les lois fiscales a priorité absolue sur toutes les autres réclamations dans le cadre de procédures engagées sous le régime de la LACC*

[198] Le texte, le contexte et l’objectif du par. 227(4.1) de la *LIR* appuient la conclusion selon laquelle il n’existe qu’une seule interprétation plausible de ce paragraphe et des dispositions connexes

interpretation: the Crown's deemed trust enjoys priority over all other claims, including priming charges granted under the *CCAA*. Parliament's intention when it amended and expanded s. 227(4) and (4.1) of the *ITA* was clear and unmistakable.

(1) The Deemed Trusts Apply Notwithstanding the Provisions of the *CCAA*

(a) *Text of the Fiscal Statutes*

[199] The text of s. 227(4.1) of the *ITA* is determinative: the Crown's deemed trust claim enjoys superior priority over all "security interests", including priming charges under the *CCAA*. The amount subject to the deemed trusts is deemed "to be held . . . separate and apart from the property of the person" and "to form no part of the estate or property of the person". It is "beneficially owned by Her Majesty", and the "proceeds of such property shall be paid . . . in priority to all such security interests". The Crown's right pursuant to its deemed trust is clear: it is a right to be paid in priority to all security interests.

[200] Parliament granted this unassailable priority by employing the unequivocal language of "[n]otwithstanding any . . . enactment of Canada". This is a "blanket paramountcy clause"; it prevails over all other statutes (P. Salembier, *Legal and Legislative Drafting* (2nd ed. 2018), at p. 385). No similar "notwithstanding" provision appears in the *CCAA*, subordinating the claims under the deemed trusts of the Fiscal Statutes to priming charges. Indeed, it is quite the opposite: unlike most deemed trusts which are nullified in *CCAA* proceedings by the operation of s. 37(1) of the *CCAA*, s. 37(2) *preserves* the deemed trusts of the Fiscal Statutes. This distinguishes the deemed trust at issue here from those discussed in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, which were nullified by the operation of what is now s. 37(1). Deschamps J. repeatedly contrasted the different deemed trusts and specified that "the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization

concernant la fiducie réputée qui figurent dans les lois fiscales : la fiducie réputée de la Couronne a préséance sur toute autre réclamation, y compris sur les charges super prioritaires accordées en vertu de la *LACC*. Lorsque le législateur a modifié les par. 227(4) et (4.1) de la *LIR* et élargi leur portée, son intention était claire et sans équivoque.

(1) La fiducie réputée s'applique malgré les dispositions de la *LACC*

a) *Texte des lois fiscales*

[199] Le libellé du par. 227(4.1) de la *LIR* est déterminant : la fiducie réputée de la Couronne a priorité absolue sur toutes les « garanties », y compris sur les charges super prioritaires créées sous le régime de la *LACC*. Le montant sujet à la fiducie réputée est réputé « être déten[u] [. . .] sépar[é] des propres biens de la personne » et « ne pas faire partie du patrimoine ou des biens de la personne ». « Sa Majesté a un droit de bénéficiaire » sur ce montant et « le produit découlant de ces biens est payé [. . .] par priorité sur [toute autre] garantie ». Le droit conféré à la Couronne par la fiducie réputée créée en sa faveur est clair : il s'agit du droit d'être payée par priorité sur toute garantie.

[200] Le législateur a accordé cette priorité inattaquable en employant ces termes non équivoques : « [m]algré [. . .] tout autre texte législatif fédéral . . . » Il s'agit d'une [TRADUCTION] « disposition générale attributive de préséance »; elle a préséance sur toute autre loi (P. Salembier, *Legal and Legislative Drafting* (2^e éd. 2018), p. 385). Il ne figure dans la *LACC* aucune disposition dérogatoire semblable (« malgré »), subordonnant aux charges super prioritaires les réclamations relatives à une fiducie réputée créée par les lois fiscales. En fait, c'est tout l'inverse : contrairement à la plupart des fiducies réputées qui sont neutralisées dans le cadre de procédures engagées sous le régime de la *LACC* par l'application du par. 37(1) de la *LACC*, le par. 37(2) *préserve* la fiducie réputée prévue par les lois fiscales. Cela distingue la fiducie réputée en litige dans la présente affaire de celles dont il était question dans l'arrêt *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, qui ont été neutralisées par l'application de ce qui est maintenant le par. 37(1).

and in bankruptcy” (para. 38). The *ITA* and *CCAA* thus operate without conflict.

(b) *Legislative Predecessor Provisions*

[201] The predecessor provisions of a statutory provision form part of the “entire context” in which it must be interpreted (*Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425, at para. 28). And here, it confirms that, by enacting s. 227(4.1) of the *ITA*, Parliament intended for the deemed trusts arising from the Fiscal Statutes to have absolute priority over all secured creditors, as defined in s. 224(1.3) of the *ITA*.

[202] As already noted, Parliament amended s. 227(4.1) of the *ITA* to its current form in response to this Court’s decision in *Sparrow Electric*. In *Sparrow Electric*, both Royal Bank and the Minister claimed priority to the proceeds from the tax debtor’s property. This Court held that the Bank had priority since the inventory was subject to the Bank’s security before the deemed trust arose. In reaching this conclusion, Iacobucci J. invited Parliament to grant absolute priority to the Crown, and showed how this could be achieved:

I wish to emphasize that it is open to Parliament to step in and assign absolute priority to the deemed trust. A clear illustration of how this might be done is afforded by s. 224(1.2) *ITA*, which vests certain moneys in the Crown “notwithstanding any security interest in those moneys” and provides that they “shall be paid to the Receiver General in priority to any such security interest”. All that is needed to effect the desired result is clear language of that kind. In the absence of such clear language, judicial innovation is undesirable, both because the issue is policy charged and because a legislative mandate is apt to be clearer than a rule whose precise bounds will become

La juge Deschamps a maintes fois comparé les différentes fiducies réputées et précisé que « 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 » (par. 38). La *LIR* et la *LACC* n’entrent donc pas en conflit.

b) *Dispositions législatives antérieures*

[201] Les versions antérieures d’une disposition législative font partie du « contexte global » dans lequel cette disposition doit être interprétée (*Merk c. Association internationale des travailleurs en ponts, en fer structural, ornemental et d’armature, section locale 771*, 2005 CSC 70, [2005] 3 R.C.S. 425, par. 28). En l’espèce, le contexte confirme qu’en édictant le par. 227(4.1) de la *LIR*, le législateur voulait que la fiducie réputée créée par les lois fiscales jouisse d’une priorité absolue sur tous les créanciers garantis, au sens du par. 224(1.3) de la *LIR*.

[202] Comme il a déjà été souligné, le législateur a modifié le par. 227(4.1) de la *LIR* pour adopter son libellé actuel en réponse à l’arrêt *Sparrow Electric* de notre Cour. Dans l’affaire *Sparrow Electric*, tant la Banque Royale que Sa Majesté revendiquaient la priorité de rang relativement au produit de la vente des biens de la débitrice fiscale. Notre Cour a jugé que la priorité de rang revenait à la Banque puisque les biens figurant dans l’inventaire étaient assujettis à la garantie de la Banque avant que la fiducie réputée n’ait pris naissance. En tirant cette conclusion, le juge Iacobucci a invité le législateur à accorder la priorité absolue à la Couronne et lui a montré comment y arriver :

... je tiens à souligner qu’il est loisible au législateur d’intervenir et d’accorder la priorité absolue à la fiducie réputée. Le paragraphe 224(1.2) *LIR* illustre clairement comment cela pourrait se faire. Cette disposition attribue à Sa Majesté certaines sommes « malgré toute autre garantie au titre de ce[s] somme[s] », et prévoit qu’elles « doi[vent] être payée[s] au receveur général par priorité sur toute autre garantie au titre de ce[s] somme[s] ». Pour obtenir le résultat souhaité, il suffit d’utiliser des termes aussi clairs. En l’absence de pareils termes, l’innovation judiciaire n’est pas souhaitable parce qu’il s’agit d’une question qui regorge de considérations de principe et parce qu’une

fixed only as a result of expensive and lengthy litigation.
[Emphasis added; para. 112.]

[203] Parliament proceeded to do just that. It amended the Fiscal Statutes to reinforce its priority. The press release accompanying the amendments stated that the objective of the amendments was to “assert the absolute priority of the Crown’s claim [for] unremitted source deductions [and to] ensure that tax revenue losses are minimised and that delinquent taxpayers and their secured creditors do not benefit from failures to remit source deductions and GST at the expense of the Crown” (Department of Finance Canada, at p. 1 (emphasis added)).

[204] The purpose of these amendments was described by Iacobucci J. for this Court in *First Vancouver*. It was, he recognized, to grant priority to the deemed trusts and ensure the Crown’s claim prevails over secured creditors, irrespective of when the security interest arose (paras. 28-29). “It is evident from these changes” he added, “that Parliament has made a concerted effort to broaden and strengthen the deemed trust in order to facilitate the collection efforts of the Minister” (para. 29). Parliament’s intention could not have been clearer.

[205] Indeed, our colleagues’ view to the contrary leaves us wondering: if the all-encompassing scope of the notwithstanding clause of s. 227(4.1) of the *ITA* is *insufficient* to prevail over the priming charges, what language would possibly be *sufficient*? Courts must give proper effect to Parliament’s plain statutory direction, and not strain to subvert it on the basis that Parliament’s categorical language or “basket clause” did not itemize a particular security interest.

(2) The Priming Charges Are “Security Interests” Within the Meaning of the Fiscal Statutes

[206] The priming charge provisions in ss. 11.2(1), 11.51(1) and 11.52(1) of the *CCAA* allow the

prescription du législateur est plus susceptible d’être claire qu’une règle dont les limites précises ne seront établies que par suite d’une longue et coûteuse série de poursuites.
[Nous soulignons; par. 112.]

[203] C’est exactement ce que le législateur a fait. Il a modifié les lois fiscales afin de renforcer sa priorité. Le communiqué qui accompagnait les modifications mentionnait que celles-ci avaient pour objectif d’« établir la priorité absolue des droits de l’État [à l’égard des] retenues à la source non versées [et de] minimiser les pertes de recettes fiscales et empêch[er] les contribuables contrevenants et leurs créanciers garantis de tirer profit du non-versement de retenues à la source et de TPS au détriment de l’État » (Ministère des Finances du Canada, p. 1 (nous soulignons)).

[204] L’objectif de ces modifications a été décrit par le juge Iacobucci au nom de notre Cour dans l’arrêt *First Vancouver*. Comme il l’a reconnu, l’objectif était d’accorder la priorité de rang à la fiducie réputée et de faire en sorte que la créance de la Couronne ait préséance sur celles des créanciers garantis, peu importe le moment où la garantie a pris naissance (par. 28-29). « Ces modifications révèlent que le législateur a manifestement voulu consolider la fiducie réputée et en accroître la portée afin de faciliter les opérations de recouvrement du ministre », a-t-il ajouté (par. 29). L’intention du législateur n’aurait pas pu être plus claire.

[205] En fait, l’opinion contraire de nos collègues nous amène à nous questionner : si la portée englobante de la disposition de dérogation du par. 227(4.1) de la *LIR* ne suffit pas à garantir la priorité de rang sur les charges super prioritaires, quel libellé imaginable aurait *suffi*? Les tribunaux doivent donner dûment effet aux directives législatives claires du législateur et ne pas s’efforcer de les renverser au motif que le libellé sans équivoque ou la « clause omnibus » du législateur ne mentionne pas expressément une garantie en particulier.

(2) Les charges super prioritaires constituent une « garantie » au sens des lois fiscales

[206] Selon les dispositions relatives aux charges super prioritaires figurant aux par. 11.2(1), 11.51(1)

supervising court to “make an order declaring that all or part of the company’s property is subject to a security or charge” (“*charge ou sûreté*” in the French version). This does not, however, prevail over the deemed trust created by s. 227(4.1) of the *ITA*, which provides that the unpaid amounts of the deemed trust for source deductions have priority over all “security interests”. That term is defined by s. 224(1.3) of the *ITA* as follows:

security interest means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for; (*garantie*)

This makes clear that a “security interest” includes a “charge” (a “*sûreté*” in the French version). Further, ss. 11.2(1), 11.51(1) and 11.52(1) of the *CCAA* describe the priming charges as a “security or charge”. There can be no doubt, therefore, that priming charges under the *CCAA* are security interests under the *ITA*.

[207] Even were this insufficient, the definition of “security interest” in s. 224(1.3) of the *ITA* is sufficiently expansive to capture *CCAA* priming charges. The word “includes”, and the categorical language of “encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for” could not be any more expansive. As Professor Sullivan explains, “[t]he purpose of a list of examples following the word ‘including’ is normally to emphasize the broad range of general language and to ensure that it is not inappropriately read down so as to exclude something that is meant to be included” (*Sullivan on the Construction of Statutes* (6th ed. 2014), at para. 4.39).

[208] This Court has already recognized, in *Caisse populaire Desjardins de l’Est de Drummond v.*

et 11.52(1) de la *LACC*, un juge surveillant « peut par ordonnance [. . .] déclarer que tout ou partie des biens de la compagnie sont grevés d’une charge ou sûreté ». Cette charge ou sûreté n’a toutefois pas pré-séance sur la fiducie réputée créée par le par. 227(4.1) de la *LIR*, lequel prévoit que le montant des retenues à la source non versées réputé être détenu en fiducie a priorité sur toute autre « garantie ». Ce terme est ainsi défini au par. 224(1.3) de la *LIR* :

garantie Intérêt ou, pour l’application du droit civil, droit sur un bien qui garantit l’exécution d’une obligation, notamment un paiement. Sont en particulier des garanties les intérêts ou, pour l’application du droit civil, les droits nés ou découlant de débiteures, hypothèques, privilèges, nantissements, sûretés, fiducies réputées ou réelles, cessions et charges, quelle qu’en soit la nature, de quelque façon ou à quelque date qu’elles soient créées, réputées exister ou prévues par ailleurs. (*security interest*)

Il est donc clair qu’une « garantie » englobe une « sûreté » et une « charge ». En outre, les par. 11.2(1), 11.51(1) et 11.52(1) de la *LACC* décrivent les charges super prioritaires comme une « charge ou sûreté ». Par conséquent, il ne fait aucun doute que les charges super prioritaires créées sous le régime de la *LACC* sont des garanties au sens de la *LIR*.

[207] Même si cela ne suffisait pas, la définition de « garantie » énoncée au par. 224(1.3) de la *LIR* est assez large pour comprendre les charges super prioritaires prévues sous le régime de la *LACC*. La portée de l’expression « sont en particulier » et du passage catégorique « charges, quelle qu’en soit la nature, de quelque façon ou à quelque date qu’elles soient créées, réputées exister ou prévues par ailleurs » ne pourrait pas être plus large. Comme l’explique la professeure Sullivan, [TRADUCTION] « [u]ne liste d’exemples introduite par le terme “notamment” [ou “sont en particulier” dans le paragraphe qui nous occupe] a généralement pour objectif de souligner la vaste portée des termes généraux et de veiller à ce qu’elle ne soit pas mal interprétée de façon à exclure un élément qui ne doit pas l’être » (*Sullivan on the Construction of Statutes* (6^e éd. 2014), par. 4.39).

[208] Notre Cour a déjà reconnu, dans l’arrêt *Caisse populaire Desjardins de l’Est de Drummond*

Canada, 2009 SCC 29, [2009] 2 S.C.R. 94, that Parliament chose “an expansive definition of ‘security interest’ . . . in order to enable maximum recovery by the Crown” (para. 14), such that it captures any interest in the property of the debtor that secures payment or performance of an obligation:

In order to constitute a security interest for the purposes of s. 227(4.1) *ITA* and s. 86(2.1) *EIA*, the creditor must hold “any interest in property that secures payment or performance of an obligation”. The definition of “security interest” in s. 224(1.3) *ITA* does not require that the agreement between the creditor and debtor take any particular form, nor is any particular form expressly excluded. So long as the creditor’s interest in the debtor’s property secures payment or performance of an obligation, there is a “security interest” within the meaning of this section. While Parliament has provided a list of “included” examples, these examples do not diminish the broad scope of the words “any interest in property” . . . [Emphasis added; para. 15.]

In that case, Rothstein J. held for the Court that a contract providing a right to compensation (or set-off at common law) could constitute a “security interest” under s. 224(1.3) of the *ITA*, *despite that it was not enumerated in the definition* and that it is *not traditionally understood as such* (paras. 37-40).

[209] For all these reasons, the priming charges fall under the definition of “security interest”, because they are “interest[s] in the debtor’s property [that] secur[e] payment or performance of an obligation”, i.e. the payment of the monitor, the interim lender, and directors. Consequently, the Crown’s interest under the trust deemed created by s. 227(4.1) of the *ITA* enjoys priority over the priming charges.

[210] Our colleague Côté J., however, sees the matter differently. In our respectful view, she disregards this Court’s authoritative statement of the law in *Caisse populaire Desjardins de l’Est de Drummond*. Specifically, she concludes that priming charges are not “security interests” under the *ITA* because “[c]ourt-ordered charges are unlike conventional consensual and non-consensual security interests in that they are integrally connected to insolvency

c. Canada, 2009 CSC 29, [2009] 2 R.C.S. 94, que le législateur a opté pour « une définition large de la “garantie” afin de maximiser le recouvrement par Sa Majesté » (par. 14), qui englobe tout intérêt sur un bien qui garantit l’exécution d’une obligation, notamment un paiement :

Il y a une garantie aux fins des par. 227(4.1) *LIR* et 86(2.1) *LAÉ* lorsque le créancier détient un « [d]roit sur un bien qui garantit l’exécution d’une obligation, notamment un paiement ». La définition de « garantie » au par. 224(1.3) *LIR* n’exige pas que l’entente entre le créancier et le débiteur revête une forme particulière et elle n’en exclut aucune expressément. Dès lors que le droit du créancier sur le bien du débiteur garantit l’exécution d’une obligation, notamment un paiement, il y a « garantie » au sens de cette disposition. L’énumération d’exemples dans la définition légale n’a pas pour effet de limiter la portée générale de l’expression « [d]roit sur un bien » . . . [Nous soulignons; par. 15.]

Dans ce cas, le juge Rothstein, s’exprimant au nom de la Cour, a déclaré qu’un contrat conférant un droit de compensation pouvait constituer une « garantie » au sens du par. 224(1.3) de la *LIR* même si la compensation n’est pas énumérée dans la définition et même si elle n’est ordinairement pas considérée comme telle (par. 37-40).

[209] Pour toutes ces raisons, les charges super prioritaires entrent dans la définition de « garantie » puisqu’elles constituent un « intérêt [. . .] sur un bien qui garantit l’exécution d’une obligation, notamment un paiement », par exemple le paiement du contrôleur, du prêteur temporaire et des dirigeants. Par conséquent, l’intérêt de la Couronne au titre de la fiducie réputée créée par le par. 227(4.1) de la *LIR* prend rang devant les charges super prioritaires.

[210] Notre collègue la juge Côté voit toutefois les choses différemment, mais à notre humble avis, elle fait abstraction de l’exposé du droit faisant autorité de notre Cour dans *Caisse populaire Desjardins de l’Est de Drummond*. Plus précisément, elle conclut que les charges super prioritaires ne sont pas des « garanties » au sens de la *LIR* parce que « [les charges super prioritaires d’origine judiciaire] se distinguent des garanties consensuelles et non consensuelles

proceedings that operate for the benefit of the creditors as a group” (Côté J.’s reasons, at para. 62 (emphasis deleted), quoting R. J. Wood, “Irresistible Force Meets Immovable Object: *Canada v. Canada North Group Inc.*” (2020), 63 *Can. Bus. L.J.* 85, at p. 98). With respect, nothing in the definition of security interest in the *ITA* precludes the inclusion of an interest that is designed to operate to the benefit of all creditors.

[211] Further, and irrespective of the nature of CCAA proceedings, our colleague’s conclusion is irreconcilable with this Court’s holding in *Caisse populaire Desjardins de l’Est de Drummond* and with the “expansive definition” Parliament adopted to maximize recovery (*Caisse populaire Desjardins de l’Est de Drummond*, at para. 14). The fact that the instrument is court-ordered and is for the presumed benefit of all creditors is irrelevant. It does not affect the nature of the priming charges — to secure the payment of an obligation — which is the only relevant criterion (para. 15). As for the express inclusion of “priming charges” in the definition and their creation by court order, we reiterate that “*sûreté*” and “*charge*” are explicitly included “however or whenever arising, created, deemed to arise or provided for” (*ITA*, s. 224(1.3)).

[212] Nor is Professor Wood’s commentary, and by extension, the reasoning in *DaimlerChrysler Financial Services (Debis) Canada Inc. v. Mega Pets Ltd.*, 2002 BCCA 242, 1 B.C.L.R. (4th) 237, and *Minister of National Revenue v. Schwab Construction Ltd.*, 2002 SKCA 6, 213 Sask. R. 278, of any avail to our colleague Karakatsanis J. (para. 102; see also Wood, at p. 98, fns. 51-52). While those judgments held that finance leases and conditional sales agreements did not fall under the definition of s. 224(1.3) of the *ITA* because they were not specifically listed, that reasoning was later squarely rejected in *Caisse populaire de l’Est de Drummond*. And, were that not enough, *Mega Pets* and *Schwab*, unlike the instant case, dealt with situations where property was not

classiques en ce qu’elles sont intimement liées aux procédures d’insolvabilité qui se déroulent au profit de l’ensemble des créanciers » (motifs de la juge Côté, par. 62 (soulignement omis), citant R. J. Wood, « Irresistible Force Meets Immovable Object : *Canada v. Canada North Group Inc.* » (2020), 63 *Rev. can. dr. comm.* 85, p. 98). Avec égards, rien dans la définition de garantie qui figure dans la *LIR* ne permet d’exclure une garantie conçue pour fonctionner au profit de tous les créanciers.

[211] Une fois de plus, et quelle que soit la nature des procédures intentées sous le régime de la *LACC*, la conclusion de notre collègue est inconciliable avec celle de notre Cour dans l’arrêt *Caisse populaire Desjardins de l’Est de Drummond* de même qu’avec la « définition large » retenue par le législateur pour maximiser le recouvrement (*Caisse populaire Desjardins de l’Est de Drummond*, par. 14). Le fait que l’instrument est constitué par un tribunal et qu’il est présumé bénéficier à tous les créanciers n’a aucune importance. Il n’a aucune incidence sur la nature des charges super prioritaires — soit garantir l’exécution d’une obligation, notamment un paiement — qui constitue le seul critère pertinent (par. 15). En ce qui concerne l’inclusion expresse des « charges super prioritaires » dans la définition et leur constitution par ordonnance judiciaire, nous réitérons que les « sûretés » et « charges » sont explicitement incluses « de quelque façon ou à quelque date qu’elles soient créées, réputées exister ou prévues par ailleurs » (*LIR*, par. 224(1.3)).

[212] De plus, ni l’observation du professeur Wood ni, par extension, le raisonnement avancé dans *DaimlerChrysler Financial Services (Debis) Canada Inc. c. Mega Pets Ltd.*, 2002 BCCA 242, 1 B.C.L.R. (4th) 237, et *Minister of National Revenue c. Schwab Construction Ltd.*, 2002 SKCA 6, 213 Sask. R. 278, ne sont d’une quelconque utilité pour notre collègue la juge Karakatsanis (par. 102; voir aussi Wood, p. 98, n. 51-52). Bien qu’il ait été conclu dans ces jugements que les contrats de location-financement et les contrats de vente conditionnelle n’entraient pas dans la définition énoncée au par. 224(1.3) de la *LIR* parce qu’ils n’y étaient pas précisément mentionnés, ce raisonnement a par la suite été rejeté sans ambages dans l’arrêt *Caisse populaire de l’Est de Drummond*.

transferred to the debtor, which facts were treated as determinatively supporting the conclusion that the instruments in those cases were not “security interests”. For example, under a conditional sales agreement, the seller does not have an interest in the debtor’s property because ownership rests with the seller until performance of the obligation (*Mega Pets*, at para. 32). By contrast, the priming charges secure payment out of property that remains the debtor’s.

Comme si ce n’était pas suffisant, les affaires *Mega Pets* et *Schwab*, contrairement à l’affaire en l’espèce, concernaient des situations où les biens n’avaient pas été transférés au débiteur, lequel fait avait été considéré comme déterminant et avait mené à la conclusion que les instruments en question dans ces affaires ne constituaient pas des « garanties ». Par exemple, aux termes d’un contrat de vente conditionnelle, le vendeur ne dispose d’aucun intérêt sur les biens du débiteur puisque le vendeur demeure propriétaire jusqu’à l’exécution de l’obligation (*Mega Pets*, par. 32). À l’inverse, les charges super prioritaires garantissent le paiement à partir des biens qui appartiennent toujours au débiteur.

[213] Finally, this Court’s interpretation of “security interest” in *Caisse populaire de l’Est de Drummond* is confirmed by the French version of the text. “*Sont en particulier des garanties*” is illustrative, not limitative. *Le Robert* (online) defines “*en particulier*” (in particular) as [TRANSLATION] “particularly, among others, especially, above all” (emphasis added). Unsurprisingly, the French version of s. 224(1.3) has been described as being [TRANSLATION] “as broadly worded as possible” (R. P. Simard, “Priorités et droits spéciaux de la couronne”, in *JurisClasseur Québec — Collection droit civil — Sûretés* (loose-leaf), vol. 1, by P.-C. Lafond, ed., fasc. 4, at para. 20). There is no discordance between both versions of the text. The French version conforms perfectly to the English text’s use of the verb “includes”, and confirms the plain reading of the English version.

[213] Enfin, l’interprétation que notre Cour donne au terme « garantie » dans *Caisse populaire de l’Est de Drummond* est confirmée par la version française du texte. « *Sont en particulier des garanties* » est un passage illustratif, et non limitatif. *Le Robert* (en ligne) définit « en particulier » comme suit : « particulièrement, notamment, spécialement, surtout » (nous soulignons). Sans surprise, la version française du par. 224(1.3) a été qualifiée d’« aussi large qu’il est possible de l’écrire » (R. P. Simard, « Priorités et droits spéciaux de la couronne », dans *JurisClasseur Québec — Collection de droit civil — Sûretés* (feuilles mobiles), vol. 1, par P.-C. Lafond, dir., fasc. 4, par. 20). Il n’y a aucune discordance entre les deux versions du texte. La version française correspond parfaitement à l’emploi du verbe « *includes* » dans le texte anglais, et confirme le sens clair de la version anglaise.

[214] Respectfully, our colleagues Côté and Karakatsanis JJ. frustrate the clear will of Parliament. Clear, all-inclusive language should be treated as such, and not circumvented by straining to draw distinctions of no legal significance whatsoever or by searching for what is not specifically mentioned in order to avoid the otherwise inescapable conclusion that Parliament granted absolute priority to the deemed trusts.

[214] Avec égards, nos collègues les juges Côté et Karakatsanis contrecarrent la volonté claire du législateur. Un langage clair et englobant devrait être traité comme tel et ne pas être contourné en tentant désespérément de faire des distinctions dénuées de de toute importance sur le plan juridique ou en cherchant ce qui n’est pas expressément mentionné dans le but d’éviter la conclusion, autrement inéluctable, selon laquelle le législateur voulait accorder la priorité absolue à la fiducie réputée.

(3) Conclusion

[215] It is this simple:

(3) Conclusion

[215] La conclusion est simple :

1. the Fiscal Statutes give absolute priority to the deemed trusts for source deductions over all security interests notwithstanding the CCAA;
2. the priming charges are “security interests” within the meaning of the Fiscal Statutes; and
3. the CCAA does not subordinate the claims under the deemed trusts of the Fiscal Statutes to the priming charges.

[216] This is sufficient to decide the appeal: the deemed trusts of the Fiscal Statutes have priority over the priming charges. However, in view of the respondents’ submissions that such a finding leaves the deemed trust provisions in the Fiscal Statutes in conflict with the CCAA, and that recognizing the ultimate priority of the Crown’s deemed trust renders certain provisions of the CCAA meaningless, we are compelled to explain why this is not so.

C. *The CCAA and the Fiscal Statutes Operate Harmoniously*

(1) The Broad Grant of Authority Under Section 11 of the CCAA Is Not Unlimited

[217] It is not disputed that s. 11 of the CCAA contains a grant of broad supervisory discretion and the power to “make any order that it considers appropriate in the circumstances” to give effect to that supervisory role (see J. P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2nd ed. 2013), at pp. 18-19). What is in dispute, however, are the limits to this broad power.

[218] A supervising judge’s authority to grant priming charges was not always contained in the CCAA. Prior to the 2009 amendments, it was derived from the courts’ inherent jurisdiction (*Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274, at para. 14; Q.B. reasons, at para. 105). While the amendments in some respects represented a codification of the past practice, they clarified how priming charges operated (CCAA, ss. 11.2, 11.51 and 11.52). Despite being “the engine driving the statutory scheme”, s. 11’s exercise was expressly stated

1. les lois fiscales donnent à la fiducie réputée créée à l’égard des retenues à la source priorité absolue sur toute garantie malgré la LACC;
2. les charges super prioritaires sont des « garanties » au sens des lois fiscales;
3. la LACC n’accorde pas aux charges super prioritaires préséance sur une réclamation au titre d’une fiducie réputée créée par les lois fiscales.

[216] Il n’en faut pas davantage pour trancher le pourvoi : la fiducie réputée créée par les lois fiscales a préséance sur les charges super prioritaires. Cependant, comme les intimées soutiennent que cette conclusion ferait en sorte que les dispositions relatives à la fiducie réputée contenues dans les lois fiscales entrent en conflit avec la LACC et ferait perdre leur sens à certaines dispositions de la LACC, nous nous devons d’expliquer pourquoi ce n’est pas le cas.

C. *La LACC et les lois fiscales s’appliquent de façon harmonieuse*

(1) Les larges pouvoirs conférés par l’art. 11 de la LACC ne sont pas sans limites

[217] Il n’est pas contesté que l’art. 11 de la LACC confère au tribunal un vaste pouvoir discrétionnaire de surveillance ainsi que le pouvoir de « rendre toute ordonnance qu’il estime indiquée » afin de donner effet à ce rôle de surveillance (voir J. P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2^e éd. 2013), p. 18-19). Ce sont plutôt les limites de ce vaste pouvoir qui sont contestées.

[218] La LACC n’a pas toujours conféré à un juge surveillant le pouvoir d’accorder des charges super prioritaires. Avant les modifications de 2009, ce pouvoir découlait de la compétence inhérente du tribunal (*Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274, par. 14; motifs de la C.B.R., par. 105). Les modifications visaient, à certains égards, à codifier les pratiques antérieures, mais elles visaient aussi à clarifier le fonctionnement des charges super prioritaires (LACC, art. 11.2, 11.51 et 11.52). Bien que l’art. 11 ait été qualifié de « moteur

by Parliament to be “subject to the restrictions set out in this Act” (see 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, at paras. 48-49, citing *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 36). Three such restrictions are significant here.

(a) *The Continued Operation of the Deemed Trusts for Unremitted Source Deductions (Section 37(2))*

[219] The first restriction on the authority to grant priming charges is found in s. 37(2) of the CCAA. This provides for the continued operation of the deemed trusts under the Fiscal Statutes in a CCAA proceeding — a point this Court *repeatedly* highlighted in *Century Services*, at paras. 78-81. At the hearing of this appeal, the respondents argued that s. 37(1) nullifies the Crown’s priority in respect of all deemed trusts under the CCAA, and that s. 37(2) acts merely to reincorporate the deemed trusts under the Fiscal Statutes into CCAA proceedings without their absolute priority. This tortured interpretation misconceives the effect of s. 37(1).

[220] Section 37(1) provides that, despite any deemed trust provision in federal or provincial legislation, “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”, but it is expressly made “[s]ubject to subsection (2)”. Through s. 37(2), Parliament also preserved the operation of the deemed trusts under the Fiscal Statutes within CCAA proceedings by providing that “[s]ubsection (1) does not apply in respect of amounts deemed to be held in trust under [the Fiscal Statutes]”. In the face of Parliament’s clear direction that the deemed trusts operate “notwithstanding” any other enactment, and the express preservation of the deemed trusts in the CCAA, there is simply no basis whatsoever for reading s. 37 as

du régime législatif », le législateur a expressément déclaré que le pouvoir qu’il confère doit être exercé « sous réserve des restrictions prévues par la présente loi » (voir 9354-9186 *Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 521, par. 48-49, citant *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 36). Trois restrictions de ce genre importent en l’espèce.

a) *Le fonctionnement continu des fiducies réputées créées à l’égard des retenues à la source non versées (par. 37(2))*

[219] La première restriction imposée au pouvoir d’accorder des charges super prioritaires est énoncée au par. 37(2) de la LACC, lequel prévoit le maintien en vigueur de la fiducie réputée créée par les lois fiscales dans le cadre d’une procédure engagée sous le régime de la LACC — un point que notre Cour a souligné *maintes fois* dans l’arrêt *Century Services*, par. 78 à 81. À l’audition du présent pourvoi, les intimées ont soutenu que le par. 37(1) a pour effet de neutraliser la priorité de la Couronne en regard de toutes les fiducies réputées sous le régime de la LACC et que le par. 37(2) vise simplement à réintégrer les fiducies réputées créées par les lois fiscales dans les procédures engagées sous le régime de la LACC, mais sans leur priorité absolue. Cette interprétation tortueuse se méprend sur l’effet du par. 37(1).

[220] Le paragraphe 37(1) prévoit que, par dérogation à toute disposition législative fédérale ou provinciale en matière de fiducie réputée, « aucun des biens de la compagnie débitrice ne peut être considéré comme [un bien détenu en fiducie pour Sa Majesté] par le seul effet d’une telle disposition ». Toutefois, cela ne s’applique que « [s]ous réserve du paragraphe (2) ». Au moyen du par. 37(2), le législateur a également protégé l’application de la fiducie réputée créée par les lois fiscales dans le cadre de procédures engagées sous le régime de la LACC en disposant que « [l]e paragraphe (1) ne s’applique pas à l’égard des sommes réputées détenues en fiducie aux termes des [lois fiscales] ». Étant donné la directive claire du législateur voulant que la fiducie réputée s’applique « malgré » tout autre

invalidating the deemed trust provisions under the Fiscal Statutes only to revive them with a conveniently lesser priority. Such an interpretation finds no support in the text, context, or purpose of the statutory schemes. Rather, all those considerations support the view that the deemed trusts under the Fiscal Statutes are preserved in CCAA proceedings in both form and substance, along with their absolute priority.

[221] Before turning to the second restriction, we note each of our colleagues Karakatsanis J. and Côté J. fail to give effect to Parliament’s decision, expressed in clear statutory text, to “preserv[er] deemed trusts and asser[t] Crown priority only in respect of source deductions” under the CCAA (*Century Services*, at para. 45). For the same reason, the reliance they place on *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, is misconceived. There, the Court held that the deemed trust created by provincial legislation was not a “true trust” so as to fall outside the debtor’s property under what is now s. 67(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”). That is not this case. Unlike the deemed trust in *Henfrey*, the deemed trusts of the Fiscal Statutes receive a particular treatment in bankruptcy and insolvency proceeding because they are preserved by s. 37(2) of the CCAA and s. 67(3) of the BIA. Further, while the Court in *Henfrey* concluded that the deemed trust was ineffective in bankruptcy because the commingling of assets rendered the money subject to the deemed trusts untraceable, this rationale has no application to s. 227(4.1). In *First Vancouver*, this Court noted that “by deeming the trust to be effective ‘at any time’ the debtor is in default, the amendments serve to strengthen the conclusion that the Minister is not required to trace its interest to assets which belonged to the tax debtor at the time the source deductions were made” (para. 37). Again, no conclusions regarding the nature of the deemed trusts flow from the fact that tracing is irrelevant under s. 227(4.1):

texte législatif, ainsi que la protection de la fiducie réputée expressément prévue par la LACC, il n’y a tout simplement aucune raison d’interpréter l’art. 37 comme s’il avait pour effet d’invalider les dispositions relatives à la fiducie réputée contenues dans les lois fiscales pour ensuite les rétablir, comme par hasard, avec une priorité de rang inférieure. Une telle interprétation ne trouve aucun appui dans le libellé, le contexte ou l’objectif des régimes législatifs. Tous ces éléments appuient plutôt la thèse selon laquelle, dans le cadre de procédures engagées sous le régime de la LACC, la fiducie réputée créée par les lois fiscales est préservée, autant dans la forme que sur le fond, tout comme sa priorité absolue.

[221] Avant de nous pencher sur la deuxième restriction, nous soulignons qu’aucune de nos collègues les juges Karakatsanis et Côté ne donne effet à la décision du législateur, exprimée dans un texte législatif clair, de « préserv[er] les fiducies réputées et [d’]établi[r] la priorité de la Couronne seulement à l’égard des retenues à la source » sous le régime de la LACC (*Century Services*, par. 45). Pour la même raison, l’importance qu’elles accordent à l’arrêt *Colombie-Britannique c. Henfrey Samson Belair Ltd.*, [1989] 2 R.C.S. 24, est mal fondée. Dans cet arrêt, la Cour a conclu que la fiducie réputée créée par la loi provinciale n’était pas une « fiducie véritable » exclue du patrimoine de la débitrice en vertu de ce qui est maintenant l’al. 67(1)a) de la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, c. B-3 (« LFI »). La présente espèce est différente. Contrairement à la fiducie réputée en question dans l’arrêt *Henfrey*, la fiducie réputée créée par les lois fiscales reçoit un traitement particulier dans le cadre d’une procédure en matière de faillite et d’insolvabilité parce qu’elle est préservée par le par. 37(2) de la LACC et le par. 67(3) de la LFI. En outre, bien que la Cour ait conclu dans *Henfrey* que la fiducie réputée était inopérante en cas de faillite du fait que le regroupement des biens rendait non identifiable le montant assujéti à la fiducie réputée, ce raisonnement ne s’applique pas au par. 227(4.1). Dans *First Vancouver*, notre Cour a souligné que « comme elles prévoient l’application de la fiducie réputée en cas de défaut du débiteur (en anglais, « at any time »), les modifications appuient la conclusion que le ministre n’a pas à rattacher

the deemed trusts are statutory instruments and the question is one of operation, *not* characterization.

(b) *Priming Charges Attach Only to the Property of the Debtor Company*

[222] The second restriction on the CCAA's broad authority to grant priming charges is that the CCAA requires priming charges to attach only to "all or part" of the property of the debtor's company (s. 11.2(1); see also ss. 11.51(1) and 11.52(1)). Here, Parliament evinces a clear intent to preserve the ultimate priority it afforded the deemed trusts under the Fiscal Statutes. This is because, by operation of s. 227(4.1) of the *ITA* and s. 37(2) of the CCAA, the unremitted source deductions are deemed *not* to form part of the property of the debtor's company.

[223] Parliament could not have been more explicit: the source deductions are deemed never to form part of the company's property and, if there is a default in remittances, the Crown is deemed to obtain beneficial ownership in the tax debtor's property in the amount of the unremitted source deductions that it can collect "notwithstanding" any other enactment or security interest. Whether this is a true ownership interest is irrelevant to this appeal as the legislation *deems* the Crown to obtain beneficial ownership for these purposes. It follows that the priming charges cannot supersede the Crown's deemed trust claim because they may attach *only to the property of the debtor's company*, of which Parliament took great care to ensure the source deductions were deemed to form no part. As Michael J. Hanlon explains:

While it has been held that an interim financing charge may rank ahead of the deemed trusts existing in favour

son droit aux biens qui appartenaient au débiteur fiscal lorsque les retenues à la source ont été faites » (par. 37). Encore une fois, aucune conclusion quant à la nature de la fiducie réputée ne découle du fait que l'origine du montant qui y est assujéti n'est pas pertinente au regard du par. 227(4.1) : la fiducie réputée est un instrument législatif et la question qui se pose concerne son fonctionnement, *non* sa qualification.

b) *Les charges super prioritaires ne grèvent que les biens de la compagnie débitrice*

[222] La deuxième restriction imposée au vaste pouvoir de constituer des charges super prioritaires que confère la *LACC* est que celle-ci prévoit que les charges super prioritaires ne peuvent se rattacher qu'à « tout ou partie » des biens de la compagnie débitrice (par. 11.2(1); voir aussi les par. 11.51(1) et 11.52(1)). Le législateur exprime ainsi l'intention claire de préserver la priorité absolue accordée à la fiducie réputée créée par les lois fiscales. Effectivement, par application du par. 227(4.1) de la *LIR* et du par. 37(2) de la *LACC*, les retenues à la source non versées sont réputées *ne pas* faire partie des biens de la compagnie débitrice.

[223] Le législateur n'aurait pas pu être plus clair : les retenues à la source sont réputées ne jamais faire partie des biens de la compagnie et, en cas de non-versement, la Couronne est réputée obtenir un droit de bénéficiaire sur les biens du débiteur fiscal jusqu'à concurrence du montant des retenues à la source non versées, droit dont elle peut se prévaloir « malgré » tout autre texte législatif ou toute autre garantie. Qu'il s'agisse ou non d'un véritable intérêt propriétaire, cela importe peu en l'espèce, car selon la législation, la Couronne est *réputée* détenir un droit de bénéficiaire à ces fins. Il s'ensuit que les charges super prioritaires ne peuvent pas prendre rang devant la réclamation de la Couronne au titre de la fiducie réputée puisqu'elles peuvent se rattacher *uniquement* aux biens de la compagnie débitrice, dont les retenues à la source sont réputées ne pas faire partie comme s'en est assuré avec soin le législateur. Comme l'explique Michael J. Hanlon :

[TRADUCTION] Bien qu'il ait été jugé qu'une charge en faveur d'un prêteur temporaire peut prendre rang devant

of the Canada Revenue Agency with respect to amounts owing on account of unremitted source deductions, this appears to be incorrect. Property deemed to be held in trust pursuant to the provisions creating the deemed trust are deemed not to form part of the debtor's estate, and given that those deemed trusts with respect to source deductions, are preserved in a CCAA context, the interim financing charge would not attach to those assets. [Emphasis added; footnotes omitted.]

(*Halsbury's Laws of Canada — Bankruptcy and Insolvency* (2017 Reissue), at HBI-376)

(c) *The Definition of “Secured Creditor” (Section 2)*

[224] The third restriction on the CCAA's broad authority to grant priming charges is that the court “may order that the security or charge rank in priority over the claim of any secured creditor of the company” (ss. 11.2(2), 11.51(2) and 11.52(2)). Also, the definition of “secured creditor” in s. 2(1) of the CCAA makes it manifestly clear that the Crown is not a “secured creditor” in respect of its deemed trust claims under the Fiscal Statutes:

secured creditor means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds;

This definition highlights two relevant considerations. First, the definition should be read as

une fiducie réputée créée en faveur de l'Agence du revenu du Canada à l'égard d'un montant dû au titre de retenues à la source non versées, cette conclusion semble incorrecte. Les biens réputés être détenus en fiducie en vertu des dispositions créant la fiducie réputée sont considérés comme ne faisant pas partie du patrimoine du débiteur, et puisque la fiducie réputée créée à l'égard des retenues à la source est préservée sous le régime de la LACC, la charge en faveur d'un prêteur temporaire ne se rattacherait pas à ces biens. [Nous soulignons; notes en bas de page omises.]

(*Halsbury's Laws of Canada — Bankruptcy and Insolvency* (réédition 2017), HBI-376)

c) *La définition de « créancier garanti » (art. 2)*

[224] La troisième restriction imposée au vaste pouvoir de constituer des charges super prioritaires que confère la LACC est que le tribunal « peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie » (par. 11.2(2), 11.51(2) et 11.52(2)). De plus, selon la définition de « créancier garanti » énoncée au par. 2(1) de la LACC, il est tout à fait clair que la Couronne ne peut être considérée comme tel au regard des réclamations relatives à la fiducie réputée que lui accordent les lois fiscales :

créancier garanti Détenteur d'hypothèque, de gage, charge, nantissement ou privilège sur ou contre l'ensemble ou une partie des biens d'une compagnie débitrice, ou tout transport, cession ou transfert de la totalité ou d'une partie de ces biens, à titre de garantie d'une dette de la compagnie débitrice, ou un détenteur de quelque obligation d'une compagnie débitrice garantie par hypothèque, gage, charge, nantissement ou privilège sur ou contre l'ensemble ou une partie des biens de la compagnie débitrice, ou un transport, une cession ou un transfert de tout ou partie de ces biens, ou une fiducie à leur égard, que ce détenteur ou bénéficiaire réside ou soit domicilié au Canada ou à l'étranger. Un fiduciaire en vertu de tout acte de fiducie ou autre instrument garantissant ces obligations est réputé un créancier garanti pour toutes les fins de la présente loi sauf la votation à une assemblée de créanciers relativement à ces obligations.

Cette définition fait ressortir deux considérations pertinentes. Premièrement, la définition devrait être

encompassing two classes of creditors. And second, the use of the word “trust” must be given legal significance.

[225] As to the first consideration, we accept the Crown’s submission that the proper reading of the definition of secured creditor references only two classes of secured creditors: (i) holders of direct security, and (ii) holders of secured bonds. So understood, a secured creditor means either

a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company,

or

a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company

The reference to “trust” appears only in relation to an instrument securing a bond of the debtor company. The definition must be read as “secured creditor means . . . a holder of any bond of a debtor company secured by . . . a trust in respect of, all or any property of the debtor company”. Accordingly, holders of an interest under a deemed trust are not a third class of creditors (A. Prévost, “Que reste-t-il de la fiducie réputée en matière de régimes de retraite?” (2016), 75 *R. du B.* 23, at p. 58).

[226] While finding this interpretation “initially attractive”, the majority of the Court of Appeal ultimately rejected this reading. It did so because, irrespective of whether the definition needs a third reference to a “holder of a trust” drafted in parallel to the first two classes of creditors, the Crown’s interest could be classified as a “charge” and is therefore captured by the first class of secured creditors

interprétée comme englobant deux catégories de créanciers. Deuxièmement, il faut attribuer de l’importance, sur le plan juridique, à l’emploi du mot « fiducie ».

[225] En ce qui concerne la première considération, nous acceptons l’argument de la Couronne selon lequel la juste interprétation de la définition de créancier garanti ne renvoie qu’à deux catégories de créanciers garantis : (i) les détenteurs de garanties directes; (ii) les détenteurs d’obligations garanties. Par conséquent, on entend par créancier garanti :

un détenteur d’hypothèque, de gage, charge, nantissement ou privilège sur ou contre l’ensemble ou une partie des biens d’une compagnie débitrice, ou tout transport, cession ou transfert de la totalité ou d’une partie de ces biens à titre de garantie d’une dette de la compagnie débitrice

ou

un détenteur de quelque obligation d’une compagnie débitrice garantie par hypothèque, gage, charge, nantissement ou privilège sur ou contre l’ensemble ou une partie des biens de la compagnie débitrice, ou un transport, une cession ou un transfert de tout ou partie de ces biens, ou une fiducie à leur égard . . .

Le renvoi à la « fiducie » n’est lié qu’à un instrument garantissant une obligation de la compagnie débitrice. La définition de « créancier garanti » inclut donc un « détenteur de quelque obligation d’une compagnie débitrice garantie par [. . .] une fiducie à [l’égard de l’ensemble ou d’une partie des biens de la compagnie débitrice] ». En conséquence, les détenteurs d’un intérêt en vertu d’une fiducie réputée ne forment pas une troisième catégorie de créanciers (A. Prévost, « Que reste-t-il de la fiducie réputée en matière de régimes de retraite? » (2016), 75 *R. du B.* 23, p. 58).

[226] Bien qu’ils aient trouvé cette interprétation [TRADUCTION] « intéressante à première vue », les juges majoritaires de la Cour d’appel l’ont ultimement rejetée. Selon eux, indépendamment de la question de savoir si la définition devrait faire mention des « détenteurs de fiducie » comme troisième catégorie, le droit de la Couronne pourrait être qualifié de « charge », faisant ainsi d’elle un membre de la

(C.A. reasons, at paras. 42-43). Respectfully, this is incorrect. Deemed trusts are not covered by the word “charge”. To conclude that the word “charge” encompasses “deemed trusts” under the first class of secured creditors when “charge” and “trust” are listed distinctly under the second class of secured creditors (holders of secured bonds) would be incoherent and run contrary to legislative presumptions in statutory interpretation. Why would Parliament include a specific reference to *trusts* if they are already covered by *charge*? Parliament is presumed to avoid “superfluous or meaningless words, [and] phrases” (*Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at para. 178). The deliberate and distinct text of “trust” and “charge” shows that it was not Parliament’s intention to have holders of deemed trusts subsumed under “charge” such that the Crown in this circumstance would become a secured creditor.

[227] In any case, if there were only one class of creditor, the Crown would not be a secured creditor with respect to the deemed trust claim under the Fiscal Statutes. While Parliament distinguished between “deemed or actual trust[s]” in s. 224(1.3) of the *ITA*, it made no such distinction in the definition of secured creditor. Parliament is presumed to legislate with intent and chose its words carefully. Our role as a court with respect to legislation is interpretation, not drafting. We must ascribe legal significance to Parliament’s choice of text — that is, to the words Parliament chose and *did not* choose.

(d) “*Restrictions*” Under Section 11 of the CCAA

[228] Our colleague Karakatsanis J. agrees with our analysis of the priming charge provisions, but she does not seem to view them as “restrictions” within the meaning of s. 11 because “[t]he general language of s. 11 should not . . . be ‘restricted by the

première catégorie des créanciers garantis (motifs de la C.A., par. 42-43). Avec égards, ce raisonnement est erroné. Le terme « charge » ne vise pas la fiducie réputée. En ce qui concerne la première catégorie de créanciers garantis, conclure que le terme « charge » englobe la « fiducie réputée » alors que les termes « charge » et « fiducie » sont indiqués séparément pour la deuxième catégorie de créanciers garantis (détenteurs d’obligations garanties) serait incohérent et irait à l’encontre des présomptions en matière d’interprétation législative. Pourquoi le législateur ferait-il expressément mention des *fiducies* si celles-ci sont déjà visées par les *charges*? Le législateur est censé éviter « les termes [et] les phrases [. . .] superflus et dénués de sens » (*Bristol-Myers Squibb Co. c. Canada (Procureur général)*, 2005 CSC 26, [2005] 1 R.C.S. 533, par. 178). L’emploi délibéré et distinct des termes « fiducie » et « charge » montre que le législateur ne voulait pas que les fiducies réputées soient visées par le terme « charge » et que la Couronne puisse, à titre de détentrice d’une fiducie réputée, être considérée comme un créancier garanti dans cette situation.

[227] De toute façon, s’il n’y avait qu’une seule catégorie de créanciers, la Couronne ne serait pas un créancier garanti au regard de la réclamation relative à la fiducie réputée créée par les lois fiscales. Alors que le législateur a établi une distinction entre les « fiducies réputées ou réelles » au par. 224(1.3) de la *LIR*, il n’a pas établi la même distinction dans la définition de créancier garanti. Le législateur est présumé légiférer sciemment et choisir ses mots soigneusement. En tant que tribunal, notre rôle en ce qui concerne la législation en est un d’interprétation et non de rédaction. Nous devons attribuer de l’importance, sur le plan juridique, au libellé choisi par le législateur — c’est-à-dire aux termes que le législateur a et à ceux qu’il *n’a pas* choisis.

d) Les « restrictions » visées à l’art. 11 de la LACC

[228] Notre collègue la juge Karakatsanis souscrit à notre analyse des dispositions relatives aux charges super prioritaires, mais elle ne semble pas les considérer comme des « restrictions » au sens de l’article 11 parce que « “[l]a possibilité [. . .] de rendre

availability of more specific orders” (Karakatsanis J.’s reasons, at para. 170, citing *Century Services*, at para. 70). With respect, as a matter of law and statutory interpretation this view is simply unavailable to our colleague. Neither s. 11 nor the court’s inherent jurisdiction can “empower a judge . . . to make an order negating the unambiguous expression of the legislative will” (*Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, at p. 480; see also *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 32). Parliament has imposed clear restrictions on the courts’ power to give priority to priming charges. It is one thing to rely on s. 11 as a source of general authority even when other specific orders are available; it is another to misconstrue s. 11 as a source of unfettered authority to circumvent such unambiguous restrictions. While courts may use their general s. 11 power to create priming charges for purposes other than those that are specifically enumerated (see Wood, at pp. 90-91), Parliament has clearly expressed its intention to restrict any such charge in a critical way — it cannot take priority over the Crown’s deemed trust.

[229] For the same reason, we respectfully find untenable our colleague Justice Moldaver’s suggestion that it is unclear whether there are restrictions *internal* to the CCAA itself that would prevent a court from using its power under s. 11 to order a priming charge in priority to the Crown’s deemed trust claim. This statement does not account for Parliament’s clear intention, recorded in s. 37(2), to preserve the Crown’s right to be paid in absolute priority over all secured creditors in CCAA proceedings. It also renders superfluous the restrictions on the court’s authority to prioritize priming charges under ss. 11.2(2), 11.51(2) and 11.52(2) of the CCAA.

des ordonnances plus spécifiques n’a pas pour effet de restreindre” la portée des termes généraux utilisés à l’art. 11 » (motifs de la juge Karakatsanis, par. 170, citant *Century Services*, par. 70). À notre humble avis, sur le plan du droit et de l’interprétation législative, notre collègue ne peut tout simplement pas faire valoir ce point de vue. Ni l’art. 11 ni la compétence inhérente du tribunal « n’autorise [un juge] à rendre une ordonnance qui va à l’encontre de la volonté clairement exprimée du législateur » (*Baxter Student Housing Ltd. c. College Housing Co-operative Ltd.*, [1976] 2 R.C.S. 475, p. 480; voir aussi *R. c. Caron*, 2011 CSC 5, [2011] 1 R.C.S. 78, par. 32). Le législateur a imposé des restrictions claires au pouvoir des tribunaux d’accorder préséance à des charges super prioritaires. C’est une chose que de se fonder sur l’art. 11 en guise de source de pouvoir général même lorsque d’autres ordonnances plus spécifiques peuvent être rendues; c’en est une autre que d’interpréter l’art. 11, à tort, comme une source de pouvoir absolu de façon à contourner des restrictions sans équivoque. Bien que les tribunaux puissent utiliser le pouvoir général que leur confère l’art. 11 afin de créer des charges super prioritaires à d’autres fins que celles expressément énumérées (voir Wood, p. 90-91), le législateur a clairement manifesté son intention de restreindre cette charge de manière importante — elle ne peut avoir préséance sur la fiducie réputée de la Couronne.

[229] Pour la même raison, nous jugeons, avec égards, insoutenable la proposition de notre collègue le juge Moldaver selon laquelle on ne saurait dire s’il existe des restrictions *internes* à la LACC elle-même qui empêcherait un tribunal d’user du pouvoir que lui accorde l’art. 11 pour ordonner qu’une charge super prioritaire ait préséance sur la réclamation de la Couronne au titre d’une fiducie réputée. Cette affirmation ne tient pas compte de l’intention claire du législateur, consignée au par. 37(2), de préserver le droit de la Couronne d’être payée en priorité absolue aux dépens de tous les créanciers garantis dans une procédure intentée sous le régime de la LACC. Elle rend en outre superflue la limitation du pouvoir du tribunal de primer les charges super prioritaires en vertu des par. 11.2(2), 11.51(2) et 11.52(2) de la LACC.

[230] Further, our colleague Moldaver J. says it is unnecessary to “define the particular nature or operation of the” deemed trust under the *ITA* (para. 255), and relies on the “notwithstanding” language of s. 227(4.1) of the *ITA* to determine whether the Crown’s claim can have priority over priming charges. This interpretation effectively reads in a conflict in the statutory schemes, despite this Court’s clear direction that “an interpretation which results in conflict should be eschewed unless it is unavoidable” (*Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 47). In any event, this is not an *unavoidable* conflict: there is simply *no* conflict. Parliament *avoided* any conflict between the *CCAA* and the *ITA* by imposing restrictions upon the court’s authority under s. 11 of the *CCAA*.

(e) *Structure of Crown Claims Under the CCAA*

[231] Finally, while not a “restrictio[n] set out in [the *CCAA*]”, as specified in s. 11, the cogency of the statutory scheme as a whole depends on an interpretation where the Crown cannot be a secured creditor. This is so because classifying the Crown as “secured creditor” would disrupt the structure of Crown claims that the *CCAA* clearly defines at ss. 37 to 39 (Wood, at p. 98). Section 37 applies to deemed trust claims, with s. 37(1) providing that deemed trusts in favour of the Crown are ineffective under the *CCAA*, as a general rule, and s. 37(2) providing an exemption for the deemed trust for source deductions. Section 38(1) sets out the general rule that the Crown’s secured claims rank as unsecured claims, with specific exemptions at s. 38(2) and (3). Finally, s. 39(1) preserves the Crown’s secured creditor status if it registers before the commencement of the *CCAA* proceedings but, under s. 39(2), that security is subordinate to prior perfected security interests.

[230] De plus, notre collègue le juge Moldaver mentionne qu’il n’est pas nécessaire de « définir la nature ou le fonctionnement particulier » de la fiducie réputée sous le régime de la *LIR* (par. 255), et il s’appuie sur la disposition de dérogation au par. 227(4.1) de la *LIR* pour décider si la réclamation de la Couronne peut prendre rang devant des charges super prioritaires. Cette interprétation a pour effet de créer un conflit dans les régimes législatifs, en dépit de la directive claire de notre Cour selon laquelle « une interprétation qui donne lieu à un conflit devrait être évitée dans la mesure du possible » (*Lévis (Ville) c. Fraternité des policiers de Lévis Inc.*, 2007 CSC 14, [2007] 1 R.C.S. 591, par. 47). Quoi qu’il en soit, ce n’est pas un conflit *inévit*able : il n’y a tout simplement *aucun* conflit. Le législateur a *évit*é tout conflit entre la *LACC* et la *LIR* en restreignant le pouvoir dont le tribunal est investi par l’art. 11 de la *LACC*.

e) *Structure des réclamations de la Couronne sous le régime de la LACC*

[231] Enfin, bien qu’il ne s’agisse pas d’une « restrictio[n] prévu[e] par la [*LACC*] », comme le précise l’art. 11, la cohérence du régime législatif dans son ensemble dépend d’une interprétation selon laquelle la Couronne n’est pas un créancier garanti. De fait, qualifier la Couronne de « créancier garanti » aurait pour effet de perturber la structure des réclamations de la Couronne que la *LACC* définit de façon claire aux art. 37 à 39 (Wood, p. 98). L’article 37 s’applique aux réclamations au titre d’une fiducie réputée. Le paragraphe 37(1) prévoit que les fiducies réputées créées en faveur de la Couronne sont inopérantes sous le régime de la *LACC*, de façon générale, et le par. 37(2) prévoit une exemption pour les fiducies réputées créées à l’égard des retenues à la source. Le paragraphe 38(1) établit la règle générale selon laquelle les réclamations garanties de la Couronne prennent rang comme réclamations non garanties, sous réserve des exceptions énoncées aux par. 38(2) et (3). Enfin, le par. 39(1) protège la réclamation garantie de la Couronne si elle a été enregistrée avant l’introduction d’une procédure intentée sous le régime de la *LACC*, mais, suivant le par. 39(2), cette réclamation garantie est subordonnée aux garanties opposables antérieures.

[232] This leads us to question why Parliament would expressly “preserve” the deemed trusts of the Fiscal Statutes by operation of s. 37(2), only then to rank the Crown as an unsecured creditor by the operation of s. 38(1). Unlike the interpretation that affords the deemed trusts ultimate priority, allowing the Crown to be reduced to an unsecured creditor in respect of its deemed trust claims would render s. 37(2) almost meaningless. Further, this interpretation would require the Crown to register its claim under s. 39(1) to preserve its status because the deemed trust is not afforded the exemption under s. 38. It would be illogical for Parliament to confer greater protection on secured claims afforded an exemption under s. 38(2) or (3) than it conferred on deemed trusts for source deductions, when the clear objective was to confer “absolute priority” on the latter (*First Vancouver*, at paras. 26-28).

[233] We note that Professor Wood is not alone in recognizing that “sections 38 and 39 of the CCAA govern the conditions upon which a Crown claim can be viewed as ‘secured’ for the purposes of the CCAA” (F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at §79.2). Since the deemed trusts for unremitted source deductions under the Fiscal Statutes do not meet the conditions of these sections, it follows that the Crown’s claim is not “secured”.

[234] In our view, a plain reading of the definition of secured creditor within the context of the broader statutory scheme results in a single inescapable conclusion. That is, there are three classes of Crown claims under the CCAA: (1) claims pursuant to deemed trusts continued under the CCAA; (2) secured claims; and (3) unsecured claims. The claims for unremitted source deductions fall under the first type: claims pursuant to deemed trusts continued under the CCAA.

[232] Ce qui précède nous amène à nous demander pourquoi le législateur aurait expressément « protégé » les fiducies réputées créées par les lois fiscales par l’application du par. 37(2), pour ensuite faire de la Couronne un créancier non garanti par l’application du par. 38(1). Contrairement à l’interprétation qui accorde la priorité absolue à la fiducie réputée, le fait de traiter la Couronne comme un créancier non garanti à l’égard de ses réclamations au titre d’une fiducie réputée ferait perdre presque tout son sens au par. 37(2). En outre, cette interprétation exigerait de la Couronne qu’elle enregistre sa réclamation aux termes du par. 39(1) pour protéger son rang puisque la fiducie réputée n’est pas visée par l’exception prévue à l’art. 38. Il serait illogique que le législateur ait accordé aux réclamations garanties visées par les exceptions prévues aux par. 38(2) ou (3) une protection plus grande que celle accordée à la fiducie réputée créée à l’égard des retenues à la source, alors que l’objectif manifeste était de conférer une « priorité absolue » à la fiducie réputée (*First Vancouver*, par. 26-28).

[233] Nous soulignons que le professeur Wood n’est pas seul à reconnaître que les [TRADUCTION] « articles 38 et 39 de la LACC régissent les conditions dans lesquelles une réclamation de la Couronne peut être considérée comme étant “garantie” pour l’application de la LACC » (F. L. Lamer, *Priority of Crown Claims in Insolvency* (feuilles mobiles), §79.2). Puisque la fiducie réputée créée par les lois fiscales à l’égard des retenues à la source non versées ne satisfait pas aux conditions de ces articles, la réclamation de la Couronne n’est pas « garantie ».

[234] À notre avis, le sens ordinaire de la définition de créancier garanti dans le contexte du régime législatif général ne peut donner lieu qu’à une seule conclusion inéluctable, à savoir qu’il existe trois catégories de réclamations de la Couronne en vertu de la LACC : (1) les réclamations au titre d’une fiducie réputée maintenue en vigueur sous le régime de la LACC; (2) les réclamations garanties; (3) les réclamations non garanties. Les réclamations à l’égard des retenues à la source non versées entrent dans la première catégorie, soit les réclamations au titre d’une fiducie réputée maintenue sous le régime de la LACC.

(2) Recognizing the Ultimate Priority of the Crown's Deemed Trust Does Not Defeat the Purpose of any Provision of the CCAA

[235] For two further and related reasons, the majority at the Court of Appeal and the respondents resist the conclusion that the Crown's deemed trust enjoys absolute priority.

(a) *Protection of Crown Claims Under Section 6(3)*

[236] First, the majority held that granting ultimate priority to the deemed trusts would render s. 6(3) of the CCAA meaningless. This provision prohibits the court from sanctioning a compromise or arrangement unless it provides for payment in full to the Crown, within six months of the sanction of the plan, of all amounts due to the Crown. The majority reasoned that if the Crown is always paid first for its deemed trust claims under the Fiscal Statutes, there would be no need to protect the Crown claims under s. 6(3).

[237] Respectfully, this conclusion is erroneous. A review of the purpose and scope of s. 6(3) of the CCAA is clear: it operates only where there is an arrangement or compromise put to the court, and it protects the entirety of the Crown claim pursuant to s. 224(1.2) of the ITA and similar provisions of the Fiscal Statutes. This includes claims *not* subject to the deemed trusts under the Fiscal Statutes, such as income tax withholdings, employer contributions to employment insurance and CPP, interest and penalties. In contrast, the deemed trusts arise immediately and operate continuously “from the time the amount was deducted or withheld” from the employee's remuneration, and apply to *only those* deductions. It follows, then, that, without s. 6(3), the Crown would be guaranteed entitlement only to unremitted source deductions when the court sanctions a compromise or arrangement, and not to its other claims under s. 224(1.2) of the ITA. This is because most of the

(2) Reconnaître la priorité absolue de la fiducie réputée de la Couronne ne va à l'encontre de l'objectif d'aucune disposition de la LACC

[235] Pour deux autres raisons connexes, les juges majoritaires de la Cour d'appel et les intimées refusent de conclure que la fiducie réputée de la Couronne bénéficie d'une priorité absolue.

a) *Protection des réclamations de la Couronne en application du par. 6(3)*

[236] Premièrement, les juges majoritaires ont statué que le fait d'accorder une priorité absolue à la fiducie réputée ferait perdre son sens au par. 6(3) de la LACC. Cette disposition interdit au tribunal d'homologuer une transaction ou un arrangement qui ne prévoit pas le paiement intégral à la Couronne, dans les six mois suivant l'homologation, de toutes les sommes qui lui sont dues. Les juges majoritaires ont estimé que si les réclamations de la Couronne au titre d'une fiducie réputée créée par les lois fiscales sont toujours payées en priorité, il n'y a pas lieu de protéger les réclamations de la Couronne visées par le par. 6(3).

[237] Avec égards, cette conclusion est erronée. L'examen de l'objectif et de la portée du par. 6(3) de la LACC est sans équivoque : ce paragraphe s'applique seulement si une transaction ou un arrangement est soumis au tribunal, et il protège l'intégralité de la réclamation de la Couronne au titre du par. 224(1.2) de la LIR et des dispositions semblables des lois fiscales. Sont comprises les réclamations qui *ne sont pas* assujetties à une fiducie réputée créée par les lois fiscales, comme les retenues d'impôt, les cotisations d'un employeur à l'assurance-emploi et au RPC, les intérêts et les pénalités. En revanche, la fiducie réputée s'applique immédiatement et de façon continue « à compter du moment où le montant est déduit ou retenu » sur le salaire d'un employé, et elle s'applique *uniquement à ces* retenues. Par conséquent, en l'absence du par. 6(3), les réclamations de la Couronne à l'égard des retenues à la source non versées seraient garanties une fois que le tribunal

Crown's claims rank as unsecured under s. 38 of the CCAA.

[238] It bears emphasizing that s. 6(3) does *not* apply where no arrangement is proposed or to CCAA proceedings which involve the liquidation of the debtor's assets. Such "liquidating CCAAs" are "now commonplace in the CCAA landscape" (*Callidus Capital Corp.*, at para. 42). The absolute priority of the deemed trusts under the Fiscal Statutes, continued by s. 37(2) of the CCAA, provides protection to the Crown's claim for unremitted source deductions in liquidating CCAAs. Each of our colleagues Côté and Karakatsanis JJ. deprive the Crown of its guaranteed entitlements in such cases, despite Parliament having unambiguously granted "absolute priority" to claims for unremitted source deductions (Department of Finance Canada).

[239] We note that our colleague Karakatsanis J. does not conclude that s. 6(3) is rendered nugatory by our interpretation; rather, she says that, since the term "beneficial ownership" as it is used in the deemed trusts does not have the same meaning at common law, we must look to the CCAA to ascertain the Crown's rights. This "manipulation of private law concepts, without settled meaning", she further says, raises the question of *how* the deemed trust survives under the CCAA (para. 181). And the answer, she finds, is furnished by s. 6(3).

[240] This is wrong for three reasons. First, there is no question as to how the deemed trust survives. Section 37(2) operates to exempt the deemed trusts under the Fiscal Statutes from any change in form or substance under the CCAA; this continues the operation of s. 227(4.1), which confers absolute priority on the Crown's claim to the deemed trusts under the Fiscal Statutes. In other words, the deemed trust

aurait homologué une transaction ou un arrangement, mais pas ses autres réclamations visées par le par. 224(1.2) de la LIR. En effet, la plupart des réclamations de la Couronne prennent rang comme réclamations non garanties en application de l'art. 38 de la LACC.

[238] Il importe de souligner que le par. 6(3) *ne* s'applique *pas* si aucun arrangement n'est proposé ni dans le cadre d'une procédure engagée sous le régime de la LACC qui comprend la liquidation des actifs du débiteur. De telles « procédures de liquidation sous le régime de la LACC » sont « maintenant couran[tes] dans le contexte de la LACC » (*Callidus Capital Corp.*, par. 42). La priorité absolue de la fiducie réputée créée par les lois fiscales, et maintenue par le par. 37(2) de la LACC, protège la réclamation de la Couronne à l'égard des retenues à la source non versées dans le cadre de procédures de liquidation sous le régime de la LACC. Nos collègues les juges Karakatsanis et Côté privent toutes deux la Couronne de son droit garanti en pareils cas, alors que le législateur a pourtant clairement accordé la « priorité absolue » aux réclamations à l'égard des retenues à la source non versées (Ministère des Finances du Canada).

[239] Nous soulignons que notre collègue la juge Karakatsanis ne conclut pas que le par. 6(3) est rendu inopérant par notre interprétation. Elle affirme plutôt que, comme le terme « droit de bénéficiaire » utilisé dans le contexte de la fiducie réputée n'a pas la même signification en common law, nous devons nous tourner vers la LACC pour déterminer les droits de la Couronne. Elle ajoute que cette « adaptation de concepts de droit privé sans signification établie » soulève la question de savoir *comment* la fiducie réputée survit sous le régime de la LACC (par. 181). À son avis, la réponse réside dans le par. 6(3).

[240] Cette conclusion est erronée pour trois raisons. Premièrement, aucune question ne se pose quant à la façon dont la fiducie réputée survit. Le paragraphe 37(2) s'applique de façon à soustraire la fiducie réputée créée par les lois fiscales à tout changement de forme ou de fond sous le régime de la LACC; est ainsi maintenue l'application du par. 227(4.1), lequel confère une priorité absolue à

survives as it was under the Fiscal Statutes. It is unsurprising, therefore, that this Court did not opine on *how* the trust “survives” in CCAA proceedings in *Century Services*: it is, with respect, plain and obvious.

[241] Secondly, our colleague Karakatsanis J.’s suggestion that the understanding of the rights conferred on the Crown under the deemed trust must arise from reading s. 6(3) of the CCAA entirely by-passes the text of the *ITA* which specifically sets out those rights. After providing that the Crown has “beneficial ownership” of the value of the unremitted source deduction, the *ITA* continues: “. . . the proceeds of such property shall be paid to the Receiver General in priority to all such security interests” (s. 227(4.1)). This is the right of the Crown under the deemed trust, and our colleague fails to give effect to this right.

[242] Finally, as we have discussed, s. 6(3) protects different interests than those captured by the deemed trusts. If s. 6(3) were to exhaust the Crown’s rights under the CCAA, our colleague Karakatsanis J. correctly observes that “there may be some risk to the Crown that the plan [under s. 6(3)] may fail, and the Crown may not be paid in full if the restructuring dissolves into liquidation and the estate is depleted in the interim” (para. 155 (emphasis added)). This, however, only supports our interpretation. The right “not to have to compromise” under s. 6(3) is a right independent of the Crown’s right under deemed trusts (para. 155 (emphasis deleted)).

(b) *Power to Stay the Crown’s Garnishment Right (Section 11.09)*

[243] Secondly, the majority at the Court of Appeal and the respondents say that giving effect to the clear statutory wording would be contrary to the purpose of s. 11.09 of the CCAA, which grants courts the power to stay the Crown’s garnishment right under

la réclamation de la Couronne au titre d’une fiducie réputée créée par les lois fiscales. En d’autres mots, la fiducie réputée survit telle qu’elle était en application des lois fiscales. Il n’est donc pas étonnant que notre Cour ne se soit pas prononcée sur la *façon* dont la fiducie « survit » dans le cadre de procédures engagées sous le régime de la *LACC* dans l’arrêt *Century Services* : la réponse est, avec égards, évidente et manifeste.

[241] Deuxièmement, la proposition de notre collègue la juge Karakatsanis, selon laquelle les droits conférés à la Couronne au titre de la fiducie réputée doivent découler de la lecture du par. 6(3) de la *LACC* passe complètement à côté du texte de la *LIR* qui énonce expressément ces droits. Après avoir disposé que la Couronne détient un « droit de bénéficiaire » sur la valeur des retenues à la source non versées, la *LIR* ajoute ce qui suit : « . . . le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie » (par. 227(4.1)). Voilà le droit qui revient à la Couronne au titre de la fiducie réputée, et notre collègue ne donne pas effet à ce droit.

[242] Enfin, comme nous l’avons vu, le par. 6(3) protège des droits différents de ceux visés par la fiducie réputée. Si le par. 6(3) évacue les droits de la Couronne sous le régime de la *LACC*, notre collègue la juge Karakatsanis fait remarquer à juste titre qu’il « y a peut-être un risque que le plan échoue et que la Couronne ne soit pas payée intégralement si la restructuration se solde par une liquidation et que le patrimoine a été épuisé en cours de route » (par. 155 (nous soulignons)). Toutefois, cette observation ne fait qu’appuyer notre interprétation. Le droit « de ne pas avoir à transiger » qu’accorde le par. 6(3) est indépendant du droit de la Couronne au titre de la fiducie réputée (par. 155 (italique omis)).

(b) *Pouvoir de suspendre l’exercice, par la Couronne, de son droit de saisie-arrêt (art. 11.09)*

[243] Ensuite, les juges majoritaires de la Cour d’appel et les intimées soutiennent que donner effet au texte législatif clair irait à l’encontre de l’objectif de l’art. 11.09 de la *LACC*, lequel confère au tribunal le pouvoir de suspendre le droit de saisie-arrêt de

the *ITA* (C.A. reasons, at para. 54). This demonstrates, the argument goes, Parliament's intent to have the court exercise control over the Crown's interests while monitoring the restructuring proceedings. On this view, granting absolute priority to the deemed trusts under the Fiscal Statutes necessarily implies that s. 11.09 of the *CCAA* does not apply to the deemed trust claim.

[244] Again respectfully, this is not so. A court-ordered stay of garnishments under s. 11.09 of the *CCAA* can apply to the Crown's deemed trust claims under the Fiscal Statutes because the deemed trust provisions and s. 11.09 each serve different purposes: the deemed trusts grant a priority to the Crown, while s. 11.09 imposes conditions on when and how the Crown can enforce its garnishment rights under s. 224(1.2) of the *ITA*. In other words, s. 11.09 permits the Court to stay the Crown's ability to enforce its claims under the deemed trusts, but it does not remove its priority.

[245] The critical point is this: giving effect to Parliament's clear intent to grant absolute priority to the deemed trust does not render s. 6(3) or s. 11.09 meaningless. To the contrary, s. 6(3) and s. 11.09 respect the ultimate priority of the deemed trusts under the Fiscal Statutes by allowing for the ultimate priority of the Crown claim to persist, while not frustrating the remedial purpose of the *CCAA*.

(3) Conclusion

[246] As with our discussion of the deemed trust's absolute priority, the harmonious operation of the *CCAA* and the Fiscal Statutes can be summarized as follows:

1. the *CCAA* preserves the Crown's right to be paid in priority to all security interests for its claims for source deductions under the Fiscal Statutes;

la Couronne en vertu de la *LIR* (motifs de la C.A., par. 54). Si l'on en croit cet argument, le législateur voulait permettre au tribunal d'exercer un contrôle sur les droits de la Couronne tout en surveillant le processus de restructuration. Dans cette optique, accorder la priorité absolue à la fiducie réputée créée par les lois fiscales signifie nécessairement que l'art. 11.09 de la *LACC* ne s'applique pas à la réclamation relative à une fiducie réputée.

[244] Encore avec égards, ce n'est pas le cas. Une ordonnance de suspension de la saisie-arrêt en vertu de l'art. 11.09 de la *LACC* peut s'appliquer aux réclamations de la Couronne relatives à la fiducie réputée créée par les lois fiscales, parce que les dispositions en matière de fiducie réputée et l'art. 11.09 servent des fins différentes : la fiducie réputée accorde une priorité à la Couronne, tandis que l'art. 11.09 impose des conditions quant au moment et à la façon dont la Couronne peut exercer son droit de saisie-arrêt au titre du par. 224(1.2) de la *LIR*. En d'autres mots, l'art. 11.09 permet au tribunal de suspendre la faculté de la Couronne d'exécuter ses réclamations relatives à une fiducie réputée, mais il n'écarter pas la priorité de la Couronne.

[245] Le point crucial est le suivant : donner effet à l'intention claire du législateur d'accorder la priorité absolue à la fiducie réputée ne rend pas le par. 6(3) ou l'art. 11.09 dénué de sens. Au contraire, le par. 6(3) et l'art. 11.09 respectent la priorité absolue de la fiducie réputée créée par les lois fiscales en permettant le maintien de la priorité absolue de la réclamation de la Couronne sans contrecarrer l'objet réparateur de la *LACC*.

(3) Conclusion

[246] Comme nous l'avons mentionné au sujet de la priorité absolue de la fiducie réputée, l'application harmonieuse de la *LACC* et des lois fiscales peut se résumer ainsi :

1. la *LACC* protège le droit de la Couronne d'être payée par priorité sur toute garantie pour ses réclamations à l'égard de retenues à la source en vertu des lois fiscales;

2. under the <i>CCAA</i>, the Crown is not a “secured creditor” in respect of its deemed trust claims under the Fiscal Statutes; 3. as priming charges can attach only to the debtor’s property, and as Parliament has made it clear that unremitted source deductions form no part of the debtor’s property, the Crown’s interest under the deemed trust is not subject to the priming charges; 4. section 6(3) of the <i>CCAA</i>, which operates only where there is an arrangement or compromise put to the court, protects the entirety of the Crown claim under s. 224(1.2) of the <i>ITA</i> and similar provisions of the Fiscal Statutes; and 5. the deemed trust’s grant of priority to the Crown is unaffected by s. 11.09, which instead imposes conditions on when and how the Crown can enforce its garnishment rights under s. 224(1.2) of the <i>ITA</i>. D. <i>Policy Reasons Do Not Support a Different Interpretation</i>	2. sous le régime de la <i>LACC</i>, la Couronne n’est pas un « créancier garanti » à l’égard de ses réclamations relatives à une fiducie réputée créée par les lois fiscales; 3. comme les charges super prioritaires ne peuvent se rattacher qu’aux biens du débiteur, et le législateur a indiqué clairement que les retenues à la source non versées ne font pas partie des biens du débiteur, l’intérêt de la Couronne au titre de la fiducie réputée n’est pas subordonné aux charges super prioritaires; 4. le paragraphe 6(3) de la <i>LACC</i>, qui s’applique seulement si une transaction ou un arrangement a été soumis au tribunal, protège l’intégralité de la réclamation de la Couronne visée par le par. 224(1.2) de la <i>LIR</i> et les dispositions semblables des lois fiscales; 5. la priorité accordée à la Couronne au titre de la fiducie réputée n’est pas touchée par l’art. 11.09, qui impose plutôt des conditions quant au moment et à la façon dont la Couronne peut exercer son droit de saisie-arrêt en vertu du par. 224(1.2) de la <i>LIR</i>. D. <i>Des considérations de politique générale n’appuient pas une interprétation différente</i>

[247] The majority of the Court of Appeal and the respondents place significant weight on what they view as the potentially “absurd consequences” that would result from concluding that the deemed trusts under the Fiscal Statutes have priority over the priming charges. The same point implicitly underlies our colleague Côté J.’s reasons. Indeed, the majority at the Court of Appeal went as far as to warn that, under this interpretation, interim financing would “simply end”, an assertion that “almost certainly goes too far” (C.A. reasons, at para. 50; Wood, at p. 99). It added that it would lead to more business failures and, in turn, undermine tax collection (paras. 48 and 50). We disagree.

[247] Les juges majoritaires de la Cour d’appel et les intimées accordent une grande importance aux conséquences, qu’ils jugent potentiellement [TRA-DUCTION] « absurdes », qu’aurait le fait de conclure que la fiducie réputée créée par les lois fiscales a préséance sur les charges super prioritaires. Le même avis sous-tend implicitement les motifs de notre collègue la juge Côté. En effet, les juges majoritaires de la Cour d’appel sont allés jusqu’à affirmer que, suivant cette interprétation, le financement temporaire [TRADUCTION] « prendrait tout simplement fin », une affirmation qui « est presque assurément exagérée » (motifs de la C.A., par. 50; Wood, p. 99). Ils ont ajouté que cette interprétation mènerait à davantage de faillites d’entreprises et, partant, nuirait à la perception des impôts (par. 48 et 50). Nous sommes en désaccord.

[248] The “absurd consequences” identified by the majority at the Court of Appeal rest on faulty premises. The conclusion that interim financing would “simply end” was not supported by the record. The majority extrapolated from admittedly incomplete and dated data about interim financing drawn from a textbook which does not indicate the presence of a deemed trust claim. This sweeping statement elides cases where there is no interim lending and cases, such as this one, where the debtor’s assets are sufficient to satisfy both the interim lending and the Crown’s deemed trust claim. This is an omission that cannot be readily ignored as there are usually enough funds available to satisfy both the Crown claim *and* the court-ordered priming charges (Wood, at p. 100). Equally unfounded is the majority’s claim that confirming the priority of the deemed trusts of the Fiscal Statutes would “inject an unacceptable level of uncertainty into the insolvency process” (C.A. reasons, at para. 51). A company applying under the CCAA is required to provide its financial statements (s. 10(2)(c)), which include the source deductions owed to the Crown. Interim lenders can rely on this information to evaluate the risk of providing financing.

[249] Moreover, the majority at the Court of Appeal did not consider that Parliament can, and did, choose to prioritize the integrity of the tax system over the interests of secured creditors. Indeed, and with respect, the majority’s own interpretation arguably itself produces absurd results, whereby employees’ gross remuneration are conscripted as a subsidy to secure interim financing and the services of insolvency professionals.

[250] We therefore do not remotely see the consequences of our interpretation as rising to the level of absurdity. And Parliament has unambiguously struck

[248] Les [TRADUCTION] « conséquences absurdes » dont parlent les juges majoritaires de la Cour d’appel reposent sur de fausses prémisses. La conclusion selon laquelle le financement temporaire « prendrait tout simplement fin » n’était pas étayée par le dossier. Les juges majoritaires ont extrapolé à partir de données incomplètes et désuètes sur le financement temporaire tirées d’un ouvrage qui ne fait aucune mention de réclamations relatives à une fiducie réputée. Il s’agit d’une affirmation péremptoire qui élude les cas dans lesquels le débiteur ne reçoit aucun financement temporaire et les cas, comme en l’espèce, dans lesquels les actifs du débiteur sont suffisants pour couvrir à la fois le financement temporaire et la réclamation de la Couronne relative à la fiducie réputée. Cette omission ne peut être facilement ignorée puisque les fonds disponibles suffisent généralement à couvrir la réclamation de la Couronne *et* les charges super prioritaires ordonnées par le tribunal (Wood, p. 100). Est également sans fondement l’affirmation des juges majoritaires selon laquelle le fait de confirmer la priorité de la fiducie réputée créée par les lois fiscales [TRADUCTION] « introduirait un niveau d’incertitude inacceptable dans le processus de faillite » (motifs de la C.A., par. 51). Une compagnie qui présente une demande sous le régime de la LACC est tenue de fournir ses états financiers (al. 10(2)c)) indiquant les retenues à la source dues à la Couronne. Les prêteurs temporaires peuvent se fonder sur ces renseignements pour évaluer le risque d’offrir un financement.

[249] De plus, les juges majoritaires de la Cour d’appel n’ont pas tenu compte du fait que le législateur peut choisir, et a choisi, d’accorder à l’intégrité du régime fiscal la priorité sur les droits des créanciers garantis. En effet, avec égards, on pourrait soutenir que l’interprétation des juges majoritaires produit elle-même des résultats absurdes, à savoir que le salaire brut des employés est utilisé comme subvention pour obtenir le financement temporaire et les services des professionnels de l’insolvabilité.

[250] Par conséquent, nous ne croyons absolument pas que les conséquences de notre interprétation constituent une absurdité. Le législateur a, de

the balance it considered appropriate in pursuit of the dual objectives of collecting unremitted source deductions, which are not the property of the debtor, and avoiding the “devastating social and economic effects of bankruptcy” (*Century Services*, at para. 59, quoting *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 (C.A.), at p. 306, per Doherty J.A., dissenting). Whether s. 227(4.1) of the *ITA* is an effective means to protect the fiscal base or whether “the Crown is biting off the hand that feeds it” are not questions that this Court has the competence or legitimacy to answer (C.A. reasons, at para. 48).

[251] In any event, even were there evidence that giving priority to the deemed trusts under the Fiscal Statutes over the priming charges produced absurd results, our conclusion would be no different. The presumption against absurdity is exactly that: a presumption. Nothing more. Illogical consequences flowing from the application of a statute do not give rein to courts to disregard clear legislative intent. As Lamer C.J. noted in *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 41, “Parliament . . . has the right to legislate illogically (assuming that this does not raise constitutional concerns). And if Parliament is not satisfied with the judicial application of its illogical enactments, then Parliament may amend them accordingly.”

[252] Here, Parliament’s intention to give absolute priority to the deemed trust of the Fiscal Statutes is unequivocal. Our role is to give effect to this intention.

III. Disposition

[253] We would allow the appeal. The respondents should be entitled to costs in accordance with “Schedule B” to the regulations (*Rules of the Supreme Court of Canada*, SOR/2002-156). There are no exceptional circumstances that would justify enhanced costs. Despite the appeal being moot, it was not improper for the Crown to seek the correct interpretation of the Fiscal Statutes.

façon non équivoque, établi l’équilibre qu’il estimait juste au regard du double objectif de recouvrer les retenues à la source non versées, qui ne font pas partie des biens du débiteur, et d’éviter les [TRADUCTION] « effets dévastateurs, — tant sur le plan social qu’économique — de la faillite » (*Century Services*, par. 59, citant *Elan Corp. c. Comiskey* (1990), 1 O.R. (3d) 289 (C.A.), p. 306, le juge Doherty, dissident). Notre Cour ne dispose ni de la compétence ni de la légitimité nécessaires pour trancher les questions de savoir si le par. 227(4.1) de la *LIR* constitue un moyen efficace de protéger l’assiette fiscale ou de savoir si [TRADUCTION] « la Couronne mord la main qui la nourrit » (motifs de la C.A., par. 48).

[251] De toute façon, même si des éléments de preuve démontraient que la préséance de la fiducie réputée créée par les lois fiscales sur les charges super prioritaires donnait des résultats absurdes, notre conclusion ne serait pas différente. La présomption contre l’absurdité n’est rien de plus qu’une présomption. Des conséquences illogiques découlant de l’application d’une loi ne permettent pas aux tribunaux de faire fi de l’intention claire du législateur. Comme le juge en chef Lamer l’a souligné dans *R. c. McIntosh*, [1995] 1 R.C.S. 686, par. 41, « le législateur a le droit de légiférer de façon illogique (pourvu que cela ne soulève pas de préoccupations d’ordre constitutionnel). Si le législateur n’est pas satisfait de l’application que les tribunaux accordent aux textes législatifs illogiques, il peut les modifier en conséquence. »

[252] En l’espèce, l’intention du législateur d’accorder la priorité absolue à la fiducie réputée créée par les lois fiscales est sans équivoque. Notre rôle est de donner effet à cette intention.

III. Dispositif

[253] Nous sommes d’avis d’accueillir le pourvoi. Les intimées ont droit aux dépens conformément à l’annexe B du règlement (*Règles de la Cour suprême du Canada*, DORS/2002-156). Il n’y a aucune circonstance exceptionnelle qui justifierait des dépens majorés. Malgré le caractère théorique du pourvoi, la Couronne a, à bon droit, sollicité une interprétation juste des lois fiscales.

The following are the reasons delivered by

[254] MOLDAVER J. (dissenting) — I have had the benefit of reading the reasons of my colleagues, Justice Côté, Justice Karakatsanis, and Justices Brown and Rowe. While I substantially agree with the analysis and conclusions of Brown and Rowe JJ., there are two points that I wish to address.

[255] First, unlike Brown and Rowe JJ., I see no reason to define the particular nature or operation of the Crown’s interest under s. 227(4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“*ITA*”), in the context of proceedings under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“*CCAA*”). While a future appeal may require this Court to determine exactly how the Crown’s interest under s. 227(4.1) “survives”, and whether it amounts to some form of ownership interest in the debtor’s property, as Brown and Rowe JJ. maintain, some form of security interest in that property, or something else entirely (e.g., a right not to have to compromise, as Karakatsanis J. maintains), such an inquiry is not necessary in this case. Properly interpreted, the relevant provisions of the *CCAA* and *ITA* work in harmony to direct that the Crown’s interest — in whatever form it takes — must be given priority over court-ordered priming charges. This conclusion is sufficient to dispose of the appeal.

[256] In my view, to the extent that Brown and Rowe JJ. conclude that the Crown’s interest under s. 227(4.1) affords the Crown beneficial ownership over the source deductions such that “the source deductions are deemed never to form part of the company’s property”, they have effectively decided the appeal by two paths — first, by way of the Crown’s absolute priority under s. 227(4.1), and second, by way of the Crown’s beneficial ownership over any unremitted source deductions (para. 223). As they note, if the Crown’s interest amounts to an ownership interest and unremitted source deductions do not

Version française des motifs rendus par

[254] LE JUGE MOLDAVER (dissident) — J’ai pris connaissance des motifs de mes collègues, soit ceux de la juge Côté, ceux la juge Karakatsanis, ainsi que ceux des juges Brown et Rowe. Bien que je souscrive pour l’essentiel à l’analyse et aux conclusions des juges Brown et Rowe, il y a deux points que je tiens à aborder.

[255] En premier lieu, contrairement aux juges Brown et Rowe, je ne vois aucune raison de définir la nature ou le fonctionnement particulier du droit que le par. 227(4.1) de la *Loi de l’impôt sur le revenu*, L.R.C. 1985, c. 1 (5^e suppl.) (« *LIR* »), confère à la Couronne dans le cadre des procédures intentées sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« *LACC* »). Bien qu’un futur pourvoi puisse nécessiter que notre Cour précise les circonstances exactes dans lesquelles les intérêts conférés à la Couronne en vertu du par. 227(4.1) « survivent » et s’ils peuvent être assimilés à une certaine forme d’intérêt propriétaire sur les biens du débiteur, comme l’affirment les juges Brown et Rowe, à une certaine forme de garantie sur ces biens, ou à quelque chose de complètement différent (p. ex., un droit de ne pas avoir à transiger, comme l’affirme la juge Karakatsanis), une telle analyse n’est pas nécessaire en l’espèce. Correctement interprétées, les dispositions pertinentes de la *LACC* et de la *LIR* s’harmonisent de façon à ce que l’intérêt de la Couronne — quel qu’il soit — ait priorité sur les charges super prioritaires d’origine judiciaire. Cette conclusion suffit pour trancher le pourvoi.

[256] À mon avis, dans la mesure où ils estiment que l’intérêt que possède la Couronne en vertu du par. 227(4.1) lui confère un droit de bénéficiaire sur les retenues à la source, de sorte que « les retenues à la source sont réputées ne jamais faire partie des biens de la compagnie », les juges Brown et Rowe ont effectivement tranché le pourvoi par deux voies distinctes : tout d’abord en reconnaissant la priorité absolue dont bénéficie la Couronne en vertu du par. 227(4.1), et, ensuite, en reconnaissant le droit de bénéficiaire qu’elle possède sur les retenues à la source non versées (par. 223). Comme ils le font

form part of the debtor company's property, priming charges could never attach to those source deductions, whether ordered under the specific priming charge provisions or the court's broad power under s. 11 of the CCAA (paras. 222-23). If this is indeed the case, it is not clear that the issue of competing priority between the Crown's interest and court-ordered priming charges ever arises, as the source deductions would be simply inaccessible to anyone other than the Crown. As I am not necessarily convinced that the Crown's interest under s. 227(4.1) amounts to an ownership interest, and as the Crown's absolute priority does not depend on this conclusion, I would leave the question of the nature of the Crown's interest to another day.

[257] Second, while I agree with Brown and Rowe JJ. that s. 37(2) of the CCAA can be interpreted as an internal restriction on s. 11, I hesitate to accept this conclusion, as it strikes me that in order to give proper effect to Parliament's intention for s. 11 to serve as the "engine" that drives the CCAA and empowers supervising judges to further its remedial objectives, any restrictions on that discretionary power should be explicit and unambiguous (9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, [2020] 1 S.C.R. 521, at para. 48, citing *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 36). With respect, s. 37(2) does not amount to such an explicit and unambiguous restriction. Rather, s. 37(2) is a simple exception to s. 37(1), which serves to nullify the effect of any statutory provision that deems property to be held in favour of the Crown:

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.

observer, si l'intérêt de la Couronne équivaut à un intérêt propriétaire et les retenues à la source non versées ne font pas partie des biens de l'entreprise débitrice, les charges super prioritaires ne peuvent en aucun cas grever les retenues à la source, qu'elles soient constituées en vertu des dispositions spécifiques relatives aux charges super prioritaires ou en vertu du pouvoir général conféré au tribunal par l'art. 11 de la LACC (par. 222-223). Si c'est effectivement le cas, il n'est pas évident que se soulève même un problème de priorités concurrentes entre l'intérêt de la Couronne et la charge super prioritaire d'origine judiciaire, puisque personne d'autre que la Couronne n'a accès aux retenues à la source. Comme je ne suis pas nécessairement convaincu que l'intérêt que possède la Couronne en vertu du par. 227(4.1) équivaut à un intérêt propriétaire, et comme la priorité absolue de la Couronne ne dépend pas de cette conclusion, je remettrais à une autre occasion l'examen de la nature du droit de la Couronne.

[257] En deuxième lieu, bien que je convienne avec les juges Brown et Rowe que le par. 37(2) de la LACC peut être interprété comme une restriction interne à l'art. 11, j'hésite à accepter cette conclusion, car il me semble que, pour donner un effet approprié à l'intention du législateur de faire de l'art. 11 le « moteur » de la LACC qui confère aux juges surveillants le pouvoir de favoriser la réalisation des objectifs réparateurs de cette loi, toute restriction à ce pouvoir discrétionnaire devrait être explicite et non équivoque (9354-9186 *Québec inc. c. Callidus Capital Corp.*, 2020 CSC 10, [2020] 1 R.C.S. 521, par. 48, citant *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 36). Avec égards, le par. 37(2) ne constitue pas une restriction explicite et non équivoque. Le paragraphe 37(2) est plutôt une simple exception au par. 37(1), qui vise à annuler l'effet de toute disposition législative selon laquelle les biens sont réputés être détenus en faveur de la Couronne :

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.

(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*

[258] In effect, then, the function of s. 37(2) is merely to preserve the Crown's deemed trust under s. 227(4.1) from extinguishment under s. 37(1). In preserving the Crown's interest, however, "s. 37(2) does not explain what to do with that right for the purposes of a *CCAA* proceeding", nor does it say anything that would limit the court's power under s. 11 to order priming charges in priority to the Crown's deemed trust claim (Karakatsanis J.'s reasons, at para. 153). Indeed, as Karakatsanis J. notes, "[t]here is no provision in the *CCAA* stipulating what the court can do with trust property and no provision in the *CCAA* conferring more specific jurisdiction on whether a priming charge can rank ahead of the beneficiary of a deemed trust" (para. 176). Rather, it is only when one looks to s. 227(4.1) that the absolute priority of the Crown's interest — and the resulting limitations on s. 11 — become apparent. It is thus not entirely clear that interpreting s. 37(2) as an internal restriction accords with the function of s. 37(2) or the leeway that Parliament intended for the scope of powers under s. 11. In other words, the relationship between ss. 11 and 37(2) may not be as clear-cut as my colleagues seem to suggest. Accordingly, while I ultimately agree with Brown and Rowe JJ. that s. 37(2) can be interpreted as an internal restriction so as to avoid a conflict between the *CCAA* and *ITA*, I feel it important to explain that, if this interpretation is mistaken, s. 11 is nonetheless restricted by the external text of s. 227(4.1).

[259] If s. 37(2) does not amount to an internal restriction on s. 11, using s. 11 to prioritize priming charges over the Crown's deemed trust claim would put the provision in direct conflict with s. 227(4.1) which, as my colleagues Brown and Rowe JJ. have

(2) 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*

[258] En réalité, le par. 37(2) vise simplement à empêcher que la fiducie réputée de la Couronne en vertu du par. 227(4.1) soit éteinte par application du par. 37(1). Toutefois, bien qu'il vise à protéger l'intérêt de la Couronne, « le par. 37(2) n'explique pas quoi faire de ce droit dans le cadre d'une procédure engagée sous le régime de la *LACC* », et il ne renferme aucune disposition qui limiterait le pouvoir que possède le tribunal en vertu de l'art. 11 d'ordonner que des charges super prioritaires prennent rang devant la fiducie réputée de la Couronne (motifs de la juge Karakatsanis, par. 153). D'ailleurs, comme le signale la juge Karakatsanis, « [a]ucune disposition de la *LACC* n'indique ce que le tribunal peut faire avec les biens de la fiducie et aucune disposition de la *LACC* ne confère plus précisément compétence pour décider si une charge super prioritaire peut prendre rang devant le bénéficiaire de la fiducie réputée » (par. 176). Au contraire, ce n'est en fait que lorsqu'on examine le par. 227(4.1) que la priorité absolue de l'intérêt de la Couronne — et les limites qui découlent de l'art. 11 — deviennent apparentes. Il n'est donc pas parfaitement clair que le fait d'interpréter le par. 37(2) comme une restriction interne s'accorde avec le rôle que joue le par. 37(2) ou avec la latitude que le législateur souhaitait donner au tribunal dans l'exercice des pouvoirs que lui confère l'art. 11. En d'autres termes, le lien entre l'art. 11 et le par. 37(2) n'est peut-être pas aussi évident que semblent le suggérer mes collègues. Par conséquent, même si je conviens en fin de compte avec les juges Brown et Rowe que le par. 37(2) peut être interprété comme une restriction interne afin d'éviter un conflit entre la *LACC* et la *LIR*, je juge important d'expliquer que, si cette interprétation est inexacte, la portée de l'art. 11 est néanmoins restreinte par le libellé externe du par. 227(4.1).

[259] Si le par. 37(2) n'équivaut pas à une restriction interne à l'art. 11, recourir à l'art. 11 pour faire passer une charge super prioritaire devant la réclamation de la Couronne au titre d'une fiducie réputée entrerait en conflit direct avec le par. 227(4.1),

explained, requires that the Crown's claim be ranked in priority to all security interests, including priming charges. The direct conflict would trigger the "[n]otwithstanding" language in s. 227(4.1), which states that "[n]otwithstanding . . . any other enactment of Canada", the Crown's claim is to have priority. This language thus imposes an external restriction on the court's power under s. 11. Indeed, the supremacy of s. 227(4.1) is implicitly acknowledged by the text of s. 11 as, unlike s. 227(4.1), which operates despite "any other enactment of Canada", s. 11 only operates "[d]espite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*", but not despite anything in the *ITA*. Accordingly, while the court's discretionary authority under s. 11 could, in theory, empower a court to subordinate the Crown's interest in unremitted source deductions, that power is ultimately stopped short by the express language of s. 227(4.1).

[260] In outlining this position, I consider it important to contextualize this Court's statement in *Callidus* that "the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be 'appropriate in the circumstances'" (para. 67). The focus in *Callidus* was on the discretionary authority of supervising *CCAA* judges within the confines of the *CCAA* itself; it was not on addressing the question of the authority of *CCAA* judges to apply s. 11 in the face of overriding federal legislation. Respectfully, where, as here, Parliament has expressly indicated the supremacy of a statute over the provisions of the *CCAA*, the court's power under s. 11 is correspondingly restricted.

[261] The Crown's deemed trust claim must thus take priority over all court-ordered priming charges, whether they arise under the specific priming charge provisions, or under the court's discretionary authority.

ce qui, comme mes collègues les juges Brown et Rowe l'expliquent, exige que la réclamation de la Couronne prenne rang avant toutes les garanties, y compris les charges super prioritaires. Ce conflit direct entraînerait l'application de la disposition restrictive du par. 227(4.1), à savoir que « [m]algré [. . .] tout autre texte législatif fédéral », la réclamation de la Couronne doit avoir priorité. Cette disposition impose donc une limite externe au pouvoir que l'art. 11 confère au tribunal. En fait, la primauté du par. 227(4.1) est implicitement reconnue par le texte de l'art. 11 car, contrairement au par. 227(4.1), qui s'applique « [m]algré [. . .] tout autre texte législatif fédéral », l'art. 11 ne s'applique que « [m]algré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations* », mais non malgré toute disposition de la *LIR*. Par conséquent, bien que le pouvoir discrétionnaire conféré par l'art. 11 au tribunal permette en théorie à celui-ci de subordonner l'intérêt de la Couronne dans les retenues à la source non versées à d'autres intérêts, ce pouvoir est en définitive restreint par les termes exprès du par. 227(4.1).

[260] En exposant cette position, j'estime important de situer dans son contexte l'affirmation de notre Cour dans l'arrêt *Callidus* selon laquelle « le pouvoir conféré par l'art. 11 n'est limité que par les restrictions imposées par la *LACC* elle-même, ainsi que par l'exigence que l'ordonnance soit "indiquée" dans les circonstances » (par. 67). L'arrêt *Callidus* mettait l'accent sur l'exercice du pouvoir discrétionnaire du juge surveillant nommé sous le régime de la *LACC* à l'intérieur des limites imposées par la *LACC* elle-même, et non pas sur la question du pouvoir du juge d'appliquer l'art. 11 malgré une loi fédérale prépondérante. Avec égards, lorsque, comme en l'espèce, le législateur prévoit expressément qu'une loi a priorité sur les dispositions de la *LACC*, le pouvoir conféré par l'art. 11 au tribunal est restreint en conséquence.

[261] La réclamation de la Couronne au titre d'une fiducie réputée a donc priorité sur toutes les charges super prioritaires d'origine judiciaire, peu importe que celles-ci aient été créées en vertu des dispositions expresses à cet effet ou en vertu du pouvoir discrétionnaire du tribunal.

[262] A necessary consequence of the absolute supremacy of the Crown's deemed trust claim over court-ordered priming charges is that the Crown's interest under s. 227(4.1) cannot be given effect by s. 6(3) of the CCAA. Section 6(3) of the CCAA provides that

[u]nless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act* . . .

[263] In my view, there are two reasons why s. 6(3) cannot represent the Crown's interest under s. 227(4.1). First, the focus of s. 6(3) is to establish a timeframe for payment to the Crown of certain outstanding debts in the event that the debtor company succeeds in staying viable as a going concern. By contrast, s. 227(4.1) is focused on ensuring the *priority* of the Crown's claim. The key point of distinction here is that, under s. 6(3), the Crown could be ranked last, so long as it is paid within six months of any arrangement. Such an outcome would be plainly inconsistent with the absolute priority of the Crown's claim, as established by the CCAA and ITA. Second, as s. 6(3) applies only where a compromise or plan of arrangement is reached, the Crown's deemed trust claim would not operate in the event that a liquidation occurred under the CCAA, thereby depriving the Crown of its priority over security interests in such circumstances. Again, this potential consequence would be at odds with the clear intention of the CCAA and ITA.

[264] Before concluding, I would note that it cannot be doubted that Parliament considered the potential consequences of its legislative actions, including any consequences for CCAA proceedings. If

[262] Une conséquence nécessaire de la primauté absolue dont jouit la réclamation de la Couronne au titre d'une fiducie présumée sur les charges super prioritaires d'origine judiciaire est que le par. 6(3) de la LACC ne permet pas de donner effet à l'intérêt conféré à la Couronne par le par. 227(4.1). Le paragraphe 6(3) de la LACC prévoit ce qui suit :

Le tribunal ne peut, sans le consentement de Sa Majesté, homologuer la transaction ou l'arrangement qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'homologation, de toutes les sommes qui étaient dues lors de la demande d'ordonnance visée aux articles 11 ou 11.02 et qui pourraient, de par leur nature, faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* . . .

[263] À mon avis, deux raisons expliquent pourquoi le par. 6(3) ne s'applique pas à l'intérêt conféré à la Couronne par le par. 227(4.1). Premièrement, le par. 6(3) vise à établir un délai pour le paiement de certaines créances de la Couronne en souffrance au cas où la compagnie débitrice parviendrait à assurer sa viabilité. À l'inverse, le par. 227(4.1) vise à accorder *priorité* à la réclamation de la Couronne. La différence essentielle ici est que, par application du par. 6(3), la Couronne pourrait être reléguée au dernier rang à la condition qu'elle soit payée dans les six mois suivant tout arrangement. Un tel résultat serait de toute évidence incompatible avec la priorité absolue que la LACC et la LIR accordent à la réclamation de la Couronne. Deuxièmement, comme le par. 6(3) ne s'applique que si les parties concluent une transaction ou parviennent à un arrangement, la réclamation de la Couronne au titre d'une fiducie réputée ne serait pas opposable en cas de liquidation sous le régime de la LACC; la Couronne perdrait alors sa priorité au profit d'autres garanties. Là encore, cette conséquence possible irait à l'encontre de l'objectif clair de la LACC et de la LIR.

[264] Avant de conclure, je ferai remarquer qu'il ne fait aucun doute que le législateur a réfléchi aux conséquences possibles de ses mesures législatives, y compris sur les procédures engagées sous le régime

circumstances do arise in which the priority of the Crown's claim threatens the viability of a particular restructuring, it clearly lies with the Crown to be flexible so as to avoid any consequences that would undermine the remedial purposes of the CCAA.

[265] I would, therefore, allow the appeal. The respondents are entitled to costs in this Court in accordance with Schedule B of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

Appeal dismissed with costs, ABELLA, MOLDAVER, BROWN and ROWE JJ. dissenting.

Solicitor for the appellant: Attorney General of Canada, Vancouver.

Solicitors for the respondents Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd. and Ernst & Young Inc. in its capacity as monitor: Duncan Craig, Edmonton.

Solicitors for the respondent the Business Development Bank of Canada: Cassels Brock & Blackwell, Calgary.

Solicitors for the intervener the Insolvency Institute of Canada: Blake, Cassels & Graydon, Calgary.

Solicitors for the intervener the Canadian Association of Insolvency and Restructuring Professionals: Osler, Hoskin & Harcourt, Calgary.

de la LACC. S'il devait arriver que la priorité accordée à la réclamation de la Couronne menace la viabilité d'une restructuration, c'est de toute évidence à la Couronne qu'il appartient de faire preuve de souplesse afin d'éviter toute conséquence qui compromettrait l'objet réparateur de la LACC.

[265] Je suis donc d'avis d'accueillir le pourvoi. Les intimées ont droit aux dépens devant notre Cour conformément à l'annexe B des *Règles de la Cour suprême du Canada*, DORS/2002-156.

Pourvoi rejeté avec dépens, les juges ABELLA, MOLDAVER, BROWN et ROWE sont dissidents.

Procureur de l'appelante : Procureur général du Canada, Vancouver.

Procureurs des intimées Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd. et Ernst & Young Inc. en sa qualité de contrôleur : Duncan Craig, Edmonton.

Procureurs de l'intimée la Banque de développement du Canada : Cassels Brock & Blackwell, Calgary.

Procureurs de l'intervenant l'Institut d'insolvabilité du Canada : Blake, Cassels & Graydon, Calgary.

Procureurs de l'intervenante l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation : Osler, Hoskin & Harcourt, Calgary.

TAB 32

Court of Queen's Bench of Alberta

Citation: ENTREC Corporation (Re), 2020 ABQB 751

Date: 20201203
Docket: 2001 06423
Registry: Calgary

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

AND

In the Matter of the Compromise or Arrangement of ENTREC Corporation, Capstan Hauling Ltd., ENTREC Capital Corp., ENTREC Cranes & Heavy Haul Inc., ENTREC Holdings Inc., ENT Oilfield Group Ltd., and ENTREC Services Ltd.

Applicants

**Endorsement
of the
Honourable Madam Justice B.E. Romaine**

I. Introduction

[1] On November 24, 2020, I issued an oral decision granting an order terminating the *Companies' Creditors Arrangement Act* ("CCAA") proceedings of the Applicants (the "CCAA termination order"). The CCAA termination order allowed, among other relief, the release of all third party claims against the Applicants' current and former directors and officers, except for claims covered by an applicable insurance policy of the Applicants and claims that cannot be released under section 5.1(2) of the CCAA.

[2] Given that a release of third party claims against directors and officers in a situation where there will not be a plan of arrangement arising from the CCAA proceedings is unusual, I

take this opportunity to give written reasons on that issue, and emphasize that the relief with respect to the directors and officers was granted in the specific circumstances of this case.

II. Analysis

[3] While section 11 of the CCAA confers on this Court broad discretionary power to grant a variety of orders, the breadth of this authority is not without limits. With the remedial objectives of the CCAA in mind, the Court must determine whether the applicant has demonstrated the three baseline considerations: namely, (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence: *9354-9186 Quebec Inc v Callidus Capital Corp*, 2020 SCC 10 at para 49.

[4] Appropriateness is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA: *Callidus* at para 50. Due diligence, in turn, stipulates that to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights: *Callidus* at para 51.

[5] The Applicants submitted that there are no provisions within the CCAA that expressly limit this Court's jurisdiction to grant the release of third party claims against the directors and officers. In fact, section 5.1 of the CCAA contemplates the possibility of provision for the compromise of claims against directors of a company in the context of a compromise and arrangement of the company.

[6] Further, the Applicants indicated that there is a recent judicial trend in which CCAA courts have exercised their discretion to grant a release of claims against directors and officers of a debtor company in the absence of a plan of arrangement. More specifically, they directed me to three orders from Ontario and Quebec: *In the Matter of Companies' Creditors Arrangement Act, and in the Matter of Golf Town Canada Holdings Inc, et al*, (March 29, 2019), CV-16-11527-00CL (ONSC) [*Golf Town*]; *In the Matter of the Companies' Creditors Arrangement Act, and in the Matter of RCR International Inc et al*, (May 9, 2018), 500-11-053555-179 (QCCS) [*RCR International*]; and *In the Matter of the Companies' Creditors Arrangement Act, and in the Matter of Beleave Inc et al*, (September 18, 2020), CV-20-00642097-00CL (ONSC) [*Beleave*].

[7] In *Golf Town*, *RCR International*, and *Beleave*, the courts involved granted the release of claims against directors and officers because the applicants successfully demonstrated that the release was in the best interests of the debtor company and its stakeholders. In particular, in each case, the Court was satisfied that the directors and officers had acted in good faith, the release would facilitate the distribution of the applicants' remaining estate, the release would enhance the efficiency of the CCAA proceedings, and the release was nevertheless restricted by section 5.1(2) of the CCAA.

[8] The Applicants' position is that the evidence and reasons in support of the release of claims against directors and officers in these three cases are substantially identical to the ones put forward in the present case. Specifically, the Applicants advanced the following factors that support the relief sought:

- (a) The directors and officers provided critical direction leading up to the filing of the present CCAA proceedings;
- (b) They were instrumental in administering the sale and investment solicitation process ("SISP") for the benefit of the Applicants' stakeholders;

- (c) The directors and officers played an integral role in identifying and facilitating potential transactions to explore during the SISP process;
- (d) The transactions approved by this Court resulted in the sale of substantially all of the Applicants' assets;
- (e) The transactions approved by this Court resulted in the preservation of a significant number of jobs both in Canada and the U.S.;
- (f) The releases will facilitate a monetary distribution of up to \$1.5 million to the Applicants' major secured creditor, which funds would otherwise be held back for the charge to secure indemnity in favour of the directors and officers;
- (g) The key employee retention and incentive plan approved by this Court contemplated that the Applicants would seek a Court-ordered release of claims against the directors and officers;
- (h) Creditors and stakeholders of the Applicants were put on notice of the Applicants' intention to apply for a release of claims against the directors and officers;
- (i) The Applicants implemented enhanced notice provisions with respect to the release, which included mailing two letters to all known creditors of the Applicants as well as their current and former employees in both Canada and the U.S.;
- (j) The releases will not affect claims against directors and officers that are covered by an applicable insurance policy of the Applicants;
- (k) The releases are subject to limitations under section 5.1(2) of the CCAA, which provides for an exception to the release of claims that relate to contractual rights of creditors or are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors;
- (l) The releases would provide certainty and finality of the CCAA proceedings in the most efficient manner;
- (m) A syndicate of lenders, as the Applicants' senior secured creditor, will suffer a substantial shortfall on the amounts owing to it, and as a result, a claims bar process and plan of arrangement would be cost-prohibitive;
- (n) The CEO of the Applicants is not aware of any claim or proceeding in either Canada or the U.S. with respect to the directors or officers;
- (o) The CEO is not aware of any party who has opposed or expressed an intention to oppose the releases and no one appeared at the hearing to oppose the releases;
- (p) The Applicants' stakeholders had nearly two months to consider the terms of the release;
- (q) Throughout the CCAA proceedings, the directors and officers acted in good faith and with due diligence; and
- (r) The Monitor and agent in the present CCAA proceedings support the release.

[9] In granting the CCAA termination order, I accepted these as valid reasons to grant the releases, despite the fact that they would not be subject to a vote by creditors as part of a plan of arrangement. In the specific factual matrix of the case at hand, I am satisfied that the release of

third party claims against the directors and officers, subject to certain limitations, will further the policy objectives underlying the CCAA.

III. Conclusion

[10] While the CCAA termination order was granted, this endorsement serves to place a particular emphasis on the fact that the release of claims against the directors and officers was granted in the specific circumstances of the present case.

Heard on the 24th day of November, 2020.

Dated at the City of Calgary, Alberta this 3rd day of December, 2020.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Rick T.G. Reeson Q.C.
Miller Thomson LLP
for the Applicants

Kelsey J. Meyer
Bennett Jones LLP
for Wells Fargo Capital Finance Corporation Canada as agent

Howard A. Gorman, Q.C.
Norton Rose Fulbright Canada LLP
for the Monitor

Kent A. Rowan Q.C.
Ogilvie LLP
for the directors and officers

TAB 33

Court of King's Bench of Alberta

Citation: Long Run Exploration Ltd (Re), 2024 ABKB 710

Date: 20241129
Docket: 2401 09247
Registry: Calgary

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

**And In the Matter of a Plan of Compromise or Arrangement of Long Run Exploration Ltd
and Calgary Sinoenergy Investment Corp**

Corrected judgment: A corrigendum was issued on December 6, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

Corrected judgment: A corrigendum was issued on November 29, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

**Reasons for Decision
of the
Honourable Justice Douglas R. Mah**

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A. Background

- [1] The applicant is the Court-Appointed Monitor of Long Run Exploration Ltd and Calgary Sinoenergy Investment Corp acting under the **CCAA**.¹ The Monitor seeks transaction approval and a Reverse Vesting Order (RVO) in order to give effect to a stalking horse bid in the form of a Subscription Agreement for the shares of Long Run.
- [2] The stalking horse bid is advanced by Hiking Group Shandong Jinyue Int't Trading Corp as part of a Court-approved sale and investment solicitation process (SISP). It was the only qualified offer that emerged from the SISP. Hiking also provided debtor-in-possession or DIP financing in the **CCAA** proceeding to the extent of \$7 million under previous Court Order.
- [3] The stalking horse Subscription Agreement was subsequently slightly amended for tax planning purposes. Subsequent mention of the Subscription Agreement in these Reasons refers to the amended Subscription Agreement (identified as the A & R Subscription Agreement in the application materials).

¹ *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36 as am.

[4] Reduced to its basics for the purposes of this decision, the Subscription Agreement contemplates:

- Cancellation of the existing common shares of Long Run and issuance of new shares to Hiking's nominee (a new wholly owned subsidiary created for that purpose), which shares would be free and clear of any existing liabilities of Long Run other than those expressly retained.
- Long Run would continue as a going concern with its retained assets, retained liabilities and retained contracts.
- The retained liabilities include the indebtedness owing by Long Run to senior secured creditors, as represented by China Construction Bank Toronto Branch (CCBT) as collateral agent, in the approximate amount of \$350 million, as well as environmental liabilities of about \$453 million.
- Apart from assumption of the senior secured debt, the cash component of the purchase price consists of an approximate \$17.5 million to deal with priority payables, another much smaller amount (\$100,000) to fund the Trustee's expenses for the Creditor Trust to be created and set-off of the \$7 million DIP financing already advanced.
- Assets, liabilities and contracts not retained would be transferred to a Creditor Trust to be administered by the Monitor, and all of Long Run's liabilities except those expressly retained would be discharged so far as Long Run is concerned.
- Court approval of the Subscription Agreement and granting of an RVO are necessary to create the Creditor Trust. Creditors whose claims are transferred to the Creditor Trust would have further recourse only to the Creditor Trust, which is expected to be negligible. It is not anticipated that unsecured creditors would receive any payment.

[5] The transaction, if approved, enables Long Run to continue operations with a new owner "cleansed" of unwanted liabilities while retaining desired assets, contracts and liabilities.

[6] The Monitor submits that approval of the Stalking Horse Subscription Agreement with the RVO represents the best outcome for the financial stakeholders here.

[7] Two creditors of Long Run object to approval of the Stalking Horse Subscription Agreement and granting of the RVO as presented by the Monitor, on the basis of unfairness. The first objector is Henenghaixin Corp (H Corp) who has been engaged in litigation with Long Run, Calgary Sinoenergy and other defendants since February 2020. H Corp as plaintiff alleges fraud and misrepresentation against them in the action and in this proceeding claims a proprietary constructive trust to the extent of \$44 million against the assets of Long Run.

[8] As it presently stands, H Corp's claim is a transferred liability whose claim against Long Run would be in effect extinguished upon closing of the transaction. H Corp asserts that the transaction must be amended so that its proprietary constructive trust claim is preserved and adjudicated upon.

[9] The second is Mr. Neufeld, a landowner and lessor under a surface lease agreement with Long Run who at one time was owed rent. Mr. Neufeld is not currently owed any rent and all outstanding surface lease rentals will carry over as retained liabilities. He did, however, constitute himself as representative plaintiff in a lawsuit for damages commenced in June

2022 proposing a class action on behalf of all Long Run's Alberta surface lease lessors. No application to certify a class action has ever been brought. Mr. Neufeld contends that any outstanding rentals owed to landowners should be paid up front and the lawsuit claim should be categorized by the Court as a retained liability for the purposes of the transaction.

- [10] Mr. Neufeld also complains about a settlement letter sent last month by the Monitor to landowners offering to resolve outstanding surface lease claims on the basis of fifty cents on the dollar. Some 41 landowners accepted the offer. He asks the Court to rescind the letter.

B. Legal Test for Approval of a Sale or Disposition under the CCAA

- [11] In approving (or not) the disposition of assets outside the ordinary course under the **CCAA**, the Courts in Alberta and elsewhere have applied an amalgam of the factors set out in section 36(3) and those developed in *Royal Bank v Soundair Corp*, 1991 CanLII 2727 (ONCA) applicable to a sale within a receivership: *Sanjel Corporation (Re)*, 2016 ABQB 257 at paras 54-55 & *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314 at paras 10 & 11:

- [12] In the result, the consolidated factors consist of:

- The reasonableness, efficacy and integrity of the sales solicitation process;
- Whether the Monitor approved that process, and filed with the Court its opinion as to the benefit to creditors of the proposed transaction versus the alternative;
- Whether there was unfairness in the implementation of the solicitation process;
- The extent to which creditors were consulted;
- The effects of the transaction on creditors and the interests of other financial stakeholders;
- The fairness and adequacy of the proposed consideration.

- [13] The Monitor also submits that the Court should not lightly interfere with the commercial and business judgment of the debtor company and the Monitor where the solicitation process has been fair, reasonable and transparent, and should give deference to the Monitor's recommendation: *Sanjel* at para 57. This is particularly so where the Monitor conducted itself in accordance with the SISP Order, a Court-supervised process: *Acerus* at para 25.

- [14] With references to its 5th Report, the Monitor says:

- The SISP process leading to the proposed transaction was prescribed by Court Order (2nd Amended & Restated Initial Order of July 30, 2024) and therefore reasonable and fair;
- The SISP was executed according to its terms and therefore the process had efficacy and integrity (5th Report, paras 24-33);
- The Monitor made sufficient efforts to obtain the best price and has not acted improvidently (5th Report, paras 24-33);
- The Monitor expresses its opinion that the transaction is more beneficial to creditors than a sale or disposition under a bankruptcy (5th Report, paras 41-42 & 47);

- Creditors (and specifically CCBT as collateral agent for the senior secured creditors) were consulted and the impact of the transaction on other stakeholders was considered (5th Report, pars 40-41 & 48-49);
- The consideration is reasonable and fair (5th Report, paras 29, 35-36, 41-42 & 50-51);
- The SISP process was fair, reasonable, transparent and efficient (5th Report, paras 24-33); and
- The Monitor recommends that the transaction and the RVO be approved (5th Report, para 42).

[15] During argument, the Monitor's counsel stressed that Hiking was only prepared to proceed with the transaction as presented to the Court and that in the event it is not accepted, then the only remaining alternative is bankruptcy. In such a scenario, Long Run's assets would basically be turned over to the Orphan Well Association to address environmental liabilities with little to no recovery for any creditor of any type.

[16] The Monitor submits that the appropriate legal criteria for approval of the transaction have all been satisfied on the evidence.

C. Legal Test for Approval of an RVO

[17] The **CCAA** at sections 11 and 36 combine to give the Court authority to approve a transaction using an RVO. Judicial discretion in this regard must be exercised in furtherance of the **CCAA**'s purposes: *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 59 and *Harte Gold Corp (Re)*, 2022 ONSC 653 at para 32 and be guided by the baseline considerations of appropriateness, good faith and due diligence: *Harte Gold* at para 31.

[18] The request for an RVO should not be routine and should invite "close scrutiny": *Harte Gold* at para 38. Accordingly, these additional questions are apposite:

- Why is the RVO necessary in this case?
- Does the RVO structure produce an economic result that is at least as favourable as any other viable alternative?
- Is any stakeholder worse off under the RVO structure than they would have been under another viable alternative? and
- Does the consideration being paid reflect the value of the intangible assets being preserved under the RVO?

[19] To address the questions, the Monitor asserts:

- In terms of necessity of an RVO, Long Run operates in a highly regulated environment where existing permits, licenses or other rights including as party to certain key agreements are difficult or impossible to assign to a purchaser. The transaction is only viable when combined with an RVO and certain attributes otherwise lost in a traditional vesting order transaction are preserved. The attributes are recognized by the Courts as a basis for granting an RVO: *Acerus* at para s 16, 21 & 35 and *Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al*, 2022 ONSC 6354 at para 34.

- The transaction with RVO provides more benefits to Long Run's stakeholders than realization under a bankruptcy. Long Run continues as a going concern in oil and gas under a new owner who assumes substantial liabilities including all of those of an environmental nature. The transaction and RVO advance the remedial objectives of the CCAA of rehabilitating an insolvent business and avoiding the social and economic cost of large business failure: *Acerus* at para 43; *Rambler Metals and Mining Limited, Re CCAA*, 2023 NLSC 134 at para 67; and *CannaPiece Group Inc v Marzilli*, 2023 ONSC 3291 at para 19.
- No stakeholder is worse off due to the RVO. While RVO transactions often result in unsecured claims being transferred to a residual trust, resulting in zero recovery for those creditors, that is function of the insolvent state of the debtor, not the RVO process: *Acerus* at para 32; *Just Energy* at para 57; *Arrangement relatif à Blackrock Metals Inc*, 2022 QCCS 2828 at para 109.
- With regard to the adequacy of consideration, Hiking's stalking horse bid out of the multiple LOIs submitted was the only qualified bid, represents the best price for the debtor's assets and was the only proposal that enables Long Run to continue as a going concern.

[20] The Monitor submits that the *Harte Gold* test sets out the recognized legal criteria in Canada for approving an RVO and that the test is met in this case.

D. Releases

[21] As part of the transaction and RVO approval, the Monitor also seeks Court-ordered releases in respect of the Monitor, Hiking, the purchasers, Long Run and Calgary Sinoenergy and their respective current and former directors, officers, employees, contractors, agents, representatives and financial and legal advisers for any and all claims related to the transaction, Long Run and its insolvency (except the retained liabilities) and the CCAA proceedings.

[22] There is specific authority for release of the debtor's directors at section 5.1 of the CCAA. But for others, the Monitor says the plenary authority residing in section 11 allows such releases. The Monitor cites *Tacora Resources Inc (Re)*, 2024 ONSC 4436 at paras 17-25 and *Lydian International Limited (Re)*, 2020 ONSC 4006 at para 54 for the applicable legal criteria:

- whether the parties being released were necessary and essential to the restructuring of the debtor;
- whether the claims to be released are rationally connected to the purpose of the restructuring and necessary for it;
- whether the restructuring could succeed without the releases;
- whether the parties being released contributed to the restructuring; and
- whether the releases benefit the debtors as well as the creditors generally.

[23] The Court in *Tacora* says at para 17 that releases should be carefully scrutinized. The Monitor submits that the releases should be granted because the legal test set out above is satisfied, as follows:

- The proposed releasees were instrumental in all steps of the **CCAA** proceedings, including negotiating the DIP financing, operating Long Run as a going concern, preparing and conducting the SISP and will be involved in implementing the transaction and post-closing obligations.
- The proposed releases are rationally connected to and necessary for the transaction because they will reduce indemnification claims against the administration charge and directors' charge (refer to *Harte Gold* at para 82 and *Tacora* at para 25), provide certainty and finality to the transaction and the closing of the transaction is conditional upon the granting of the releases (*Harte Gold*, para 84).
- Regulatory and environmental liabilities are retained.

[24] After scrutinizing the rationale behind the releases, I am satisfied there is a critical connection between the releases and the generation, advancement and ultimately the culmination of the transaction.

[25] Before making a ruling on whether I approve the transaction with RVO (including the releases) as presented, I must deal with the objections of H Corp and Mr. Neufeld.

E. H Corp Objection

[26] H Corp's claim is designated as a transferred liability in the proposed transaction/RVO.

[27] The background to the H Corp lawsuit against Long Run, Calgary Sinoenergy and others is fully recounted in *Henenghaixin Corp v Deng*, 2021 ABQB 168 and *Henenghaixin Corp v Deng*, 2022 ABCA 271. In essence, it alleges that some individuals, while acting as directors and officers of the **CCAA** debtors, improperly induced the transfer of some \$44 million of H Corp's funds to either Long Run or Calgary Sinoenergy by fraud or misrepresentation, including presentation of false financial statements, bank records and a false shareholder declaration. Long Run reportedly received \$150,000 of these funds directly and a further \$11.5 million through Calgary Sinoenergy. I will briefly summarize the history here.

[28] The investment agreements among the general partners of the Chinese entities that funded H Corp show that the purpose of the investment was to acquire the assets of Twin Butte Energy Ltd in a receivership sale through H Corp's wholly owned subsidiary, West Lake Energy Corporation. West Lake did acquire those assets in March 2017.

[29] At the material time, Mr. Deng was one of four members of the H Corp board of directors and also a director of West Lake, Calgary Sinoenergy and Long Run. Ms. Deng, his daughter, was a director of West Lake and Long Run. Mr. Lam was a business associate of the Dengs.

[30] In early 2018, two of the Chinese investor parties became concerned that Mr. Deng would not be able to fund the acquisition of their equity interests and sent Mr. Zhang and two others to investigate West Lake's operations. At an October 2018 meeting in Calgary, with

Ms. Deng and Mr. Lam, the representatives were shown West Lake financial statements and bank statements that overstated West Lake's position.

- [31] PricewaterhouseCoopers (PwC) prepared a forensic report indicating that H Corp received \$354 million from the investment funds, of which \$276 million was used for the Twin Butte purchase and related operational costs, and that \$77 million in net payments not related to the Twin Butte assets were made to various other entities including Calgary Sinoenergy and Long Run.
- [32] Mr. Lam is said to be individual who caused the impugned transfers. He later produced a shareholders' declaration from H Corp and an investment agreement between Calgary Sinoenergy and a lender that purported to clothe him with proper authority. Both documents are alleged by H Corp to be falsified.
- [33] H Corp began its action in February 2020 and obtained a without notice Mareva Injunction/Attachment Order from this Court in April 2020 against the individuals, Long Run and Calgary Sinoenergy. The Order was vacated in March 2021 in respect of Long Run and Calgary Sinoenergy because the putative rogue individuals were no longer involved as directors and officers (at paras 94, & 96-97). The Court of Appeal then allowed the appeal in August 2022 in respect of the individuals on the basis that the evidentiary record consisted primarily of hearsay (at para 45).
- [34] At one point, H Corp asked the Court to direct a trial of an issue with respect to the falsification of records but was not successful. The litigation continued until it was stayed as a result of the Initial Order on July 4, 2024.
- [35] H Corp asserts in the **CCAA** proceedings that it has a *prima facie* case for unjust enrichment that results in a proprietary trust claim against the assets of Long Run and Calgary Sinoenergy. Relying on the classic formulation of unjust enrichment, H Corp says that Long Run was enriched by the wrongfully transferred funds, H Corp has been thereby deprived and there is no juristic reason to deny recovery: **Becker v Pettkus**, [1980] 2 SCR 834 at pg 848 and **Kerr v Baranow**, 2011 SCC 10 at para 36.
- [36] While H Corp does not oppose either the transaction or the RVO in principle, it submits that relegating H Corp's claims to the realm of transferred liabilities extinguishes its claim, which, being a constructive trust claim, is of a higher order. Justice cannot be done, says H Corp, unless its constructive trust claim is adjudicated on the merits. And since that cannot be completed in advance of the transaction closing, the claim must be preserved. That would be achieved, in H Corp's estimation, by the Court amending the transaction to designate the H Corp claim as a retained liability and securing that claim in one of two ways:
- Increasing the cash consideration payable by the Purchaser by \$44 million, to be held in trust pending adjudication; or
 - Alternatively, if H Corp is ultimately successful, the secured lender (as represented by CCBT), either advances the value of H Corp's claim or reduces its secured claim by the same amount, in either event with payment to H Corp of its claim as adjudicated.
- [37] H Corp's theory is that if constructive trust is proven then the assets comprising the trust were never Long Run's property, never secured to CCBT's principals and cannot be sold unless the trust claim is paid, i.e. the *nemo dat* rule.

[38] Since the trust assets are unidentifiable at this point, H Corp proposes a “tracing exercise” to determine if and how H Corp’s money turned into assets of Long Run. H Corp says the broad discretion under section 11 allows the Court to alter the transaction as requested by H Corp.

[39] Initially, H Corp had two further objections regarding aspects of the Subscription Agreement/RVO that it felt were detrimental and unfair to H Corp. The first was that the Subscription Agreement preserves as a retained asset the Third Party Claim against H Corp which, says H Corp, severs mutuality of debts and prejudices its rights of set-off. The Monitor and Hiking have voluntarily amended the Subscription Agreement so as not to impair any set-off rights that H Corp would otherwise have.

[40] The second further objection relates to the scope of the proposed Releases which, in H Corp’s submission, encompasses the three individual defendants in the H Corp action. H Corp submits that this purported release of liability in favour of the three individuals is contrary to section 5.1(2) of the **CCAA** (which excepts from a compromise or arrangement any claim against directors based on allegations of misrepresentation or wrongful or oppressive conduct by the directors) and further that **Lydian** factors do not apply to these individuals.

[41] The Monitor disagrees that the Releases can bear this broad an interpretation but in any event, and for greater certainty, has amended the Releases to specifically exclude the three individuals.

[42] As to H Corp’s main objection, the Monitor responds:

- H Corp’s claim cannot succeed as a constructive trust claim. First, there are no identifiable trust assets which are a legal requirement for a constructive trust: **Peter v Beblow**, [1993] 1 SCR 980, 1993 CarswellBC 1258 at para 24. The simple “knowing receipt” of funds is not sufficient to establish a constructive trust if specific property cannot be identified which is the subject of the enrichment. The failure to identify specific property effectively turns the claim into a request for a floating charge, which the Monitor says the Courts have consistently rejected.
- Moreover, there is a high threshold for recognition of constructive trust claims in the insolvency context that is not met here. The Monitor submits that the claimant must exhibit compelling or extraordinary grounds: **Credifinance Securities Limited v DLSC Capital Corp**, 2011 ONCA 160 at paras 32-33.
- Second, there is a juristic reason for not recognizing the claim, being its negative impact on other creditors within the **CCAA** proceeding, upsetting the priority scheme established by law and defeating the remedial objectives of the **CCAA**.
- This latter ground hinges on the fact that the SISP only produced Hiking’s Stalking Horse Bid as a qualified bid and, further, that Hiking is only prepared to enter into the transaction on the terms negotiated with the Monitor and presented to the Court, and not an amended transaction as suggested by H Corp or any other transaction: **Supplement to the Monitor’s Fifth Report**, Appendix H. The alternative then is bankruptcy, or the surrender of Long Run’s assets to the Orphan Well Association: **Supplement to the Monitor’s Fifth Report** at para 56.

- H Corp has incorrectly framed the issue as a “priority dispute” between H Corp and CCBT. The Monitor asserts that unless H Corp can prove its claim takes precedence over the DIP fund (which it has not attempted to do), there is no basis to require Hiking (the stalking horse bidder) to retain it, even if H Corp’s claim holds the same or higher priority than the CCBT debt.
- Accordingly, the feature that distinguishes the present case from the authorities cited by H Corp (where contingent property claims were either adjudicated on a summary basis² or preserved by funds in trust pending adjudication³), is that Hiking has made a credit bid by way of its DIP Fund (not at the secured creditor level as in H Corp’s authorities) and has chosen to retain some liabilities and shed others.
- Regardless, strictly on a timing basis, CCBT has priority over any subsequent claims by H Corp against the Debtors. CCBT perfected its security on January 26, 2017, before the first impugned transfer of funds by H Corp to the Debtors on April 13, 2017.
- There is no viable alternative to the Subscription Agreement with RVO advanced by Hiking. Hiking has staked its ground by saying that it will not proceed with the transaction if H Corp’s claim becomes a retained liability. The only other scenario is bankruptcy and the resulting loss for all stakeholders: *Invico* at para 26.

[43] CCBT by its counsel supported the Monitor’s approval application by arguing:

- CCBT’s security is first in time. Recognizing H Corp’s constructive trust claim would in effect confer upon H Corp a super-priority for its unproven claim, notwithstanding that CCBT fulfilled all statutory obligations to register and perfect its security.
- H Corp has nothing more than an unsecured claim. That there is no statutory distribution scheme within the *CCAA* does not entitle unsecured creditors to obtain enhanced security over secured creditors for pre-filing obligations. It is essential in Court-supervised proceedings to give due consideration to the priority rights of secured creditors: *Windsor Machine & Stamping Limited (Re)*, 2009 CanLII 39771 (ONSC) at para 43.
- H Corp has failed in four years of litigation to present any substantial evidence to support its claim.

[44] The Monitor’s application was supported by TC Energy and Nova Gas Transmission Ltd and Canadian Natural Resources Limited, whose contracts with Long Run are on the retained list, by the Orphan Well Association who would take on abandonment and reclamation obligations in the event of Long Run’s cessation of operations, by the municipalities of Birch Hills County, Big Lakes County and Lac Ste Anne County whose unpaid tax levies are proposed to be retained, and by Long Run and Calgary Sinoenergy themselves.

F. Analytic Framework for H Corp Claim

[45] H Corp took issue with the notion of the Monitor and the Purchaser “picking winners and losers” in terms of which liabilities are retained and which are transferred. However, the Monitor submits that Alberta law recognizes that a purchaser may choose which liabilities to

² *Invico Diversified Income Limited Partnership v NewGrange Energy Inc*, 2024 ABKB 214 at para 19.

³ *Bison Properties Ltd (Re)*, 2016 BCSC 793 and *American Iron v 1340923 Ontario*, 2018 ONSC 2810.

keep or disclaim in a credit bid context, as part of the advancement of the **CCAA**'s remedial objectives: *Canadian Overseas Petroleum Limited (Re)*, 2024 ABCA 190 (*COPL* case) at paras 24 & 38.⁴

[46] As stated in *Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc*, 2019 ONCA 508 at para 101, many cases (cited therein) in Canada have considered the equities to determine whether a third-party interest should be extinguished. There is no prescribed list of factors and every case is contextual and fact-dependent.

[47] Having regard to the caselaw referred to immediately above, I conclude that a constructive trust claimant, such as H Corp in this case, must meet some kind of threshold on the merits in order for the Court to order that the claim survive the transaction/RVO in the manner suggested by H Corp. There has been an assessment of sorts found in the Monitor's Supplement to the Fifth Report. H Corp on the one hand and the Monitor and CCBT on the other were all content to have me consider the merits for the purposes of this application.

[48] Accordingly, in deciding whether I implement either of H Corp's proposals to amend the Subscription Agreement in order to preserve its constructive claim for later adjudication, I employ this analytic framework:

1. What standard must be met in terms of the strength of the fraud or misrepresentation claim?
2. Has the standard been met in this case?
3. Is this an appropriate case for the remedy of constructive trust?
4. What is the role of the equities?

[49] In effect, I am engaging in a form of summary adjudication that is necessitated by the circumstances of this case.

G. Standard to be met in terms of the strength of the fraud or misrepresentation case

[50] A standard is necessary because the mere assertion of a constructive trust claim should not be enough to derail or frustrate **CCAA** proceedings.

[51] When this question of threshold was posed during the hearing, counsel for the Monitor argued that a standard equal to that required of a Plaintiff in a summary judgment application, i.e. proof on a balance of probabilities, was necessary to control unmeritorious claims that could upset **CCAA** proceedings. The Monitor contends that given the factual ambiguity of the case and that H Corp cannot even point to any identifiable trust property mean that H Corp's claim is no where near that standard.

[52] H Corp says that the standard of *prima facie* case applies, that this standard was met for the purposes of a Mareva Injunction/Attachment Order as found by Romaine J and that this finding has never been assailed.

⁴ Note this is a leave decision. Justice Yamauchi had countenanced the credit bidder's selective assumption approach. Justice de Wit denied leave.

- [53] The cases state that the threshold for establishing constructive trust claims in the bankruptcy context is high: **Credifinance** at para 13; **Hoard (Re)**, 2014 ABQB 42 at para 23. It should be no different in the case of an insolvency where the **CCAA** applies.
- [54] The Monitor relies on Chief Justice Morawetz’s decision in **Laurentian University of Sudbury**, 2022 ONSC 3013 for the proposition that the standard to be met is proof on a balance of probabilities. In that case, a plaintiff sought to have an historical claim for sexual abuse adjudicated outside of the claims process that had been established under the **CCAA**. At issue was the interpretation of s 19(2) of the **CCAA** which exempts certain types of claims from compromises or arrangements under the **CCAA**, including civil judgments resulting from sexual assault claims and, notably, any debt or liability resulting from obtaining property by false pretences or fraudulent misrepresentation.
- [55] The University’s counsel had argued that (at para 29 of **Laurentian University**):
- ... It would mean that any claim of the types mentioned in s. 19(2) – which is a broad category of claims including fraud, misappropriation, and misrepresentation – would not be capable of being determined in the **CCAA** claims process and could proceed in ordinary litigation. This would create chaos and is precisely what the Supreme Court of Canada stated the **CCAA** was designed to prevent when it said that “the single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt” (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para 22).
- [56] In assessing the standard of proof to be met, Chief Justice Morawetz in turn relied on the Supreme Court of Canada’s decision in **Montreal (City) v. Deloitte Restructuring Inc.**, 2021 SCC 53 in relation to claims of fraud and misrepresentation. The Supreme Court stated at paras 24 & 25:
- [24] The burden of proof applicable to this scheme can be determined by referring to the case law and academic commentary on s. 178(1)(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”), which is analogous in every respect to s. 19(2)(d) of the **CCAA**. As this Court noted in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, these two statutes “for[m] part of an integrated body of insolvency law” (para. 78; see also 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at para. 74).
- [25] To discharge its burden of proving that its claim relates to a debt “resulting from obtaining property or services by false pretences or fraudulent misrepresentation”, a creditor must establish, on a balance of probabilities, the following four elements: (i) the debtor made a representation to the creditor; (ii) the representation was false; (iii) the debtor knew that the representation was false; (iv) the false representation was made to obtain property or a service (*Léger v. Ouellet*, 2011 QCCA 1858, at para. 30 (CanLII); *Dupuis v. Cernato Holdings Inc.*, 2019 QCCA 376, at para. 37 (CanLII); see also L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf)), vol. 3, at H§63; *Berger, Re*, 2010 ONSC 4376, 70 C.B.R. (5th) 225, at para. 28; J. P. Sarra, G. B. Morawetz and L. W. Houlden, *The 2020-2021 Annotated Bankruptcy And Insolvency Act* (2020), at pp. 1001 and 1006;

D. Brochu, *Précis de la faillite et de l'insolvabilité* (5th ed. 2016), at pp. 502-3). Once these elements have been proved, the creditor of a claim to which s. 19(2)(d) of the CCAA applies is in a better position than other ordinary creditors, insofar as such a claim, while not conferring secured creditor status, cannot be dealt with by a compromise or arrangement (see Houlden, Morawetz and Sarra, at H§63). This exception to the general scheme established by s. 19(1) of the CCAA must be interpreted narrowly (see, e.g., by analogy, *Lambert v. Macara*, 2004 CanLII 30445 (QC CA), [2004] R.J.Q. 2637 (C.A.), at para. 96; *Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710, at para. 24).

(emphasis appears in the *Laurentian University* case.)

- [57] Chief Justice Morawetz considered the above ruling by the Supreme Court of Canada to be determinative and found that since the claimant had only asserted a claim of historical sexual assault (as opposed to having proven it on a balance of probabilities), the claim would not be separately adjudicated. He says at paras 44-46:

[44] The foregoing analysis sets out the proper framework for analyzing the issue before the Court. In my view, it confirms the argument put forth by LU and is a complete answer to the submissions of both BR and US.

[45] Simply put, the exception to the general scheme established by s. 19(1) of the CCAA must be interpreted narrowly and the elements of the exception set out in s. 19(2) must be proved.

[46] It is not sufficient to infer liability (*Montreal* para. 21). The burden of proof to establish a debt or liability and an award of damages for sexual assault is on the claimant (*Montreal*, para. 24, 25 and 28).

- [58] There are no statutory restrictions on the form, structure or content of a plan of compromise or arrangement. The RVO is a relatively new and still novel structure in Canada. As stated earlier, the Court's authority for approving the Subscription Agreement/RVO derives from section 11. Even if the transaction/RVO in this case does not, strictly speaking, form a compromise or arrangement under Part I of the CCAA, a Subscription Agreement with RVO is a recognized and legitimate vehicle for salvaging a business under the CCAA. Accordingly, either section 19(2) itself applies or its underlying logic as set out in *Montreal (City)* applies. This necessarily flows from the notion expressed in *Century Services* and *Callidus* that the BIA⁵ and CCAA comprise a complete code with regard to insolvency law in Canada.

- [59] Here, H Corp is doing the same thing that the applicant was seeking in *Laurentian University*, namely, to have an as-yet unproven claim preserved for later adjudication outside the CCAA regime. I appreciate that H Corp's claim is in a more advanced state. But there is no reason for me to apply a different standard than that established by the Supreme Court of Canada because a Subscription Agreement coupled with a RVO is the structure in this case. Consistent standards must be applied so that the CCAA regime overall has integrity and stability.

⁵ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 as am.

[60] I therefore conclude that H Corp must meet the standard of proof on a balance of probabilities, based on the record presented to the Court. In this case, the record includes the latest affidavit of Mr. Zhang which, with exhibits, comes in at 1051 pages.

H. Has the standard been met in this case?

[61] It was Mr. Zhang who provided the affidavit evidence for the original Mareva Injunction/Attachment Order application. As described by the Court of Appeal in 2022 ABCA 271 at para 32, he was “an employee of the general partner of one of limited partnerships, several entities removed from H Corp in the ownership chain.” The Court of Appeal determined at para 45 that his evidence was entirely hearsay and therefore an inadequate foundation for establishing the allegations to the required standard. The Mareva Injunction/Attachment Order was thus vacated by the Court of Appeal in respect of the individuals as well.

[62] Mr. Zhang, as of the date of the swearing of the more recent September 13, 2024 affidavit for this application, is the President of H Corp. This more recent affidavit revisits some of the evidence he gave in his previous affidavits in the H Corp action but also recounts in detail events subsequent to the Court of Appeal vacating the Injunction/Attachment Order.

[63] However, Mr. Zhang’s most recent affidavit does attach Mr. Neu’s affidavit from the H Corp action sworn May 21, 2021 as an exhibit. The submission of this affidavit, along with an affidavit from Mr. Middleton, is discussed at para 90 of 2021 ABQB 168 and paras 46 & 47 of 2022 ABCA 271. H Corp suggests in this application that Mr. Neu’s affidavit shores up any evidentiary deficiency found by the Court of Appeal and establishes a strong *prima facie* case of fraud.

[64] Mr. Neu was a director of H Corp and says he was, on paper at least, the President and CEO of H Corp. He worked for different companies “under the Calgary Sinoenergy umbrella” in the field as well as in the office of Long Run and affiliated companies as an engineering consultant. Mr. Neu’s affidavit supports H Corp’s claim in several respects:

- He believes that the companies under the Calgary Sinoenergy umbrella were affiliated and managed and controlled by Mr. Deng.
- He confirms the transfers that total some \$93 million between April 13, 2017 and September 5, 2017 from H Corp to Calgary Sinoenergy. Mr. Lam, one of the Defendants in the H Corp action, was described by Mr. Neu as the CFO of both H Corp and Calgary Sinoenergy. Mr. Lam set up Mr. Neu as a co-signor for H Corp’s bank account with ATB.
- He says that he did not believe Mr. Lam required his approval for any of the transfers. He confirmed the payments with ATB because he believed they were intercompany transfers authorized by Mr. Lam.
- He indicates that, contrary to what is stated in Mr. Lam’s affidavit in the H Corp action, he never gave instructions to Mr. Lam to conduct any transfers nor did Mr. Lam seek his approval to do so.
- He was never aware of the shareholder declaration and loan agreement, empowering Mr. Lam to do banking and transactions as H Corp’s “special representative”.

- Mr. Neu was asked in December 2018 by Mr. Lam to sign backdated indemnity agreements for Mr. Deng, Ms. Deng and Mr. Lam. One of the signatures on one of the agreements looked like a forgery to him. He was also asked by Mr. Lam to sign an authorization letter. He signed none of these. Mr. Lam later claimed that Mr. Neu had written the authorization letter.

[65] Mr. Neu's evidence primarily implicates Mr. Lam and to a lesser extent the two Dengs. It does not expressly implicate Long Run except to the extent it may have been used as an instrument in the same way H Corp was. I accept that Mr. Neu's evidence lends direct support to a case of fraud or misrepresentation but that is in respect of the individuals. While it is true that Mr. Deng and his daughter Ms. Deng were directors of Long Run at the time of the impugned transfers, Mr. Deng was also a director of H Corp. It is live issue as to the capacity in which they were acting, their own or as directors of H Corp, Long Run or some other entity.

[66] The Monitor notes from its review of H Corp's claim that:

- H Corp obtained \$352 million in funds from York City Enterprises Limited to acquire the assets of Twin Butte Energy Ltd in a receivership sale.
- H Corp alleges from approximately January to September 2017, Mr. Deng, while he was a director of H Corp and the Debtors, and assisted by Ms. Deng and Mr. Lam, wrongfully diverted net funds of \$43,765,669 from H Corp to the Debtors. H Corp further claims that the diversion of the funds was not discovered by H Corp until January 2019.
- The forensic report by PwC, an exhibit to Mr. Zhang's recent affidavit, outlines a complicated series of transactions whereby H Corp, York City, the Debtors and other related and unrelated entities advanced and received payments (or benefits) back and forth which net out to the aforesaid \$44 million.
- Of the \$77,006,491 in net advances, H Corp alleges that \$76,956,491 was made to Calgary Sinoenergy and \$150,000 to Long Run. H Corp acknowledges that because the Debtors made payments towards a deposit for the Twin Butte assets and interest payments against a York City loan, the net outflow from H Corp is the amount of the claim.
- The date of the transfers from H Corp is after the date of which CCBT's security was perfected and after the date of funds were advanced under the CCBT credit facilities.
- Calgary Sinoenergy and Long Run filed their Statement of Defence on February 11, 2021. Rather than the funds in question being wrongfully diverted, they say that if the claimed funds were paid, they were governed by contracts in place between Calgary Sinoenergy and Long Run, or with H Corp or York City.
- The Monitor refrains from commenting on whether fraudulent documents were uttered to support the impugned payments but notes in its review of the Calgary Sinoenergy financial statements the amounts received from H Corp are recorded as intercompany loans.
- The classification of the advances from H Corp is clearly a complicated issue that has resulted in protracted litigation since H Corp's claim was filed on February 28, 2020. A further complicating factor is that H Corp and the Debtors had common directors including the individual Defendants who appear to have been controlling finances and intermingling funds as among H Corp and the Debtors.

- PwC's forensic report contains a specific limitation that it cannot verify the completeness of payments made by "unrelated entities" (which include Calgary Sinoenergy and Long Run) on behalf of the two parent partnerships of which H Corp is an indirectly wholly owned subsidiary.

[67] The Monitor's special counsel, appointed to deal with H Corp's claim, argues:

- The H Corp allegations are focused on fraudulent actions attributed to the individual defendants, acting within their roles at H Corp or its affiliates, including West Lake. The financial documents, especially the bank records and statements, said to be falsified relate to West Lake, not Long Run.
- Long Run is a distinct entity from both H Corp and West Lake. It is unreasonable to assume that the individual defendants were acting as agents of Long Run when presenting documents pertaining to West Lake. There is no factual basis on which to suggest that Long Run, on its own account, made any representations to H Corp in connection with the documents.
- Moreover, the motive behind whatever actions the individual defendants took was not to benefit Long Run, but rather for personal gain or some other business reason.
- H Corp has asserted but has not proven to the required standard of proof on a balance of probabilities, that the representations made were false. No Court has made that finding. As the Rule 7.1 application was denied, the factual issue of fraud (or not) remains unresolved.
- H Corp itself says that it was the individuals pretending to have authority that allowed them to effect the unauthorized transfers:

(from H Corp's Statement of Claim at para 7)

Both Ms. Deng and Mr. Lam represented themselves as having authority to direct the affairs of H Corp. and West Lake as delegates of Mr. Deng. They held out Mr. Deng as being the ultimate owner or controller of H Corp. As outlined below, they had no such authority. However, under the pretenses of having such authority, Ms. Deng, Mr. Lam, and Mr. Deng wrongfully removed tens of millions of dollars from H Corp, as detailed below.

and

(from Mr. Zhang's September 13, 2024 affidavit at paras 24-25)

Mr. Neu indicated he was a Calgary Sinoenergy employee who, at the direction of a cousin of Mr. Deng, accepted a role as a director of H Corp and was then appointed President and CEO. Further, at the direction of Mr. Lam, he stated he would confirm, if asked by the bank, transfers from H Corp to West Lake that Mr. Lam initiated via ATB. He assumed H Corp was one of the corporations controlled by Deng and that Mr. Lam had authority to initiate such transfers.

[68] Further to this last point, I note that the presentation of the supposedly false financial statements and bank records to H Corp's representatives occurred in October 2018 and the supposedly false shareholders' declaration and the investment agreements were presented by

Mr. Lam some time after that. The indemnity agreements were presented by Mr. Lam to Mr. Neu in December 2018. The last of the impugned transfers was made in September 2017. Therefore, the false documents did not induce the transfers. Rather, they were more in the nature of cover-up or attempts at after-the-fact justification.

- [69] The facts support the Monitor's contention that it was the misrepresentations of status by the individuals in respect of H Corp, and not Long Run, that induced the transfers. It is not apparent on the record that the Individual Defendants made any supposed representations, either verbal or documentary, about or on behalf of Long Run.
- [70] Even if Mr. Zhang's latest affidavit in this proceeding, which includes Mr. Neu's 2021 affidavit from the H Corp action, has the effect of remedying the evidentiary lacuna identified by the Court of Appeal in 2022 ABCA 271, the evidence of wrongdoing is on the part of the individual defendants. There is a clear, important and unresolved issue regarding on whose behalf the individuals were acting, given the multiplicity of "hats" they were wearing. There are credibility issues to be determined. The Court previously ruled in a Rule 7.1 application brought by H Corp that the determination of liability for fraud required a trial.
- [71] In summary, H Corp has not met the threshold of the balance of probabilities set out in the Supreme Court of Canada's interpretation of section 19(2) in *Montreal (City)*.

I. Is this an appropriate case for the remedy of constructive trust?

- [72] The imposition of a constructive trust is a remedy that the Courts consider only after a valid restitutionary claim has been made out: *Lac Minerals Ltd. v International Corona Resources Ltd.*, [1989] 2 SCR 574 at page 678. This Court also said in *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809 (Romaine J) at paras 77-78:
- [77] The onus of proving a constructive trust rests with the claimant. It is a discretionary remedy that will not be imposed without taking into account the interest of others who may be affected by granting the remedy: *Re Hoard*, 2014 ABQB 426 at para 26.
- [78] As noted at para 23 of *Hoard*, given that the *BIA* provides a code by which legislators have balanced the interest of those adversely affected by the bankruptcy, the legal rights of creditors should not be defeated unless it would be unconscionable not to recognize a constructive trust. The same reasoning applies to the *CCAA*.
- [73] Further, the Supreme Court of Canada has stated there are two broad categories of cases where constructive trusts may be recognized. In *Soulos v Korkontzilas*, 1997 CanLII 346 (SCC), [1997] 2 SCR 217 at para 43, McLachlin J as she was then writing for the majority, stated:

I conclude that in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground: where there is a wrongful act but no unjust enrichment and corresponding deprivation; or where there is an unconscionable unjust enrichment in the absence of a wrongful act, as

in *Pettkus v Becker*, *supra*. Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate.

[74] According to *Soulos* at para 45, there are four prerequisites for a constructive trust based on wrongful conduct:

- The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
- The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
- The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
- There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

[75] For recent Alberta application, see *Hillsboro Ventures Inc v Ceana Development Sunridge Inc*, 2024 ABKB 658 at para 89 and *Zerbin v Vrbanek*, 2020 ABQB 797 at para 170, *aff'd* 2021 ABCA 317, leave to appeal *ref'd* 2022 CanLII 21684 (SCC).

[76] The wrongful conduct that engages the conscience of the Court must be that of the insolvent person, such that retention of the property by that person (or the creditors of that person) would be against conscience, as was the case in *Soulos* and *Credifinance*. It is not established on this record that Long Run received H Corp's funds on its own behalf or from Calgary Sinoenergy knowing the funds had been misappropriated from H Corp. That is an available inference from the evidence based on the fact that the Dengs, father and daughter, were directors of Long Run but it is also an equal inference that Long Run, along with H Corp, were merely the vehicles by which their machinations were carried out. I say that because H Corp's Statement of Claim at para 26 suggests that Calgary Sinoenergy and Long Run have siphoned H Corp's money elsewhere, as do paras 36 – 38 which allege fraudulent conveyance of the funds to payees unknown. By its own pleading, H Corp says it does not know whether Long Run even has the money. In other words, Long Run could also be a corporate dupe.

[77] H Corp posed its constructive trust claim on the basis of a wrongful act that results in unjust enrichment. It is not a case where the unjust enrichment is the result of gratuitous services provided by the plaintiff that increases the value of the defendant's assets in the vein of *Becker v Pettkus* or *Kerr v Baranow*. It is not a case where the defendant misappropriated a corporate opportunity that belonged to the plaintiff that resulted in the defendant acquiring a valuable property as in *Lac Minerals*. The latter case poses the important question about the type of case that ought to be recognized with a constructive trust. At page 678, La Forest J for the majority of the Supreme Court of Canada states:

- In the “vast majority” of cases, a constructive trust will not be the appropriate remedy. There is no need to award a constructive trust if the plaintiff’s claim can be satisfied by a monetary award.
- A constructive trust should only be awarded if there is a reason to grant the plaintiff additional rights that flow from a recognition of proprietary rights. One of the most important is the priority accorded to a property holder in a bankruptcy. Another is the change in value of the specific asset in question. The third is the taking by the defendant of a “specific and unique property” that the plaintiff would have otherwise acquired.

[78] Here, H Corp’s claim would be satisfied by a monetary judgment but for the fact that Long Run is insolvent. The fact that Long Run is insolvent cannot be a reason for awarding a constructive trust, particularly when there are other interests at stake: **Barnabe v Touhey**, 1995 CanLII 1672 (ONCA). Moreover, there is no specific fund in Long Run’s possession that H Corp can point to as being H Corp’s funds. There may have been comingling at one point and the transferred funds may or may not be within Long Run’s existing assets.

[79] The **Soulas** case involved the defendant realtor misappropriating an opportunity to acquire a certain piece of real estate from a client. The finding that a constructive trust is appropriate is founded upon recognized situations of equitable obligation, the existence of a duty of loyalty and the breach of that duty through the misappropriation of an opportunity to acquire a specific property. At paras 34-35, the Court notes:

[34] It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.

[35] Good conscience as a common concept unifying the various instances in which a constructive trust may be found has the disadvantage of being very general. But any concept capable of embracing the diverse circumstances in which a constructive trust may be imposed must, of necessity, be general. Particularity is found in the situations in which judges in the past have found constructive trusts. A judge faced with a claim for a constructive trust will have regard not merely to what might seem “fair” in a general sense, but to other situations where courts have found a constructive trust. The goal is but a reasoned, incremental development of the law on a case-by-case basis.

[80] It is true that H Corp and Long Run are connected by a common director (Mr. Deng). The missing funds came from a \$352 million investment put together by H Corp to enable West Lake to acquire and operate the Twin Butte assets. Calgary Sinoenergy and Long Run were unrelated to the Twin Butte assets: 2022 ABCA 271 at para 12.

[81] In this case, where are the **Soulas** elements of a recognized situation of equitable obligation, the existence of a duty of loyalty and the breach of that duty? There is a legal (versus equitable) duty on all residents of Canada to not knowingly possess proceeds obtained by or derived from the commission of an offence (of which fraud and false pretences are an example): **Criminal Code**, section 354. No other particular situation of recognized equitable obligation between H Corp and Long Run nor duty by Long Run to H Corp are alleged, except that Long Run was the recipient or even only the conduit of the funds.

[82] The **Soulas** case gives an example of “intervening” creditors in a bankruptcy whose claims would be defeated by recognition of a constructive trust for wrongful conduct. It is named as a factor that prevents such recognition. A prior creditor, such as CCBT in this case, would be an equal example. See also **Barnabe v Touhey** where the Ontario Court of Appeal says:

While a constructive trust, if appropriately established, could have the effect of the beneficiary of the trust receiving payment out of funds which would otherwise become part of the estate of a bankrupt divisible among his creditors, a constructive trust, otherwise unavailable, cannot be imposed for that purpose. This would amount to imposing what may be a fair result as between the constructive trustee and beneficiary, to the unfair detriment of all other creditors of the bankrupt.

[83] In summary, I find that the reasons for denying that a constructive trust as a remedy here are:

- Insufficient proof that Long Run knowingly received funds obtained by fraud or misrepresentation, or played a role on its own account in perpetrating a fraud or misrepresentation against H Corp;
- Insufficient proof that the funds, formerly comingled, are still in Long Run’s possession;
- A monetary judgment would be sufficient, but for Long Run’s insolvency;
- The insolvency of Long Run is not a reason to award a constructive trust;
- There is no specific and unique, or even identifiable, property claimed by H Corp that engages the constructive trust concept;
- H Corp has not established a situation of recognized equitable obligation and breach of a corresponding duty that renders Long Run’s continued possession of the funds (if that is indeed the case) contrary to conscience.

J. The Role of the Equities

[84] Consideration of the equities of this case is the confluence point of all the theories for determining whether a constructive trust is indicated. Those theories in totality present these questions:

- Whether there is a juristic reason that negates an unjust enrichment claim;

- Whether there are factors (including the interests of other creditors) that would render imposition of a constructive trust unjust (the 4th **Soulas** factor);
- Whether it would be contrary to good conscience not to recognize a constructive trust in these circumstances.

[85] These may be variations of the same question of the role of the equities.

[86] Even where the strength of the case for wrongful conduct is established to the required standard, it would still be necessary to have regard to the equities to determine whether the claimant's claim should be preserved where there are **CCAA** proceedings. That is not the case here. Admittedly, in the case before me, the strength of H Corp's claim against Long Run features prominently in equitable considerations.

[87] In looking at the equities, I first ask myself the question of whether it is advisable or even legally possible to amend the transaction as suggested by H Corp?

[88] The authority to do so, says H Corp, lies in section 11 which gives a wide discretionary power to the Court to make any Order it considers appropriate in the circumstances. While making the requested Order may be theoretically possible, the question is whether I *should* make it. I am guided by the **CCAA**'s objective, summarized in the **COPL** case at para 17 as:

The objective of the **CCAA** is to attempt to avoid the social and economic losses which result from the liquidation of an insolvent company. The typical **CCAA** case involves an attempt to facilitate the reorganization and survival of a pre-filing debtor company so that it can remain in an operational state. Where such a goal cannot be accomplished liquidation, receivership or the **Bankruptcy and Insolvency Act** regime will apply. The **CCAA** also has the objectives of maximizing creditor recovery, the preservation of going concern value, the preservation of jobs and communities, and the enhancement of the credit system generally. See **9354-9186 Québec Inc v Callidus Capital Corp**, 2020 SCC 10 at paras 40-42.

[89] I need to be realistic about what would happen if I were to purport to change the transaction as H Corp asks that I do. I see these consequences:

- The Subscription Agreement is a comprehensive, complex and detailed series of inter-related promises and obligations, meticulously and intensely negotiated between sophisticated arms-length parties. I would be forcing those parties into a business arrangement that they did not agree to and do not want. The changes could have consequences, unforeseen by me, that adversely affect either or both parties or the viability of the transaction itself. I would be interfering with the right of parties to freely enter into commercial agreements. The Court should not step in here and rewrite the agreement.
- I would be forcing either Hiking or CCBT's principals to become unwitting (and unwilling) indemnitors of Long Run and Calgary Sinoenergy with regard their putative liability to H Corp, an unfair result when neither had anything to do with the transactions between H Corp and the Debtors giving rise to H Corp's action.

[90] Hiking states in no uncertain terms that it will not enter into a transaction that is not the one presented to the Court. It is a reasonable position to take. The parties have negotiated in good faith so far. Hiking is taking on a lot of risk as it is.

[91] The other equities that come into play are:

- The strength of H Corp's case: H Corp may have a triable issue but has not proven fraud or misrepresentation on a balance of probabilities based on the record. The facts are too ambiguous at this point. There are credibility issues to be tested.
- H Corp must meet the summary judgment standard. Otherwise, most any allegation of fraud or misrepresentation could have the effect of stopping a **CCAA** proceeding in its tracks. The integrity of the **CCAA** regime could be thereby compromised.
- There is no identifiable trust property. The amount of the trust claim is uncertain. H Corp's own forensic expert recognizes that not all outflows made by Calgary Sinoenergy and Long Run are necessarily accounted for.
- Neither Hiking nor CCBT (or its principals) are tainted by any alleged wrongdoing on the part of the Individual Defendants and it would be unjust to scuttle the transaction for them or make them indemnitors for wrongdoing yet to be proven.
- CCBT is not enriched by a failed (or in this case, disclaimed constructive trust claim) but is merely recovering (or in this case, continuing to be secured for) what it is owed: **3 Eau Claire Developments Inc (Re)**, 2015 ABQB 208 at para 51.
- While I concede that the Individual defendants did and said some suspicious things that suggest fraud on their part, H Corp has not shown that Long Run, either on its own or through the agency of the individuals, is responsible for the suspicious things and that it would therefore be unconscionable for H Corp not to recover its claim from the assets of Long Run. Compelling or extraordinary grounds have not been shown.
- In greater context, I would be violating the "single proceeding model" espoused in **Century Services** and **Laurentian University** by permitting the constructive trust claim to be separately litigated, potentially destabilizing Canada's insolvency regime.

[92] The main counterbalancing factor is the interests of Long Run's secured creditors, the Purchaser and the other financial stakeholders such as contractual parties, the municipalities owed taxes, the employees, suppliers and so on. The interests of the creditors and others, as represented in the Subscription Agreement and RVO, can be characterized in any of these ways:

- as a juristic reason for denying unjust enrichment;
- a factor that negates a constructive trust based on wrongful conduct, or
- as aligning with good conscience in a constructive trust analysis.

[93] However characterized, the same conclusion is reached. The equities favour approval of the Subscription Agreement/RVO in the present form, without amendment. I can stretch my imagination and contemplate amending the Subscription Agreement as H Corp requests under the authority granted by section 11. But I am not going to actually do it. I am not satisfied that is fair or not harmful to do so.

[94] Chief Justice Morawetz cautions at para 33 of *Harte Gold*:

The SCC in *Callidus* made an important point in the context of the limits of broad discretion; all discretion has limits and its exercise under s. 11 must accord with the objectives of the *CCAA* and other insolvency legislation in Canada. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. Further, the discretion under s. 11 must also be exercised in furtherance of three baseline considerations: (a) that the order sought is appropriate in the circumstances, and (b) that the applicant has been acting in good faith and (c) with due diligence.

[95] Is H Corp being treated fairly and equitably by not preserving its claim? For all the reasons set out above, I conclude that its case is not proven to the required standard and that the circumstances do not give rise to a remedy of constructive trust. H Corp is then left with an unsecured claim. The fact that unsecured claims will not be paid is a function of Long Run's insolvency, not the Subscription Agreement and RVO. The same outcome would arise if Long Run were simply to go into bankruptcy.

[96] As stated, the *BIA* and *CCAA* are deemed to comprise a complete insolvency code in Canada. In a bankruptcy, H Corp would face the same issues of having to meet the required standard of proof and establishing the constituent elements of a constructive trust when its claim is adjudicated in a bankruptcy. H Corp is no further ahead but CCBT and other financial stakeholders are adversely affected in a severe way.

[97] While I say the test in *Harte Gold* is met, the equities also favour approval of the Subscription Agreement/RVO without amendment.

K. Neufeld Objection

[98] Abe Neufeld is a rural landowner who is the lessor under a registered surface lease with Long Run as lessee. The previous owner of the property had commenced Action # 2204 00354 in June 2022 against Long Run that purported to be a class action on behalf all Alberta Long Run lessors. In that action, the plaintiff claimed (as a representative plaintiff) that Long Run was in default of rentals under the surface leases and sought not just the unpaid rentals but also a further \$30 million in consequential damages, and then punitive damages. The statement of claim (paraphrasing here) accuses Long Run of deliberately withholding the rental payments as a corporate strategy to the financial detriment of the landowners.

[99] In August 2022, Mr. Neufeld was substituted as the representative plaintiff in an amended statement of claim. The claim for the additional \$30 million was clarified as consisting of damages for loss of investment opportunity. The plaintiff estimates that there are 6,415 members in the proposed class and says Long Run has been unjustly enriched by the use of money otherwise payable to the class members.

[100] No statement of defence has yet been filed and no certification application has been made.

[101] The outstanding rental payments are already shown in the Subscription Agreement as a retained liability in the amount of \$6.5 million. Mr. Neufeld himself has been fully paid.

[102] The law firm KMSC Law LLP says in its brief on behalf of Mr. Neufeld that it also represents 54 different landowners with, in total, 140 surface locations where Long Run is lessee. The brief says these clients, unnamed, support the relief sought by Mr. Neufeld and adopt his submissions. In the brief, “the Neufeld Claim” is defined as “outstanding lease rentals and interest Long Run knowingly withheld from Albertan landowners since 2020.”

[103] In this proceeding, Mr. Neufeld asks that the Subscription Agreement be amended to designate the Neufeld Claim as a retained liability and that the Purchaser be made to front additional cash of \$7.5 million (for outstanding rentals and interest) to be paid to landowners upon closing. During the hearing, counsel for Mr. Neufeld also suggested that the claim for consequential damages was also part of the Neufeld Claim sought to be retained. He described the claim for consequential damages as an “open question” and argued that the Neufeld Claim should be retained so that certification can proceed, and the question of consequential damages adjudicated.

[104] Mr. Neufeld’s grounds for this relief are:

- Making the Neufeld Claim a transferred liability is logically inconsistent with making the outstanding surface lease rentals a retained liability.
- Making the Neufeld Claim a retained liability is more favorable to the landowners.
- Should the Subscription Agreement with RVO not close, landowners will not be materially worse off than if the transaction proceeds in its current form.
- Designating the Neufeld Claim as a retained liability discourages exploitation of landowners and the land itself by O & G operators.

[105] The Monitor responds:

- KMSC Law has not disclosed who its other 54 clients are, so it is impossible for the Monitor to assess the validity of their claims. Furthermore, the class has not been certified and therefore the law firm cannot purport to speak on behalf of all Alberta landowners dealing with Long Run.
- The **Surface Rights Act**, which governs rights and obligations between landowners and operators, does not provide for the payment of interest and damages and so the claimed losses are not recoverable.
- Furthermore, recovery of surface lease rentals falls within the exclusive jurisdiction of the Surface Rights Board under section 36.
- The Court should not rewrite the Subscription Agreement.
- Mr. Neufeld’s suggested revisions will have adverse impact on the secured creditor.

[106] I find that:

- There is no logical inconsistency in making the Neufeld Claim a transferred liability while recognizing the outstanding rental arrears as a retained liability. The Purchaser is entitled to make the choice of which liabilities are necessary to be retained. The legal character of

the consequential damages portion of the claim and the contractual right to receive rent payments are essentially different such that separating them is not illogical.

- The Monitor is correct that the **Surface Rights Act** does not provide for interest or damages. Neither does the lease agreement between Mr. Neufeld and Long Run (both as successors) except for property damage. I assume the agreement is a prototype.
- I should not amend the Subscription Agreement for the same reasons cited earlier in this decision. Requiring the additional injection of cash from the Purchaser not only rewrites the agreement but allows landowners to jump the priority-queue, over CCBT's principals.
- Mr. Neufeld's claim of unjust enrichment fails on the basis that there has been no deprivation since the outstanding rentals are carried over as retained liabilities and, moreover, ultimately guaranteed by the Province under section 36 of the **Surface Rights Act**. While the claims for interest and consequential damages are not preserved, they are speculative and legally uncertain. Those latter claims fail for the same reason that H Corp's does in that they are not proven on a balance of probabilities.
- That the landowners are prepared to accept a "scorched earth" approach by allowing Long Run to go into bankruptcy or fall to the Orphan Wells Association because the landowners would not be worse off than under the Subscription Agreement runs counter to any and all objectives of the **CCAA**.
- That the oil and gas industry should stop exploiting landowners and blighting Alberta's agricultural landscape is not a message for this Court to deliver within a **CCAA** context. Such a message is political in nature and should be addressed by government, regulators, policymakers and lobby groups.

[107] Accordingly, Mr. Neufeld's requested to amend the Subscription Agreement is denied.

[108] Mr. Neufeld's final concern relates to a letter sent by the Monitor to landowners dated October 22, 2024 which, in contemplation of presenting the Subscription Agreement (with outstanding surface rentals designated as a retained liability) to the Court for approval, asks them if they are prepared to accept fifty cents on the dollar. The letter stipulates payment within 10 days of closing of the Subscription Agreement. Mr. Neufeld asks that I rescind the letter as part of my section 11 authority.

[109] Counsel for Mr. Neufeld expressed these objections about the letter:

- It is exploitative and seeks to gain an unfair advantage of a 50% discount for Long Run and the Purchaser, at the expense of the landowners.
- It was sent to represented clients (represented by KSMC LLP in the class action lawsuit) without directing them to seek independent legal advice.

[110] As of the date of the Third Supplement to the Monitor's Fifth Report (November 14, 2024), some 41 landowners had accepted the offer.

[111] I do not find the letter offensive for these reasons:

- The letter made a straightforward business proposal. It gave each recipient over a month to think it over or do something about it. It did not prevent any landowner from seeking independent legal advice.

- The class has not been certified. The Monitor at the time of sending the letter could not have known which landowners are clients of KSMC LLP. The law firm did not disclose the identity of any of its landowner clients apart from Mr. Neufeld prior to the letter being sent. After the letter was sent, the only further known client is a numbered company who was a recipient and whose letter was attached to a November 13, 2024 affidavit filed on behalf of Mr. Neufeld.
- As a Court-appointed officer, the Monitor presumptively acts in good faith. Acting in good faith is now a statutory element for consideration in **CCAA** proceedings: section 18.6; **Bellatrix** at para 99. I asked Mr. Neufeld's counsel if he felt the letter exhibited bad faith. He said he did not.
- It is within the Monitor's duty and function to attempt to compromise the Debtor's liabilities at any time before final disposition in **CCAA** proceedings. Nothing untoward occurred here.

[112] It is wrong for me to second-guess the Monitor's actions here. If such a thing as rescinding the letter is possible within section 11, I decline to do so for the reasons given.

L. Restricted Access Order

[113] The Monitor requests a Restricted Access Order (also known as a Sealing Order) over Confidential Appendix "A" to the Fifth Report of the Monitor (the "Confidential Appendix"). Since the Transaction has yet to close, and the Confidential Appendix contains confidential information regarding the bids received in the SISP, the Monitor submits that the disclosure of the information contained in the Confidential Appendix could prejudice any further efforts to market and sell the business and assets of the Debtors should the transaction fail to close. Such an outcome would be prejudicial to the Debtors and the public interest inherent in the sale of distressed companies and their assets via an insolvency process.

[114] The request for a Restricted Access Order, Sealing Order or any compromise of the open Courts principle is governed by **Sierra Club of Canada v Canada (Minister of Finance)**, [2002] 2 SCR 522, 2002 SCC 41 as refined by **Sherman Estate v Donovan**, 2021 SCC 25.

[115] The applicant must show on a balance of probabilities that:

- normal Court openness presents a serious risk to an important interest;
- the order is necessary to prevent the risk because alternative measures are inadequate; and
- as a matter of proportionality, the benefits outweigh the negative effects.

[116] It is recognized in Alberta and elsewhere that commercial interests, particularly in the context of Court supervised insolvency proceedings, are an important interest deserving of protection: for example, see **Alberta Treasury Branches v Elaborate Homes Ltd**, 2014 ABQB 350 at para 54.

[117] The risk here is that if the sale falls through or the information in the confidential appendix is disclosed, disclosure will adversely affect the value of the assets to the detriment of the stakeholders.

[118] The form of Order appears to be the least intrusive means of managing the risk, being specific in scope and limited in time (3 months after the date of hearing). The Court's process

for giving notice to the media has been complied with and no contrary representations have been presented.

[119] Accordingly, I find the legal test is met and I grant the order.

M. Summary of Rulings

[120] In the result, and to summarize:

- I accept the Monitor's submissions (Sections B & C above) that the Subscription Agreement/RVO as presented by the Monitor represents the optimal outcome for Long Run and its stakeholders, best advances the remedial objectives of the **CCAA** and meets the test and expectations set out in **Harte Gold**. I therefore grant approval of the Subscription Agreement and RVO in accordance with the form of Order presented to the Court on November 14, 2024.
- In so doing, I approve the Releases as requested by the Monitor as part of the transaction, for the reasons set out in Section D above.
- Necessarily implicit in my approval of the transaction, I deny the relief sought by H Corp and Mr. Neufeld to vary the transaction as they respectively requested, for the reasons set out in Sections E to J (H Corp) and Section K (Neufeld) above.
- I also deny Mr. Neufeld's request to rescind the Monitor's letter to landowners of October 22, 2024 as set out in Section K above.
- The Restricted Access Order (or Sealing Order) as requested is granted.

[121] Should the parties or some of them wish to address costs of this application, they may do so by January 3, 2025 by each submitting a letter no more than 3 single-spaced pages in length, excluding exhibits and authorities, and supported by a draft Bill of Costs.

Heard on the 14th day of November, 2024.

Dated at the City of Calgary, Alberta this 29th day of November, 2024.

Douglas R. Mah
J.C.K.B.A.

Appearances:

Kelsey Meyer, Michael Selnes and Kaamil Khalfan, Bennett Jones LLP
for the Monitor, FTI Consulting Canada Inc.

Kyle Kashuba and Bilal Qureshi, Torys LLP
for the Monitor, FTI Consulting Canada Inc.

Dustin Olver and Brett Wilson, FTI Consulting Canada Inc
for the Monitor

Kelly Bourassa, Warren Nishimura, Farrukh Ahmad, Blake Cassels & Graydon LLP
for China Construction Bank, Toronto Branch

John Regush, Dentons Canada LLP
for Long Run Exploration Ltd and Calgary Sinoenergy Investment Corp.

Wendy Barber, Interim Chief Executive Officer
for Long Run Exploration Ltd

Trevor Batty, Field LLP
for Henenghaixin Corp.

Ryan Zahara, MLT Aikins
for Orphan Well Association

Kristian Toivonen, KMSC Law LLP
for Abe Neufeld and unnamed surface lessors

Michael E. Swanberg, Reynolds Mirth Richard & Farmer
for Birch Hills County, Big Lakes County and Lac Ste Anne County

Jessica Cameron, Fasken Martineau Dumoulin LLP
for TC Energy and Nova Gas Transmission Ltd.

Alexander W. Yiu, Ackroyd LLP
for Paddle Prairie Metis Settlement

Curtis Auch, Brownlee LLP
for Mackenzie County, Flagstaff County, Lamont County, the Municipal District of Smoky River, and Sturgeon County (collectively, the “Municipalities”)

Randal Van de Mosselaer, Osler, Hoskin & Harcourt LLP
for Canadian Natural Resources Limited

Colin LaRoche, Department of Justice Canada
for Indian Oil and Gas Canada

Chase Van Sant, Burnet, Duckworth & Palmer LLP
for Obsidian Energy

Danielle Marechal and Danica Jorgenson, Cassels, Brock & Blackwell LLP
for Hiking Group Shandong Jinyue Int’t Trading Corporation and for the Purchaser

Peng Zuo, Genesis Law Professional Corp.
for Bank of China (Qingdao Branch)

Kristopher Lensink, Government of Alberta
for Alberta Energy and Minerals Energy Team

George Wong,
for Alberta Energy Regulator

**Corrigendum of the Reasons for Decision
of
The Honourable Justice Douglas R. Mah**

Errors have now been corrected as follows:

- page 3, last bullet point, should be "are necessary" not "is"
- page 5, para 14, third bullet, should be "5th report" not "5h";
- page 7, para 27, second last line, insert "Calgary" before "Sinoenergy";
- page 15, para 66, second bullet, last line, insert the word "funds" between "the" and "was";
- page 16, para 67, fourth bullet, should be "No Court" not "No Courts";
- page 17, para 69, first line, insert the word "support" between "facts" and "the";
- page 17, para 72, end of first line, should be "the Courts consider" not "the Courts considers";
- page 20, para 80, last line, should be "para 12" not "paras 10 & 13",
- Counsel's first name corrected to "Farrukh" from "Farruk".

**Corrigendum of the Reasons for Decision
of
The Honourable Justice Douglas R. Mah**

List of counsel have been updated as follows:

Kelsey Meyer, Michael Selnes and Kaamil Khalfan, Bennett Jones LLP
for the Monitor, FTI Consulting Canada Inc.

Kyle Kashuba and Bilal Qureshi, Torys LLP
for the Monitor, FTI Consulting Canada Inc.

TAB 34

**Estate of Bernard Sherman and
Trustees of the Estate and
Estate of Honey Sherman and
Trustees of the Estate** *Appellants*

v.

**Kevin Donovan and
Toronto Star Newspapers Ltd.** *Respondents*

and

**Attorney General of Ontario,
Attorney General of British Columbia,
Canadian Civil Liberties Association,
Income Security Advocacy Centre,
Ad IDEM/Canadian Media Lawyers
Association,
Postmedia Network Inc., CTV, a Division
of Bell Media Inc.,
Global News, a division of Corus Television
Limited Partnership,
The Globe and Mail Inc.,
Citytv, a division of Rogers Media Inc.,
British Columbia Civil Liberties Association,
HIV & AIDS Legal Clinic Ontario,
HIV Legal Network and
Mental Health Legal Committee** *Interveners*

INDEXED AS: SHERMAN ESTATE v. DONOVAN

2021 SCC 25

File No.: 38695.

2020: October 6; 2021: June 11.

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

**ON APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO**

*Courts — Open court principle — Sealing orders —
Discretionary limits on court openness — Important public*

**Succession de Bernard Sherman et
fiduciaires de la succession et
Succession de Honey Sherman et
fiduciaires de la succession** *Appelants*

c.

**Kevin Donovan et
Toronto Star Newspapers Ltd.** *Intimés*

et

**Procureur général de l'Ontario,
procureur général de la Colombie-
Britannique,
Association canadienne des libertés civiles,
Centre d'action pour la sécurité du revenu,
Ad IDEM/Canadian Media Lawyers
Association,
Postmedia Network Inc., CTV, une division
de Bell Média inc.,
Global News, a division of Corus Television
Limited Partnership,
The Globe and Mail Inc.,
Citytv, a division of Rogers Media Inc.,
British Columbia Civil Liberties Association,
HIV & AIDS Legal Clinic Ontario, Réseau
juridique VIH et
Mental Health Legal Committee** *Intervenants*

**RÉPERTORIÉ : SHERMAN (SUCCESSION) c.
DONOVAN**

2021 CSC 25

N° du greffe : 38695.

2020 : 6 octobre; 2021 : 11 juin.

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

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

*Tribunaux — Principe de la publicité des débats judi-
ciaires — Ordonnances de mise sous scellés — Limites*

dignity dimension of their privacy is at “serious risk”. For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

[36] In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club*. Moreover, as I shall endeavour to explain, there was no serious risk of physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star’s new evidence is moot. I propose to dismiss the appeal.

A. *The Test for Discretionary Limits on Court Openness*

[37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

[38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three

qu’il y a un « risque sérieux » pour cette dimension de sa vie privée liée à sa dignité. Pour l’application du test des limites discrétionnaires à la publicité des débats judiciaire, le demandeur doit donc démontrer que les renseignements contenus dans le dossier judiciaire sont suffisamment sensibles pour que l’on puisse dire qu’ils touchent au cœur même des renseignements biographiques de la personne et, dans un contexte plus large, qu’il existe un risque sérieux d’atteinte à la dignité de la personne concernée si une ordonnance exceptionnelle n’est pas rendue.

[36] En l’espèce, les renseignements contenus dans les dossiers judiciaires ne revêtent pas ce caractère si sensible qu’on pourrait dire qu’ils touchent à l’identité fondamentale des personnes concernées; les fiduciaires n’ont pas démontré en quoi la levée des ordonnances de mise sous scellés met en jeu la dignité des personnes touchées. Je ne suis donc pas convaincu que l’atteinte à leur vie privée soulève un risque sérieux pour un intérêt public important, comme l’exige *Sierra Club*. De plus, comme je tenterai de l’expliquer, il n’y avait pas de risque sérieux que les personnes visées subissent un préjudice physique en raison de la levée des ordonnances de mise sous scellés. Par conséquent, la présente affaire n’est pas un cas où il convient de rendre des ordonnances de mise sous scellés ni aucune ordonnance limitant l’accès aux dossiers judiciaires en cause. Dans les circonstances, la question de l’admissibilité des nouveaux éléments de preuve du Toronto Star est théorique. Je suis d’avis de rejeter le pourvoi.

A. *Le test des limites discrétionnaires à la publicité des débats judiciaires*

[37] Les procédures judiciaires sont présumées accessibles au public (*MacIntyre*, p. 189; *A.B. c. Bragg Communications Inc.*, 2012 CSC 46, [2012] 2 R.C.S. 567, par. 11).

[38] Le test des limites discrétionnaires à la publicité présumée des débats judiciaires a été décrit comme une analyse en deux étapes, soit l’étape de la nécessité et celle de la proportionnalité de l’ordonnance proposée (*Sierra Club*, par. 53). Après un examen, cependant, je constate que ce test repose sur trois conditions préalables fondamentales dont une

prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

- (1) court openness poses a serious risk to an important public interest;
- (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
- (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[39] The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*,

personne cherchant à faire établir une telle limite doit démontrer le respect. La reformulation du test autour de ces trois conditions préalables, sans en modifier l'essence, aide à clarifier le fardeau auquel doit satisfaire la personne qui sollicite une exception au principe de la publicité des débats judiciaires. Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir que :

- (1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important;
- (2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et
- (3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs.

Ce n'est que lorsque ces trois conditions préalables sont remplies qu'une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires — par exemple une ordonnance de mise sous scellés, une interdiction de publication, une ordonnance excluant le public d'une audience ou une ordonnance de caviardage — pourra dûment être rendue. Ce test s'applique à toutes les limites discrétionnaires à la publicité des débats judiciaires, sous réserve uniquement d'une loi valide (*Toronto Star Newspapers Ltd. c. Ontario*, 2005 CSC 41, [2005] 2 R.C.S. 188, par. 7 et 22).

[39] Le pouvoir discrétionnaire est ainsi structuré et contrôlé de manière à protéger le principe de la publicité des débats judiciaires, qui est considéré comme étant constitutionnalisé sous le régime du droit à la liberté d'expression garanti par l'al. 2b) de la *Charte* (*Nouveau-Brunswick*, par. 23). Reposant sur la liberté d'expression, le principe de la publicité des débats judiciaires est l'un des fondements de la liberté de la presse étant donné que l'accès aux tribunaux est un élément essentiel de la collecte d'information. Notre Cour a souvent souligné l'importance de la publicité pour maintenir l'indépendance et l'impartialité des tribunaux, la confiance du

at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become “one of the hallmarks of a democratic society” (citing *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that “acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law . . . thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice” (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

[40] The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the *Charter* is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

[41] The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the “fairness of the trial” (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the “proper administration of justice” (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an “important interest, including a commercial interest, in the context of litigation” (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that

public à l’égard de leur travail et sa compréhension de celui-ci, et, au bout du compte, la légitimité du processus (voir, p. ex., *Vancouver Sun*, par. 23-26). Dans l’arrêt *Nouveau-Brunswick*, le juge La Forest a expliqué que la présomption en faveur de la publicité des débats judiciaires était devenue « [TRADUCTION] “l’une des caractéristiques d’une société démocratique” » (citant *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), p. 119), qui « fait en sorte que la justice est administrée de manière non arbitraire, conformément à la primauté du droit [. . .], situation qui favorise la confiance du public dans la probité du système judiciaire et la compréhension de l’administration de la justice » (par. 22). Le caractère fondamental de ce principe pour le système judiciaire sous-tend la forte présomption — quoique réfutable — en faveur de la tenue de procédures judiciaires publiques (par. 40; *Mentuck*, par. 39).

[40] Le test fait en sorte que les ordonnances discrétionnaires ne soient pas assujetties à une norme moins exigeante que la norme à laquelle seraient assujetties des dispositions législatives qui limiteraient la publicité des débats judiciaires (*Mentuck*, par. 27; *Sierra Club*, par. 45). À cette fin, la Cour a élaboré un cadre d’analyse par analogie avec le test de l’arrêt *Oakes*, que les tribunaux utilisent pour déterminer si une limite imposée par un texte de loi à un droit garanti par la *Charte* est raisonnable et si sa justification peut se démontrer dans le cadre d’une société libre et démocratique (*Sierra Club*, par. 40, citant *R. c. Oakes*, [1986] 1 R.C.S. 103; voir également *Dagenais*, p. 878; *Vancouver Sun*, par. 30).

[41] La portée reconnue des intérêts qui pourraient justifier une exception discrétionnaire à la publicité des débats judiciaires s’est élargie au fil du temps. Dans l’arrêt *Dagenais*, le juge en chef Lamer a parlé de la nécessité d’un risque « que le procès soit inéquitable » (p. 878). Dans *Mentuck*, le juge Iacobucci a étendu cette condition à un risque « pour la bonne administration de la justice » (par. 32). Enfin, dans *Sierra Club*, le juge Iacobucci, s’exprimant encore une fois au nom de la Cour à l’unanimité, a reformulé le test de manière à englober tout risque sérieux pour un « intérêt important, y compris un intérêt commercial, dans le contexte d’un litige » (par. 53). Il a en