Second Report to Court of KSV Restructuring Inc., as CCAA Monitor of MPX International Corporation, BioCannabis Products Ltd., Canveda Inc., The CinG-X Corporation, Spartan Wellness Corporation, MPXI Alberta Corporation, MCLN Inc., and Salus BioPharma Corporation

September 20, 2022

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COURT FILE NO. CV-22-00684542-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MPX INTERNATIONAL CORPORATION, BIOCANNABIS PRODUCTS LTD., CANVEDA INC., THE CING-X CORPORATION, SPARTAN WELLNESS CORPORATION, MPXI ALBERTA CORPORATION, MCLN INC., AND SALUS BIOPHARMA CORPORATION

SECOND REPORT OF KSV RESTRUCTURING INC. IN ITS CAPACITY AS MONITOR

SEPTEMBER 20, 2022

1.0 Overview of Proceedings

1. Pursuant to an order of the Ontario Superior Court of Justice (Commercial List) (the "Court") made on July 25, 2022 (the "Initial Order"), MPX International Corporation ("MPXI"), BioCannabis Products Ltd., Canveda Inc., The CinG-X Corporation, Spartan Wellness Corporation ("Spartan"), MPXI Alberta Corporation, MCLN Inc., and Salus BioPharma Corporation (collectively, the "Applicants" and each an "Applicant") were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), and KSV Restructuring Inc. ("KSV") was appointed monitor of the Applicants (in such capacity, the "Monitor"). A copy of the Initial Order is attached as Appendix "A". Capitalized terms used herein but not defined are as set out in the first report of the Monitor dated July 25, 2022 (the "First Report"), a copy of which is attached here without appendices at Appendix "B".

2. MPXI wholly-owns each of the other Applicants and, directly or indirectly, wholly-owns or has an interest in several other non-Applicant affiliates[1].

3. At the Applicants' comeback motion on August 4, 2022 (the "Comeback Motion"), the sought an order or orders for the following relief:

[1] The non-Applicant affiliates are: MPX Australia Pty Ltd.; MPXI UK Limited; MPXI Lesotho (Pty) Ltd.; Highland Farms (Pty) Ltd.; MPXI Malta Operations Limited; MPXI Malta Property Limited; Alphafarma Operations Limited; MPXI Malta Holding Limited; MPXI SA Pty Ltd.; First Growth Holding Pty Ltd.; Salus Bioceutical (Thailand) Co., Ltd.; Salus International Management Ltd.; Holyworld SA; and MPXI Labs SA (collectively, the "Non-Applicant Stay Parties"). MPXI also has a minority interest in Prime Pharmaceutical Corporation, which in turn controls Primapharm Funding Corporation. MPXI is not involved in the day-to-day operations of either of these companies, and accordingly neither are Applicants or Non-Applicant Stay Parties.

a. an amended and restated initial order (the "Amended and Restated Initial Order"), which sought, *inter alia*:

   i. an increase to the Directors' Charge and the DIP Lenders' Charge (both as defined in the Initial Order);

   ii. an elevation to the priority of the Charges such that the Charges shall rank in priority to all Encumbrances (as defined in the Amended and Restated Initial Order);

   iii. an extension of the Stay Period to and including October 21, 2022; and

   iv. an authorization that the Applicants will incur no further expenses in relation to certain securities filings; and

b. an order approving a sale and investment solicitation process (the "SISP") for the purpose of soliciting interest in, and opportunities for the sale of, or investment in, the assets and business operations of the Applicants (the "SISP Approval Order").

4. On or about August 5, 2022, the Court issued an endorsement and granted both the Amended and Restated Initial Order and the SISP Approval Order. Copies of the Amended and Restated Initial Order and the SISP Approval Order are attached at Appendix "C".

5. Since the last attendance before this Court, the Monitor, with the assistance of the Applicants, has carried out the SISP in accordance with the terms of the SISP Approval Order. The SISP generated some bids, including binding offers, although none of which, individually or in aggregate, were sufficient to repay the DIP Lenders and the Debentureholders in full. In accordance with the terms of the SISP, the Monitor was notified by the DIP Lenders that none of the Binding Offers were acceptable and, accordingly, that the Debentureholders would proceed with a credit bid for the Business and the Property.

6. In early August, 2022, counsel to Ninth Square Capital Corporation ("Ninth Square") advised the Applicants' counsel that that stay of proceedings did not apply to Ninth Square's action as against certain of the individual Directors and Officers of MPXI, and advised that they would be reserving their rights to seek such relief or declaration from the Court.

7. The Applicants advised Ninth Square that pursuant to paragraph 19 of the Amended and Restated Initial Order all Proceedings are stayed as against the former, current or future directors or officers (or similar position) of any MPXI Entity and, accordingly, leave of the Court was required to continue any proceedings against them.

8. On or about September 1, 2022, following a case conference before Chief Justice Morawetz, a scheduling conference was attended by parties to determine a timetable for the Ninth Square Litigation (as defined below). At such attendance, the Court set down the hearing date for September 29, 2022 (the "Ninth Square Motion").

1.1 Purposes of this Report

1. This report (the "Report") is filed to assist the Court with its review and determination of the specific relief being sought by Ninth Square at the Ninth Square Motion and provides:

    a) background information about the Ninth Square Litigation and the Stay Declaration (as defined below); and

    b) a Statement of Law (as defined below) which sets out the applicable jurisprudence for the Court to consider in assessing the declaratory relief being sought by Ninth Square.

1.2 Restrictions

1. In preparing this Report, the Monitor has relied upon the Ninth Square Litigation motion materials, as served upon the service list by parties to the Ninth Square Litigation (collectively, the "Information").

2. The Monitor has not audited or otherwise attempted to verify the accuracy or completeness of the Information in a manner that complies with Canadian Auditing Standards ("CAS") pursuant to the Chartered Professional Accountants of Canada Handbook and, accordingly, the Monitor expresses no opinion or other form of assurance as contemplated under the CAS in respect of the Information. Any party wishing to place reliance on the Information should perform its own diligence and the Monitor accepts no responsibility for any reliance placed on the Information in this Report by any party.

2.0 Summary of Ninth Square Litigation

1. On or about August 7, 2019, Ninth Square commenced an action against MPXI, MPX Bioceutical ULC ("MPX ULC") and iAnthus Capital Holdings Inc. ("iAnthus") via a statement of claim, which was amended on August 21, 2019. On October 15, 2020, Ninth Square commenced a separate action against W. Scott Boyes ("Boyes"), Jeremy Budd ("Budd") and Michael Arnkvarn in their capacity as directors and/or officers of MPX and MPXI ("Arnkvarn" and together with Boyes and Budd, the "Individual Defendants" and with MPXI, MPX ULC and iAnthus, the "Defendants") by way of statement of claim. Both statements of claim were consolidated into an issued version on or about July 13, 2021 under Court File No. CV-19-625101-00CL (the "Ninth Square Litigation"), which is attached hereto at Appendix "D".

2. The Ninth Square Litigation is largely an oppression claim under the *Business Corporations Act* (Ontario). As alleged in the Ninth Square Litigation, *inter alia*:

    a. Ninth Square was originally a 50% shareholder in Spartan, a privately held cannabis company that focused its business in providing cannabis to veterans for medicinal purposes;

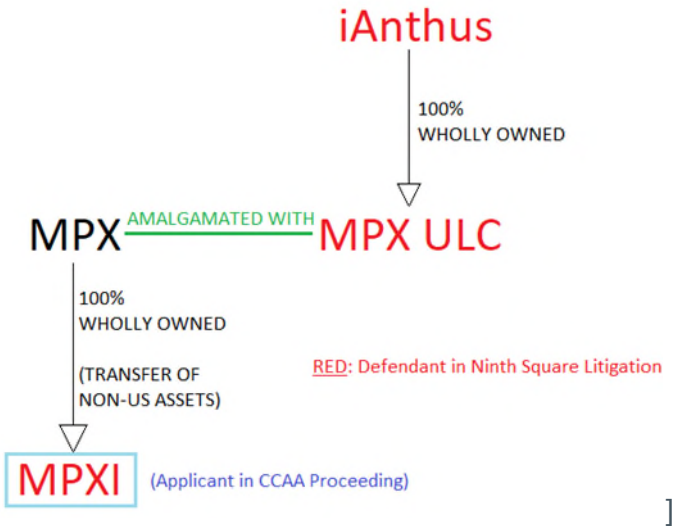
    b. In September 2018, Ninth Square entered into an agreement under which it sold its shares in Spartan to MPX Bioceutical Corporation ("MPX") in return for shares and warrants of MPX. The MPX shares and warrants were publicly traded on the Canadian Securities Exchange.

c. When MPX was negotiating to purchase Ninth Square's Spartan shares, MPX was also negotiating the sale of itself and the Spartan shares it was about to acquire to iAnthus.

d. During a prior statutory arrangement of certain of the Applicants (the "Arrangement"), an acquisition of MPX was structured so that:

i. MPX was amalgamated with MPX ULC, which was a wholly-owned subsidiary of iAnthus; and

ii. All of the non-US assets of MPX, including Spartan, were spun out into a new corporation, MPXI, which was a subsidiary to MPX. A summary of (i) and (ii) can be seen in the below diagram.



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e. A copy of the order made on January 18, 2019 by the Supreme Court of British Columbia during the Arrangement in association with the spinoff of MPXI from MPX is appended to this Report at Appendix "E" and is further referenced within the Monitor's Statement of Law (as defined below).

f. As part of the above, MPX assigned to MPXI the share purchase agreement for the Spartan shares (the "SPA"). Ninth Square alleges that its consent to any assignment of the share purchase agreement was required and was not obtained.

g. Ultimately, Ninth Square did not receive shares in iAnthus but received shares in MPXI.

3. Ninth Square seeks damages of $3 million, including as against the Individual Defendants. Allegations of misconduct and impropriety are further directed against the Individual Defendants in their capacity as directors and officers of MPXI and former directors and/or officers of MPX, as applicable.

4. In summary, Ninth Square's core allegation is that it contracted to sell Spartan shares in exchange for shares in a publicly traded company (iAnthus), but instead received shares in a privately traded company (MPXI), which it alleges constitutes a breach of the duty of good faith and is oppressive.

5. The Defendants largely submit two primary objections: first, that oppression is not available because its complaint is based on activities that occurred prior to Ninth Square becoming a shareholder in any corporation other than Spartan, and second, that the statement of claim does not plead sufficient facts to justify an action against the Individual Defendants as officers and directors. A copy of the Fresh as Amended Statement of Defence and Counterclaim of the Individual Defendants and MPXI, as well as a copy of the Amended Statement of Defence and Crossclaim of iAnthus and MPX ULC are attached here at Appendix "F".

3.0 The Declaratory Relief re Stay

1. On or about September 1, 2022, Ninth Square brought a motion for an order declaring that the stay of proceedings as ordered in the Amended & Restated Initial Order does not apply to the Ninth Square Litigation (the "Stay Declaration").

2. Since filing its Responding Motion to the Ninth Square Motion, the Applicants have advised the Monitor and Ninth Square that they no longer have access to funding to continue responding to this motion and, accordingly, that they were no longer taking a position with respect to the relief being sought by Ninth Square at the Ninth Square Motion. The Monitor and Applicants were advised by the DIP Lenders that they did not authorize, nor would they consent to, the use of advances under the DIP Facility being used to fund MPXI or the Individual Respondents to respond to this motion.

3. The Monitor understands that parties will take the following positions:

    a. Ninth Square will argue that while the stay of proceedings within the Initial Order and the Amended & Restated Initial Order (the "Stay") applies to the Individual Defendants in their capacity as directors and/or officers of MPXI, the Stay does not apply to the Individual Defendants in their capacity as directors and/or officers of MPX ULC, such that the Ninth Square Litigation should move forward as against them in such capacities.

    b. The Applicants have advised the Monitor that they now take no position as a result of funding constraints outlined above. As was previously stated in the Affidavit of Jeremy S. Budd dated September 9, 2022, "While the [Individual Defendants] each deny the allegations in Ninth Square's consolidated statement of claim and view them as being without merit, we are each concerned that if Ninth Square's allegations are not properly defended and adjudicated, then it could have a profound impact on us, our families, and our livelihoods" (para 20). Furthermore, Budd stated that preparations or participation in Ninth Square's action would likely "materially detract from our respective abilities to focus on the administration of the CCAA Proceedings" (para 23) which would trigger material prejudice to the MPX Entities and the Individual Defendants.

4. The Monitor does not take a position on the Stay Declaration. As noted above, the Monitor further understands that the relief being sought is against the Individual Defendants in both their capacities as MPX and MPXI, respectfully. The Monitor does not understand given the integrated nature of the claim how Ninth Square could proceed solely with a claim against the Individual Defendants in their capacity as directors of MPX. Upon direction of the Court in association with the set timetable for the Ninth Square Motion, the Monitor submits a neutral Statement of Law summarized by its counsel to assist the Court in determining the Stay Declaration, and to provide a preliminary groundwork to the following legal issues:

    a. the nature of the relationships between the corporate entities MPX, MPXI and MPX ULC and, in particular:

        i. the legal relationship between a predecessor amalgamating corporation (MPX) and the new amalgamated corporation (MPX ULC);

        ii. the legal relationship between a predecessor parent corporation (MPX) and the 'spun-out' subsidiary corporation (MPXI); and

    b. the principals of interpretation applicable to interpreting an order made under the CCAA and in particular, in interpreting stay provisions in favour of directors and officers.

5. A copy of the Statement of Law and associated book of authorities is attached hereto at Appendix "G" to this Report.

* * *

All of which is respectfully submitted,

KSV RESTRUCTURING INC.,
SOLELY IN ITS CAPACITY AS MONITOR OF
MPX INTERNATIONAL CORPORATION, BIOCANNABIS PRODUCTS LTD., CANVEDA INC., THE CING-X CORPORATION, SPARTAN WELLNESS CORPORATION,
MPXI ALBERTA CORPORATION, MCLN INC., AND SALUS BIOPHARMA CORPORATION
AND NOT IN ITS PERSONAL CAPACITY

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APPENDIX A

Court File No. CV-22-684542-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE CHIEF	)	MONDAY, THE 25th
	)	
JUSTICE MORAWETZ	)	DAY OF JULY, 2022

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 MPX INTERNATIONAL CORPORATION, BIOCANNABIS PRODUCTS LTD., CANVEDA INC., THE CING-X CORPORATION, SPARTAN WELLNESS CORPORATION, MPXI ALBERTA CORPORATION, MCLN INC., AND SALUS BIOPHARMA CORPORATION
(collectively, the "**Applicants**")

INITIAL ORDER

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day by Zoom videoconference.

ON READING the affidavit of Jeremy Blumer sworn July 25, 2022 and the Exhibits thereto (the "**Blumer Affidavit**") and the Pre-Filing Report of KSV Restructuring Inc. ("**KSV**") dated July 25, 2022, and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Applicants and the additional parties listed in Schedule "A" hereto (collectively, the "**Non-Applicant Stay Parties**" and together with the Applicants, the "**MPXI Entities**"), counsel for KSV, counsel for David Taylor, Alastair Crawford, Broughton Finance and Brahma Finance Limited (collectively, the "**Initial DIP Lenders**"), and such other parties listed on the Counsel Slip, and on reading the consent of KSV to act as Monitor (the "**Monitor**"),

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that each of the Applicants is a company to which the CCAA applies. Although not Applicants, the Non-Applicant Stay Parties shall enjoy the benefits of the protections and authorizations provided under the terms of this Order.

POSSESSION OF PROPERTY AND OPERATIONS

3. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their respective current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The Applicants are authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

4. **THIS COURT ORDERS** that the MPXI Entities shall be entitled to continue to utilize the central cash management system currently in place as described in the Blumer Affidavit or, with the consent of the Monitor and the Initial DIP Lenders, together with any other lender who participates in the DIP Facility (as defined below) (together, the "**DIP Lenders**"), replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the MPXI Entities of funds transferred, paid, collected or otherwise dealt with in the Cash

Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the MPXI Entities, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under any plan of compromise or arrangement (a "**Plan**") with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

5. **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to, on, or after the date of this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and employee expenses payable prior to, on, or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) with the consent of the Monitor and the DIP Lenders, amounts owing for goods and services actually supplied to the Applicants prior to the date of this Order and all outstanding amounts related to honouring customer obligations whether existing before or after the date of this Order, incurred in the ordinary course of business and consistent with existing policies and procedures;

(c) any taxes, duties or other payments required under the Cannabis Legislation (as defined below); and

(d) the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges.

6. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, and subject to the Definitive Documents (as defined below), the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course prior to, on, or, after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

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

(b) payment for goods or services actually supplied to the Applicants on or following the date of this Order.

Payments for amounts incurred prior to this Order shall require the consent of the Monitor and the DIP Lenders, or leave of this Court.

7. **THIS COURT ORDERS** that the Applicants shall remit, in accordance with legal requirements, or pay:

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

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order;

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

8. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Applicants shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be

negotiated between the applicable Applicant and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, monthly, on the first day of each month, in advance (but not in arrears) in the amounts set out in the applicable lease. On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

9. **THIS COURT ORDERS** that, except as specifically permitted herein and in the Definitive Documents, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

10. **THIS COURT ORDERS** that each of the Applicants shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents, have the right to:

(a) with the prior consent of the DIP Lenders, permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $250,000 in any one transaction or $1,000,000 in the aggregate;

(b) sell inventory in the ordinary course of business consistent with past practice, or otherwise with the consent of the Monitor and the DIP Lenders;

(c) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

(d) pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business.

NO PROCEEDINGS AGAINST THE MPXI ENTITIES OR THEIR RESPECTIVE PROPERTY

11. **THIS COURT ORDERS** that until and including August 4, 2022, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of any MPXI Entity or the Monitor or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, except with the written consent of the MPXI Entities and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of any MPXI Entity or affecting the Business or the Property, are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

12. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of any MPXI Entity or the Monitor, or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the MPXI Entities and the Monitor, or leave of this Court, provided that nothing in this Order shall: (i) empower any MPXI Entity to carry on any business which the MPXI Entity is not lawfully entitled to carry on; (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA; (iii) prevent the filing of any registration to preserve or perfect a security interest; or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

13. **THIS COURT ORDERS** that during the Stay Period, no Person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, rescind, terminate or cease to perform any right, renewal right, contract, agreement, lease, licence or permit in favour of or held by any MPXI Entity, except with the written consent of the MPXI Entities and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

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

NON-DEROGATION OF RIGHTS

15. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to an MPXI Entity. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

16. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers (or similar position) of any MPXI Entity with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of an MPXI Entity whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of

such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

17. **THIS COURT ORDERS** that the Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as a director or officer of the Applicants after the commencement of the within 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.

18. **THIS COURT ORDERS** that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $145,000, unless permitted by further Order of this Court, as security for the indemnity provided in paragraph 17 of this Order. The Directors' Charge shall have the priority set out in paragraphs 36 and 38 herein.

19. **THIS COURT ORDERS** that, 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 Directors' Charge; and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any director's and officer's insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 17 of this Order.

APPOINTMENT OF MONITOR

20. **THIS COURT ORDERS** that KSV is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the MPXI Entities and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the MPXI Entities pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

21. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements, including the management and deployment/use of any funds advanced by the DIP Lenders to the Applicants under the DIP Term Sheet;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) assist the Applicants, to the extent required by the Applicants, in their dissemination, to the DIP Lenders and its counsel on a weekly basis of financial and other information as agreed to between the Applicants and, the DIP Lenders which may be used in these proceedings including reporting on a basis to be agreed with the DIP Lenders;

(d) advise the Applicants in their preparation of the Applicant's cash flow statements and reporting required by the DIP Lenders, which information shall be reviewed with the Monitor and delivered to the DIP Lenders and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by the DIP Lenders;

(e) monitor all payments, obligations and any transfers as between the MPXI Entities;

(f) receive funds advanced by the DIP Lenders and to disburse such funds to the Applicants pursuant to the terms of the DIP Term Sheet, including any actions or activities incidental thereto;

(g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the MPXI Entities, to the extent that is necessary to adequately assess the Applicants' business and financial affairs or to perform its duties arising under this Order;

(h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

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

22. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property or be deemed to take possession of the Property, pursuant to any provision of any federal, provincial or other law respecting, among other things, the manufacturing, possession, processing and distribution of cannabis or cannabis products including, without limitation, under the *Cannabis Act* S.C. 2018, c.16, the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, the *Excise Act, 2001*, S.C. 2002, c. 22,, the Ontario *Cannabis Licence Act*, S.O. 2018, c. 12, Sched. 2, the Ontario *Cannabis Control Act*, S.O. 2017, c. 26, Sched. 1, the *Ontario Cannabis Retail Corporation Act*, 2017, S.O. 2017, c. 26, the Alberta *Gaming, Liquor and Cannabis Act*, R.S.A. 2000, c. G-1, the Alberta *Gaming, Liquor and Cannabis Regulation*, Alta. Reg. 143/996, or other such applicable federal, provincial or other legislation or regulations (collectively, the "**Cannabis Legislation**"), and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof within the meaning of any Cannabis Legislation or otherwise, and nothing in this Order shall be construed as resulting in the Monitor being an employer or successor employer within the meaning of any statute, regulation or rule of law or equity for any purpose whatsoever.

23. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, the Ontario *Occupational Health and Safety Act*, the Alberta *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, the *Alberta Water Act*, R.S.A. 2000, c. W-3 and the Alberta *Occupational Health and Safety Act*, S.A. 2020, c. O-2.2 and all regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to

report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

24. **THIS COURT ORDERS** that, in addition to the rights and protections afforded to the DIP Lenders under this Order or at law, the DIP Lenders shall not incur any liability or obligation as a result of the carrying out of the provisions of this Order, save and except for any gross negligence or willful misconduct on its part.

25. **THIS COURT ORDERS** that that the Monitor shall provide any creditor of the Applicants, including without limitation, the DIP Lenders, with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

26. **THIS COURT ORDERS** that, in addition to the rights and protections afforded to the Monitor under the CCAA or as an officer of this Court, neither the Monitor nor its respective employees and representatives acting in such capacities shall incur any liability or obligation as a result of the appointment of the Monitor or the carrying out by it of the provisions of this Order, including under any Cannabis Legislation, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

27. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, whether incurred prior to, on or subsequent to, the date of this Order, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a weekly basis.

28. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

29. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Applicants' counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $300,000, unless consented to by the DIP Lenders and permitted by further Order of this Court, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 36 and 38 hereof.

DIP FINANCING

30. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to obtain and borrow under a credit facility from the DIP Lenders in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures.

31. **THIS COURT ORDERS** that such credit facility shall be on the terms and subject to the conditions set forth in the Summary of Terms and Conditions for Credit Facility between the DIP Lenders and the Applicants dated as of July 25, 2022 (as may be amended from time to time, the "**DIP Term Sheet**"), filed.

32. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the DIP Term Sheet or as may be reasonably required by the DIP Lenders pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the DIP Lenders under and pursuant to the DIP Term Sheet and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

33. **THIS COURT ORDERS** that the DIP Lenders shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lenders' Charge**") on the Property, which DIP Lenders' Charge shall not exceed the amount of $1,200,000 or secure an obligation that exists before this Order is made. The DIP Lenders' Charge shall have the priority set out in paragraphs 36 and 38 hereof.

34. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lenders may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lenders' Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Definitive Documents or the DIP Lenders' Charge, the DIP Lenders, upon 4 business days notice to the Applicants and the Monitor, may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the DIP Term Sheet, Definitive Documents and the DIP Lenders' Charge, including without limitation, to cease making advances to the Applicants and set off and/or consolidate any amounts owing by the DIP Lenders to the Applicants against the obligations of the Applicants to the DIP Lenders under the DIP Term Sheet, the Definitive Documents or the DIP Lenders' Charge, to make demand, accelerate payment and give other 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 Applicants and for the appointment of a trustee in bankruptcy of the Applicants; and

(c) the foregoing rights and remedies of the DIP Lenders shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

35. **THIS COURT ORDERS AND DECLARES** that, unless otherwise agreed to by the DIP Lenders, the DIP Lenders shall be treated as unaffected in any Plan filed by any of Applicants under the CCAA, or any proposal filed by any of the Applicants under the *Bankruptcy and Insolvency Act*, with respect to any advances made under the Definitive Documents.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

36. **THIS COURT ORDERS** that the priorities of the Directors' Charge, the Administration Charge and the DIP Lenders' Charge (collectively, the "**Charges**"), as among them, shall be as follows:

First - Administration Charge (to the maximum amount of $300,000);

Second - DIP Lenders' Charge (to the maximum amount of $1,200,000); and

Third - Directors' Charge (to the maximum amount of $145,000).

37. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that 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.

38. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property and 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; provided that the Charges shall rank behind Encumbrances in favour of any Persons that have not been served with notice of this application. The Applicants and the beneficiaries of the Charges shall be entitled to seek priority of the Charges ahead of such Encumbrances on a subsequent motion on notice to those parties.

39. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Applicants also obtain the prior written consent of the Monitor, the DIP Lenders and the beneficiaries of the Charges, or further Order of this Court.

40. **THIS COURT ORDERS** that the Charges, the DIP Term Sheet and the Definitive Documents 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**") and/or the DIP

Lenders thereunder 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**") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Term Sheet or the Definitive Documents shall create or be deemed to constitute a breach by the Applicants of any Agreement to which they are a party;

(b) 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 Applicants entering into the DIP Term Sheet, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made by the Applicants pursuant to this Order, the DIP Term Sheet or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

41. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the applicable Applicant's interest in such real property leases.

CORPORATE MATTERS

42. **THIS COURT ORDERS** that MPX International Corporation be and is hereby relieved of any obligation to call and hold an annual meeting of its shareholders until further Order of this Court.

SERVICE AND NOTICE

43. **THIS COURT ORDERS** that the Monitor shall: (i) without delay, publish in the Globe and Mail, National Edition, a notice containing the information prescribed under the CCAA; and (ii) within five (5) days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against any of the Applicants of more than $1,000 (excluding individual employees, former employees with retirement savings plan entitlements, and retirees and other beneficiaries who have entitlements under any retirement savings plans), and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder; provided that the Monitor shall not make the claims, names and addresses of individuals who are creditors publicly available unless otherwise ordered by this Court.

44. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: https://www.ksvadvisory.com/insolvency-cases/case/MPXI.

45. **THIS COURT ORDERS** that the Applicants and the Monitor and their respective counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Applicants' creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or judicial obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations,* Reg. 81000-2175 (SOR/DORS).

46. **THIS COURT ORDERS** that, except with respect to any motion to be heard on the Comeback Date (as defined below), and subject to further Order of this Court in respect of urgent motions, any interested party wishing to object to the relief sought in a motion brought by the Applicants or the Monitor in these CCAA proceedings shall, subject to further Order of this Court, provide the service list in these proceedings (the "**Service List**") with responding motion materials or a written notice (including by e-mail) stating its objection to the motion and the grounds for such objection by no later than 5:00 p.m. (Toronto time) on the date that is two (2) days prior to the date such motion is returnable (the "**Objection Deadline**"). The Monitor shall have the ability to extend the Objection Deadline after consulting with the Applicants.

47. **THIS COURT ORDERS** that following the expiry of the Objection Deadline, counsel to the Monitor or counsel to the Applicants shall inform the Court, including by way of a 9:30 a.m. appointment, of the absence or the status of any objections to the motion and the judge having carriage of the motion may determine (a) whether a hearing in respect of the motion is necessary, (b) if a hearing is necessary, the date and time of the hearing, (c) whether such hearing will be in person, by telephone or videoconference, or by written submissions only, and (d) the parties from whom submissions are required. In the absence of any such determination, a hearing will be held in the ordinary course on the date specified in the notice of motion.

GENERAL

48. **THIS COURT ORDERS** that any interested party that wishes to amend or vary this Order shall be entitled to appear or bring a motion before this Court on August 4, 2022, at 10:30 a.m. (Toronto Time) or such other date as may be set by this Court upon the granting of this Order (the "**Comeback Date**"), provided, however, that the Chargees shall be entitled to rely on this Order as issued and entered and on the Charges and priorities set forth in paragraphs 36 and 38 hereof with respect to any fees, expenses and disbursements incurred, as applicable, until the date this Order may be amended, varied or stayed.

49. **THIS COURT ORDERS** that, notwithstanding paragraph 48 of this Order, each of the Applicants, the DIP Lenders or the Monitor may from time to time apply to this Court to amend, vary or supplement this Order or for advice and directions in the discharge of its powers and duties under this Order or in the interpretation of this Order hereunder.

50. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of any of the Applicants, the Business or the Property.

51. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, Switzerland, South Africa, Malta, Australia, Lesotho, Thailand or any other country, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

52. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

53. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. (Toronto time) on the date of this Order.

Chief Justice G.B. Morawetz

SCHEDULE "A"
NON-APPLICANT STAY PARTIES

MPX Australia Pty Ltd.
MPXI UK Limited
MPXI Lesotho (Pty) Ltd.
Highland Farms (Pty) Ltd.
MPXI Malta Operations Limited
MPXI Malta Property Limited
Alphafarma Operations Limited
MPXI Malta Holding Limited
MPXI SA Pty Ltd.
First Growth Holding Pty Ltd.
Salus Bioceutical (Thailand) Co., Ltd.
Salus International Management Ltd.
Holyworld SA
MPXI Labs SA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36,* AS AMENDED AND IN THE MATTER OF AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MPX INTERNATIONAL CORPORATION, BIOCANNABIS PRODUCTS LTD., CANVEDA INC., THE CING-X CORPORATION, SPARTAN WELLNESS CORPORATION, MPXI ALBERTA CORPORATION, MCLN INC., AND SALUS BIOPHARMA CORPORATION

Court File No.:_____

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings Commenced in Toronto

INITIAL ORDER

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APPENDIX B

First Report of KSV Restructuring Inc. as CCAA Monitor of MPX International Corporation, BioCannabis Products Ltd., Canveda Inc., The CinG-X Corporation, Spartan Wellness Corporation, MPXI Alberta Corporation, MCLN Inc., and Salus BioPharma Corporation

July 29, 2022

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Appendices

COURT FILE NO.: CV-22-00684542-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MPX INTERNATIONAL CORPORATION, BIOCANNABIS PRODUCTS LTD., CANVEDA INC., THE CING-X CORPORATION, SPARTAN WELLNESS CORPORATION, MPXI ALBERTA CORPORATION, MCLN INC., AND SALUS BIOPHARMA CORPORATION

FIRST REPORT OF
KSV RESTRUCTURING INC., IN ITS CAPACITY AS MONITOR

JULY 29, 2022

1.0 Introduction

1. Pursuant to an order of the Ontario Superior Court of Justice (Commercial List) (the "Court") made on July 25, 2022 (the "Initial Order"), MPX International Corporation ("MPXI"), BioCannabis Products Ltd., Canveda Inc., The CinG-X Corporation, Spartan Wellness Corporation, MPXI Alberta Corporation, MCLN Inc., and Salus BioPharma Corporation (collectively, the "Applicants" and each an "Applicant") were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") and KSV Restructuring Inc. ("KSV") was appointed monitor of the Applicants (in such capacity, the "Monitor"). A copy of the Initial Order is attached as Appendix "A".

2. MPXI wholly-owns each of the other Applicants and, directly or indirectly, wholly-owns or has an interest in several other non-Applicant affiliates[1] (each subsidiary of MPXI individually a "Subsidiary" and together the "Subsidiaries", and collectively with MPXI, the "Companies").

[1] The non-Applicant affiliates are: MPX Australia Pty Ltd.; MPXI UK Limited; MPXI Lesotho (Pty) Ltd.; Highland Farms (Pty) Ltd.; MPXI Malta Operations Limited; MPXI Malta Property Limited; Alphafarma Operations Limited; MPXI Malta Holding Limited; MPXI SA Pty Ltd.; First Growth Holding Pty Ltd.; Salus Bioceutical (Thailand) Co., Ltd.; Salus International Management Ltd.; Holyworld SA; and MPXI Labs SA (collectively, the "Non-Applicant Stay Parties"). MPXI also has a minority interest in Prime Pharmaceutical Corporation, which in turn controls Primapharm Funding Corporation. MPXI is not involved in the day-to-day operations of either of these companies, and accordingly neither are Applicants or Non-Applicant Stay Parties.

3. Pursuant to the terms of the Initial Order, *inter alia*, the Court:

   a) granted a stay of proceedings in favour of each of the Applicants, the Non-Applicant Stay Parties and their respective directors and officers to and including August 4, 2022 (the "Stay Period");

   b) approved the terms of a debtor-in-possession loan facility (the "DIP Facility") in the initial maximum principal amount of $1.2 million made available by David Taylor, Alastair Crawford, Broughton Finance and Brahma Finance Limited (collectively, the "Initial DIP Lenders", and together with any other Debentureholder who participates in the DIP Facility with the consent of the Monitor and the Initial DIP Lenders (the "DIP Lenders")), pursuant to a term sheet dated July 25, 2022 (as amended, the "DIP Term Sheet");

   c) granted a charge:

      i. in the amount of $300,000 on all of the Applicants' current and future assets, property and undertaking (collectively, the "Property") to secure the fees and disbursements of the Applicants' legal counsel, as well as the fees and disbursements of the Monitor and its independent legal counsel (the "Administration Charge");

      ii. up to the maximum amount of $1.2 million on the Property in favour of the DIP Lenders to secure advances to the Applicants made under the DIP Facility until August 4, 2022 (the "DIP Lenders' Charge"); and

      iii. in the amount of $145,000 on the Property in favour of the directors and officers of the Applicants (the "Directors' Charge" and collectively with the DIP Lenders' Charge and the Administration Charge, the "Charges"); and

   d) relieved MPXI, a reporting issuer listed on the Canadian Securities Exchange, of its obligation to call and hold its annual general meeting of shareholders (the "AGM") until further order of the Court.

4. The Court set August 4, 2022 as the date for the comeback motion in these proceedings (the "Comeback Motion").

5. The principal purpose of these CCAA proceedings (the "CCAA Proceedings") is to create a stabilized environment to enable the Applicants to secure urgently required interim financing and to pursue a restructuring of their business and/or sale of the business and assets of the Companies by conducting a Court-supervised sale and investor solicitation process (the "SISP"), while continuing operations in the ordinary course of business with the breathing space afforded by filing for protection under the CCAA. Subject to Court approval, the SISP is to be conducted by the Monitor, with the assistance of the Applicants.

1.1 Purposes of this Report

1. The purposes of this report ("Report") are to:

   a) provide the Court with an update on the Applicants' operations since the granting of the Initial Order;

   b) provide the Court with an update on the Monitor's activities since its appointment;

   c) discuss the proposed:

      - SISP;
      - extension of the Stay Period from August 4, 2022 to October 21, 2022;
      - increase in the quantum of the DIP Lenders' Charge from $1.2 million to $2.67 million (plus interest, fees and costs) and to disclose certain minor amendments agreed to by the DIP Lenders to the DIP Term Sheet;
      - increase in the quantum of the Directors' Charge from $145,000 to $410,000; and
      - relief sought regarding MPXI's reporting obligations under applicable securities law;

   d) set out the Monitor's recommendations as it relates to the relief sought by the Applicants.

1.2 Restrictions

1. In preparing this Report, the Monitor has relied upon the unaudited financial information of the Companies, the books and records of the Companies and discussions with representatives of the Companies, the Applicants' counsel, the DIP Lenders and the DIP Lenders' counsel.

2. The Monitor has not audited, or otherwise attempted to verify, the accuracy or completeness of the financial information relied on to prepare this Report in a manner that complies with Canadian Auditing Standards ("CAS") pursuant to the Chartered Professional Accountants of Canada Handbook and, accordingly, the Monitor expresses no opinion or other form of assurance contemplated under the CAS in respect of such information. Any party wishing to place reliance on the financial information should perform its own diligence.

3. An examination of the Companies' cash flow forecast for the period July 25, 2022 to October 21, 2022 (the "Cash Flow Forecast") as outlined in the Chartered Professional Accountants of Canada Handbook has not been performed. Future oriented financial information relied upon in this Report is based upon the Companies' assumptions regarding future events; actual results achieved may vary from this information and these variations may be material. The Monitor expresses no opinion or other form of assurance on whether the Cash Flow Forecast will be achieved.

1.3 Currency

1. Unless otherwise noted, all currency references in this Report are in Canadian dollars.

2.0 Background of the Companies

1. The Companies' principal business is cannabis production, resale, management consulting for cannabis companies and cannabis education. The Companies consist of 23 entities registered in Canada, Lesotho, South Africa, Switzerland, Malta, Thailand, Australia and the United Kingdom.

2. The Companies' corporate chart is provided at Exhibit "A" of the Affidavit of Jeremy Blumer, a director and Chief Financial Officer of MPXI, sworn July 25, 2022 in support of the initial CCAA application (the "Blumer Affidavit").

3. The Blumer Affidavit and the Pre-Filing Report dated July 25, 2022 (the "Pre-Filing Report") prepared by KSV as Proposed Monitor, each set out detailed information with respect to the Companies' business and operations. The Monitor recommends that readers review the application materials filed in respect of the CCAA Proceedings. The Blumer Affidavit and the Pre-Filing Report are available on the Monitor's website at the following link: https://www.ksvadvisory.com/insolvency-cases/case/MPXI.

3.0 Update on Applicants' Activities since the Initial Order

1. The Applicants' activities since the granting of the Initial Order have included:

   a) operating their business in the ordinary course;

   b) communicating with suppliers to secure goods and services during these proceedings and to address payment terms;

   c) finalizing the SISP in consultation with the Monitor;

   d) disseminating a press release through *The Newswire* informing investors and other interested parties that the Applicants had obtained protection pursuant to the CCAA and would be seeking approval of the SISP (the "CCAA Press Release");

   e) considering cost-saving initiatives;

   f) corresponding regularly with representatives of the Monitor regarding numerous issues in these proceedings;

   g) communicating with their staff to explain the impact of the CCAA Proceedings;

   h) reporting daily receipts and disbursements to the Monitor;

   i) implementing communication plans to their employees and customers, which plans were developed with the assistance of the Monitor;

   j) sending a letter to Health Canada to advise of the CCAA Proceedings;

k) together with legal counsel, convening a meeting of holders of MPXI's common share purchase warrants and secured convertible debentures (collectively, the "Debentures" and the holders of such Debentures, the "Debentureholders"); and

l) corresponding with the DIP Lenders.

4.0 Monitor's Activities since the Initial Order

1. The Monitor's activities since the granting of the Initial Order have included:

a) corresponding regularly with the Applicants, including senior executives, regarding various matters in the CCAA Proceedings;

b) assisting the Applicants to procure goods and services;

c) working with the Applicants to prepare and implement a stakeholder communication strategy;

d) mailing a notice to the Applicants' creditors, as required pursuant to the CCAA;

e) filing of Form 1 with the Office of Superintendent of Bankruptcy;

f) making arrangements to have the CCAA notice published in *The Globe and Mail* (National Edition) pursuant to the CCAA and in accordance with the Initial Order;

g) attending a townhall meeting with the Applicants' employees regarding the commencement of these proceedings;

h) attending an update meeting with Debentureholders;

i) corresponding with various suppliers to provide information regarding the CCAA Proceedings;

j) monitoring the Companies' receipts and disbursements;

k) corresponding with Aird & Berlis LLP (the Monitor's counsel), Bennett Jones LLP (restructuring counsel to the Applicants), and Dentons (Canada) LLP (counsel to the DIP Lenders), regarding various matters in these CCAA Proceedings;

l) corresponding with the Companies regarding the terms of the SISP;

m) preparing SISP materials, including a teaser, confidential information memorandum, virtual data room and a list of potential bidders;

n) corresponding and communicating with the DIP Lenders; and

o) preparing this Report.

5.0 Cash Flow

1. Pursuant to the terms of the Initial Order, the DIP Lenders were granted the DIP Lenders' Charge up to a maximum amount of $1.2 million to secure initial advances made under the DIP Facility from the date of the Initial Order to the Comeback Motion (the "Initial DIP Advance"). The DIP Lenders have advanced the full $1.2 million to the Companies since the granting of the Initial Order.

2. Substantially all of the funds advanced by the DIP Lenders under the Initial DIP Advance have been used, or are expected to be used prior to the Comeback Hearing, in the manner described in the Pre-Filing Report, including to pay critical expenses of the Companies and to fund an intercompany loan to Salus Bioceutical (Thailand) Co., Ltd., an indirect subsidiary of MPXI with operations in Thailand.

3. A copy of the Cash Flow Forecast prepared by the Applicants, with the assistance of the Monitor, was attached to the Pre-Filing Report. The Cash Flow Forecast reflects that the Companies will have sufficient liquidity to operate their business until October 21, 2022; provided that the Companies have full access to the DIP Facility, being $2.67 million. Accordingly, the Applicants are requesting that, in accordance with disbursements conditions contained in the DIP Term Sheet, the DIP Lenders' Charge be increased from $1.2 million to $2.67 million.

4. A description of the key terms of the DIP Facility is provided in the Pre-Filing Report. A condition to the Initial DIP Advance was the termination of all head office staff, with the exception of those employee(s) who are retained with the DIP Lenders' consent on such terms satisfactory to DIP Lenders acting reasonably.

5. As of the writing of this Report, no head office staff have been terminated; however, the DIP Lenders have released the Initial DIP Advance. The Monitor understands that the DIP Lenders are having discussions with management of the Companies to determine which employees are required.

6.0 SISP

1. At the commencement of the CCAA Proceedings, the Applicants advised that they intended to seek approval of the SISP. A copy of the proposed SISP (the "SISP Document") is attached hereto as Appendix "B".

2. The Monitor has summarized the key aspects of the proposed SISP below; however, interested parties should review the SISP Document as well as the Applicants' materials filed in connection therewith. Capitalized terms in this section have the meaning provided to them in the SISP Document unless otherwise defined herein.

3. The proposed SISP was developed in consultation with the Monitor, and the DIP Lenders, who are one of the key stakeholders in the CCAA Proceedings and comprise a large portion of the Debentureholders.

4. The purpose of the SISP is to solicit interest in and opportunities for a sale of, or investment in, all or part of the Applicants' and the Non-Applicant Stay Parties' (collectively with the Applicants, the “MPXI Entities”) assets and business operations (the “Business”). The SISP process may include one or more of a restructuring, recapitalization or other form of reorganization of the business and affairs of one or more of the MPXI Entities as a going concern, or a sale of all, substantially all or one or more components of the Business as a going concern or otherwise.

5. A summary of the proposed SISP timeline is as follows:

Milestone	Key Dates
Delivery of Teasers/NDA to Known Potential Bidders	August 5, 2022
Binding Offer Deadline	September 8, 2022
Deadline to notify Qualified Bidders of Successful Bid	September 12, 2022

6.1 Solicitation of Interest

1. The Monitor and the Applicants will prepare a list of potential bidders, including: (i) parties that have approached the MPXI Entities or the Monitor indicating an interest in the Opportunity; and (ii) local and international strategic and financial parties who the Monitor and the MPXI Entities have identified as parties who may be interested in purchasing all or part of the Business or Property or investing in the Companies pursuant to the SISP (collectively, the "Known Potential Bidders"). The Companies have been informally marketing the Business for the past few months and have held discussions with several interested parties. These interested parties will be canvassed and included on the list of Known Potential Bidders. The Monitor has also received unsolicited interest in the SISP as a result of the CCAA Press Release.

2. The Monitor will cause a notice of the SISP to be published in *The Globe and Mail* (National Edition), and such international publications and/or journals as the Monitor deems appropriate, including in Thailand and Malta. The Monitor will also consider translating the Notice and/or Teaser Letter into other languages.

3. The Monitor or the Applicants will send the Teaser Letter describing the Opportunity and a form of non-disclosure agreement (an “NDA”) to all Known Potential Bidders by no later than August 5, 2022.

6.2 Qualified Bidders

1. Any party who has delivered written confirmation of the identity of the Potential Bidder and an executed NDA will be deemed a "Qualified Bidder" if the Monitor, in consultation with the Applicants, determines such person is likely, based on the availability of financing, experience and other considerations, to be able to consummate a sale or investment pursuant to the SISP.

2. All Qualified Bidders will receive a Confidential Information Memorandum prepared by the Monitor, with the assistance of the Applicants, and will be granted access to a virtual data room (the “Data Room”).

3. Qualified Bidders will be provided access to such due diligence materials and information relating to the Property and Business as the Monitor, in consultation with the Applicants, may deem appropriate.

6.3 Binding Offers

1. Qualified Bidders shall submit a Binding Offer,[2] which must:

    a) be submitted on or before the Binding Offer Deadline;

    b) clearly indicate if the offer is to acquire all, substantially all or a portion of the Property and/or Business (a "Binding Sale Offer"), or to make an investment in, restructure, reorganize or refinance the Business and/or one or more of the MPXI Entities (a "Binding Investment Offer");

    c) a Binding Sale Offer must contain, among other things: (i) the purchase price, including details of any liabilities to be assumed by the Qualified Bidder and key assumptions supporting the valuation; (ii) a description of the Property subject to the transaction and any of the Property to be excluded; (iii) the proposed treatment of employees; (iv) the key terms and provisions to be included in any order approving the Binding Sale Offer, including whether such order would be a "reverse vesting order"; (v) evidence of the financial capability of the Qualified Bidder to consummate the transaction and the expected structure and financing of the transaction; (vi) any anticipated approvals required to close the transaction; and (vii) any other information as reasonably requested by the Applicants or the Monitor; and

    d) a Binding Investment Offer must include, among other things, (i) the aggregate amount of the equity and/or debt investment to be made in the Business/the Applicants in Canadian dollars; (ii) key assumptions supporting the valuation; (iii) the key terms and provisions to be included in any order approving the Binding Investment Offer, including whether such order would be a "reverse vesting order"; (iv) the underlying assumptions regarding the pro forma capital structure; (v) a specific indication of the sources of capital for the Qualified Bidder and the structure and financing of the transaction; (vi) any anticipated approvals required to close the transaction; and (vii) any other information as reasonably requested by the Applicants or the Monitor.

2. The Monitor, with the Applicants' approval, may waive one or more of the requirements specified above.

6.4 Reviewing of Binding Offers and Selection of Successful Bid(s)

1. Binding Offers will be valued based on various factors, including, but not limited to:

    a) the purchase price and the net value provided by such offer;

    b) the claims likely to be created by such offer in relation to other offers;

    c) the identity, circumstances and ability of the bidder to successfully complete such transactions;

[2] A "Binding Offer" includes a Binding Sale Offer and a Binding Investment Offer.

d) the proposed transaction documents;

e) the effects of the bid on the stakeholders of the Companies;

f) factors affecting the speed, certainty and value of the transaction (including any licensing, Health Canada, regulatory or legal approvals or third-party contractual arrangements required to close the transactions);

g) the assets included or excluded from the offer;

h) any related restructuring costs; and

i) the likelihood and timing of consummating such transactions.

2. The Applicants and the Monitor, in consultation with the DIP Lenders, will:

   a) review and evaluate each Binding Offer; and

   b) identify the highest or otherwise best Binding Offer(s) (the "Successful Bid(s)").

3. The determination of any Successful Bid shall be subject to approval by the Court.

4. The Monitor, in consultation with and with the approval of the Applicants and the DIP Lenders, shall notify each Qualified Bidder in writing as to whether its Binding Offer has been selected as a Successful Bid no later than September 12, 2022.

5. The Applicants may, in consultation with and with the approval of the Monitor, aggregate separate Binding Offers to create one "Binding Offer".

6. The Applicants, in consultation with the Monitor and DIP Lenders, reserve the right to reject any or all Binding Offers.

7. The Monitor may, with the consent of the Applicants and the DIP Lenders, pause, terminate, amend or modify the SISP, remove any portion of the Business and the Property from the SISP, or establish further procedures for the SISP.

8. The Applicants may, with the consent of the Monitor in consultation with the DIP Lenders, bring a motion to the Court to seek approval of a sale of, or investment in, all or part of the Property or the Business whether or not such sale or investment is in accordance with the terms or timelines set out in the SISP, and/or a stalking horse agreement in respect of some or all of the Property or Business.

9. A motion will be held to approve any transaction with a Successful Bidder brought forth by the Applicants. All Binding Offers, other than the Successful Bid(s), shall be deemed rejected by the Applicants as of the date of approval of the Successful Bid(s) by the Court.

6.5 Bidder Communication & Confidentiality

1. As noted above, the Monitor was consulted in designing the SISP and will be involved throughout the SISP.

2. The Monitor will oversee, in all respects, the conduct of the SISP and, without limitation to that role, the Monitor will carry out the SISP in the manner set out in the SISP Document.

3. All discussions regarding the SISP should be directed through the Monitor. For greater certainty, under no circumstances should the management of the Companies or any stakeholder of the Companies be contacted directly without the prior consent of the Monitor.

6.6 Access to Information and Credit Bidding by Debentureholders

1. Following the Binding Offer Deadline, should none of the Binding Offers received be acceptable to the DIP Lenders, including because such Binding Offers do not provide for the immediate repayment in cash of all outstanding amounts owing under the Debentures in full, the Applicants, with the consent of the Monitor and the DIP Lenders, may terminate the SISP and accept a credit bid from the Debenture Trustee (on behalf of Debentureholders), the DIP Lenders or the Debentureholders for the Business and the Property.

2. Neither the MPXI Entities nor the Monitor shall provide the Debenture Trustee (on behalf of Debentureholders) or any Debentureholder (including in its capacity as a DIP Lenders) with any information relating to the Binding Offers, other than Subject Information, unless and until the Debenture Trustee and/or such Debentureholder(s) confirm to the Applicants and the Monitor in writing that if they submit a credit bid in the SISP, such bid shall not be for an amount greater than the amount owing under the Debentures, plus all amounts ranking in priority to the Debentures. Subject Information means, subject to the Monitor's determination of whether it is appropriate to disclose: (i) the amount and form of consideration payable in respect of the outstanding obligations under the DIP Term Sheet and the Debentures; (ii) the transaction structure and the material conditions to closing contemplated in any Binding Offer; and (iii) any other information the Monitor considers appropriate.

6.7 SISP Recommendation

1. The Monitor recommends that this Court grant the proposed SISP Approval Order for the following reasons:

   a) the SISP will test the market for the Business and the Property for the benefit of all stakeholders;

   b) the duration of the SISP is sufficient to allow interested parties to perform diligence and submit Binding Offers. In that regard, several parties have already approached the Monitor with interest in the SISP following the issuance of the CCAA Press Release;

   c) the SISP provides flexibility by inviting potential investors or purchasers to submit either Binding Sale Offers or Binding Investment Offer, in each case, for all or some of the Companies' Business and Property;

d) the SISP will be broadly marketed and provides for the compilation of an extensive list of Known Potential Bidders who will receive a Teaser Letter and NDA;

e) the SISP will be carried out by and with the oversight of the Monitor, to ensure fairness and transparency; and

f) the DIP Lenders are supportive of the proposed SISP.

7.0 Stay Extension

1. The Stay Period currently expires on August 4, 2022. The Applicants are requesting an extension to the Stay Period until October 21, 2022, as well as an extension of the benefit of the stay of proceedings to the Non-Applicant Stay Parties.

2. The Monitor supports the request for an extension to the Stay Period for the following reasons:

   a) the Applicants are acting in good faith and with due diligence;

   b) the Applicants will be permitted to continue to operate in the ordinary course, with the benefit of the stay of proceedings, and certain cost cutting measures, and with the oversight of the Monitor;

   c) the Monitor does not believe that any creditor will be prejudiced if the extension is granted;

   d) it will allow the Monitor and the Companies time to conduct the SISP, which is expected to be completed prior to the end of the proposed Stay Period;

   e) as of the date of this Report, neither the Applicants nor the Monitor is aware of any party opposed to the requested extension; and

   f) subject to the Court approving the proposed increase to the DIP Lenders' Charge, the Companies are projected to have sufficient liquidity to fund their operations until October 21, 2022, as reflected in the Cash Flow Forecast.

8.0 Court Ordered Charges

1. The Applicants are seeking an increase in the quantum of certain of the Charges. Under the proposed amended and restated Initial Order, the ranking and quantum of the Charges would be as follows:

Proposed Charged & Priorities		Amount ($000s)
1.	Administration Charge	300
2.	DIP Lenders' Charge	2,670 (plus interest, fees and costs)
3.	Directors' Charge	410

8.1 Administration Charge

1. The Initial Order granted a $300,000 Administration Charge to secure the fees and expenses of the Monitor, its counsel and the Applicants' counsel. Neither the Applicants nor the Monitor are seeking to amend this Charge at this time.

8.2 DIP Lenders' Charge

1. The Applicants are seeking to increase the quantum of the DIP Lenders' Charge from $1.2 million to $2.67 million (plus interest, fees and costs), which is the maximum amount available under the DIP Facility.

2. The Monitor is of the view that an increased DIP Lenders' Charge is required, as: (i) the Companies are in need of additional liquidity to fund the Business; (ii) the Cash Flow Forecast reflecting the liquidity needs under the DIP Lenders' Charge appears reasonable; (iii) the terms of the DIP Facility are reasonable for the reasons set out in the Pre-Filing Report; and (iv) the DIP Lenders are not prepared to provide further advances above and beyond the Initial DIP Advance under the DIP Facility without the benefit of the increased DIP Lenders' Charge.

3. The Monitor further understands that the DIP Lenders have agreed to make certain minor amendments to the DIP Term Sheet to reduce the minimum participation amount for any other Debentureholder wishing to participate in the DIP Facility from $100,000 to the greater of (i) $10,000; and (ii) each new lender's *pro rata* percentage of the Debentures. In the event of oversubscription, the commitments of each DIP Lender will be reduced to their *pro rata* percentage. The *pro rata* percentage is determined based on each Debentureholder's current holding in the existing Debentures.

4. The Monitor views these minor alterations to the DIP Term Sheet as reasonable and they do not change the economics of the DIP Facility.

8.3 Directors' Charge

1. The Initial Order approved a Directors' Charge in the amount of $145,000 to secure any liabilities that may accrue to the directors and officers until the Comeback Motion. The Applicants are seeking to increase the Directors' Charge to $410,000 to secure additional exposure that will accrue.

2. As provided in the table below, the quantum of the Directors' Charge was estimated by the Applicants in consultation with the Monitor, taking into consideration payroll obligations, sales tax obligations, excise tax obligations and the Applicants' vacation pay liability:

(unaudited)	Amount ($)
Payroll, including source deductions	130,000
Vacation pay	65,000
Sales tax	65,000
Excise tax	150,000
Total Directors' Charge	410,000

3. The Monitor understands that, apart from consensual salary related holdbacks for certain senior employees which totalled approximately $538,000 as at July 22, 2022, the Applicants are current on their normal course payroll obligations (including withholding taxes). The Cash Flow Forecast contemplates payroll and sales taxes will continue to be paid in the ordinary course and the Companies are projected to have sufficient liquidity to do so provided the increase to the DIP Lenders' Charge is approved.

4. The proposed Directors' Charge provides protection for the directors and officers should the Applicants fail to pay certain obligations which may give rise to liability for directors and officers, including vacation pay.

5. The Directors' Charge will only cover the current and future directors and officers for liabilities incurred after the commencement of the CCAA Proceedings to the extent relating to the period on or after the date of the Initial Order.

6. The Monitor is of the view that the increased Directors' Charge is required and reasonable in the circumstances and that the continued involvement of the directors and officers is beneficial to the Companies and these CCAA Proceedings. The Directors' Charge is particularly needed in this instance where the DIP Lenders are requiring the existing D&O insurance policy to be cancelled. In that respect, the Monitor has been advised by Mr. Blumer that he has written to the D&O insurer to cancel the D&O insurance policy.

7. The DIP Lenders have been consulted and are supportive of the proposed Directors' Charge.

9.0 Securities Reporting Obligations

1. MPXI is seeking authorization to incur no further expenses in relation to any filings (including financial statements), disclosures, core or non-core documents, restatements, amendments to existing filings, press releases or any other actions (collectively, the "Securities Filings") that may be required by any federal, provincial or other law respecting securities or capital markets in Canada, or by the rules and regulations of a stock exchange, including, without limitation, the *Securities Act* (Ontario), RSO 1990, c S.5 and comparable statutes enacted by other provinces of Canada, the CSE Policies 1-10 and other rules, regulations and policies of the Canadian Securities Exchange (the "Securities Provisions").

2. The Applicants are also seeking to protect the directors, officers, employees, and other representatives of MPXI and the Monitor from any personal liability for any failure by MPXI to make any Securities Filings required by the Securities Provisions.

3. As discussed above, at the initial application the Court relieved MPXI of its obligation to call an AGM. As set out in the Pre-Filing Report, MPXI's executive management will be focused on the Applicants' restructuring efforts. The Securities Filings would require significant time and resources, and attention from MPXI's management and would detract from these efforts. Furthermore, as a cost savings measure, MPXI may not continue as a reporting issuer upon its emergence from the CCAA.

4. As a result, the Monitor views this request as reasonable and supports such relief in the circumstances.

10.0 Conclusion and Recommendation

5. Based on the foregoing, KSV respectfully recommends that this Honourable Court make an order granting the relief detailed in Section 1.1 (1)(d) of this Report.

* * *

All of which is respectfully submitted,

KSV Restructuring Inc.

KSV RESTRUCTURING INC.
IN ITS CAPACITY AS MONITOR OF
MPX INTERNATIONAL CORPORATION, BIOCANNABIS PRODUCTS LTD., CANVEDA INC., THE CING-X CORPORATION, SPARTAN WELLNESS CORPORATION, MPXI ALBERTA CORPORATION, MCLN INC., AND SALUS BIOPHARMA CORPORATION
AND NOT IN ITS PERSONAL CAPACITY

APPENDIX C

Court File No. CV-22-00684542-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE CHIEF	)	THURSDAY, THE 4th
	)	
JUSTICE MORAWETZ	)	DAY OF AUGUST, 2022

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 MPX INTERNATIONAL CORPORATION, BIOCANNABIS PRODUCTS LTD., CANVEDA INC., THE CING-X CORPORATION, SPARTAN WELLNESS CORPORATION, MPXI ALBERTA CORPORATION, MCLN INC., AND SALUS BIOPHARMA CORPORATION
(collectively, the "**Applicants**")

AMENDED & RESTATED INITIAL ORDER

(amending Initial Order dated July 25, 2022)

THIS APPLICATION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day by Zoom videoconference.

ON READING the affidavit of Jeremy Blumer sworn July 25, 2022 and the Exhibits thereto (the "**Blumer Affidavit**"), the affidavit of Jeremy Blumer sworn July 28, 2022 and the Exhibits thereto, the Pre-Filing Report of KSV Restructuring Inc. ("**KSV**") dated July 25, 2022 and the First Report of KSV dated July 29, 2022, and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Applicants and the additional parties listed in Schedule "A" hereto (collectively, the "**Non-Applicant Stay Parties**" and together with the Applicants, the "**MPXI Entities**"), counsel for KSV in its capacity as court-appointed monitor (the "**Monitor**"), counsel for David Taylor, Alastair Crawford, Broughton Finance and Brahma Finance Limited (collectively, the "**Initial DIP Lenders**"), and such other parties listed on the Counsel Slip, no one

appearing for any other party although duly served as appears from the Affidavit of Service of Thomas Gray sworn July 28, 2022,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that each of the Applicants is a company to which the CCAA applies. Although not Applicants, the Non-Applicant Stay Parties shall enjoy the benefits of the protections and authorizations provided under the terms of this Order.

PLAN OF ARRANGEMENT

3. **THIS COURT ORDERS** that each of the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. **THIS COURT ORDERS** that the Applicants shall remain in possession and control of their respective current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The Applicants are authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. **THIS COURT ORDERS** that the MPXI Entities shall be entitled to continue to utilize the central cash management system currently in place as described in the Blumer Affidavit or, with the consent of the Monitor and the Initial DIP Lenders, together with any other lender who participates in the DIP Facility (as defined below) (together, the "**DIP Lenders**"), replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the MPXI Entities of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the MPXI Entities, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under any Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

6. **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to, on, or after the date of this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and employee expenses payable prior to, on, or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) with the consent of the Monitor and the DIP Lenders, amounts owing for goods and services actually supplied to the Applicants prior to the date of this Order and all outstanding amounts related to honouring customer obligations whether existing before or after the date of this Order, incurred in the ordinary course of business and consistent with existing policies and procedures;

(c) any taxes, duties or other payments required under the Cannabis Legislation (as defined below); and

(d) the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, and subject to the Definitive Documents (as defined below), the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course prior to, on, or, after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

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

(b) payment for goods or services actually supplied to the Applicants on or following the date of this Order.

Payments for amounts incurred prior to this Order shall require the consent of the Monitor and the DIP Lenders, or leave of this Court.

8. **THIS COURT ORDERS** that the Applicants shall remit, in accordance with legal requirements, or pay:

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

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order;

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal

realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

9. **THIS COURT ORDERS** that until a real property lease is disclaimed in accordance with the CCAA, the Applicants shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the applicable Applicant and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, monthly, on the first day of each month, in advance (but not in arrears) in the amounts set out in the applicable lease. On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

10. **THIS COURT ORDERS** that, except as specifically permitted herein and in the Definitive Documents, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

11. **THIS COURT ORDERS** that each of the Applicants shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents, have the right to:

(a) with the prior consent of the DIP Lenders, permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $250,000 in any one transaction or $1,000,000 in the aggregate;

(b) sell inventory in the ordinary course of business consistent with past practice, or otherwise with the consent of the Monitor and the DIP Lenders;

(c) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; and

(d) pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business.

12. **THIS COURT ORDERS** that the applicable Applicant shall provide each relevant landlord with notice of the Applicant's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes such Applicant's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the applicable Applicant, or by further Order of this Court upon application by the applicable Applicant on at least two (2) days notice to such landlord and any such secured creditors. If any Applicant disclaims a lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the lease shall be without prejudice to such Applicant's claim to the fixtures in dispute.

13. **THIS COURT ORDERS** that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then: (a) during the notice period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the applicable Applicant and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the applicable Applicant in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE MPXI ENTITIES OR THEIR RESPECTIVE PROPERTY

14. **THIS COURT ORDERS** that until and including October 21, 2022, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of any MPXI Entity or the Monitor or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, except with the written consent of the MPXI Entities and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of any MPXI Entity or affecting the Business or the Property, are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of any MPXI Entity or the Monitor, or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the MPXI Entities and the Monitor, or leave of this Court, provided that nothing in this Order shall: (i) empower any MPXI Entity to carry on any business which the MPXI Entity is not lawfully entitled to carry on; (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA; (iii) prevent the filing of any registration to preserve or perfect a security interest; or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

16. **THIS COURT ORDERS** that during the Stay Period, no Person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, rescind, terminate or cease to perform any right, renewal right, contract, agreement, lease, licence or permit in favour of or held by any MPXI Entity, except with the written consent of the MPXI Entities and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

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

NON-DEROGATION OF RIGHTS

18. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to an MPXI Entity. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

19. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers (or similar position) of any MPXI Entity with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of an MPXI Entity whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of

such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

20. **THIS COURT ORDERS** that the Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as a director or officer of the Applicants after the commencement of the within 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.

21. **THIS COURT ORDERS** that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $410,000, unless permitted by further Order of this Court, as security for the indemnity provided in paragraph 20 of this Order. The Directors' Charge shall have the priority set out in paragraphs 39 and 41 herein.

22. **THIS COURT ORDERS** that, 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 Directors' Charge; and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any director's and officer's insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 20 of this Order.

APPOINTMENT OF MONITOR

23. **THIS COURT ORDERS** that KSV is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the MPXI Entities and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the MPXI Entities pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

24. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements, including the management and deployment/use of any funds advanced by the DIP Lenders to the Applicants under the DIP Term Sheet;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) assist the Applicants, to the extent required by the Applicants, in their dissemination, to the DIP Lenders and its counsel on a weekly basis of financial and other information as agreed to between the Applicants and, the DIP Lenders which may be used in these proceedings including reporting on a basis to be agreed with the DIP Lenders;

(d) advise the Applicants in their preparation of the Applicant's cash flow statements and reporting required by the DIP Lenders, which information shall be reviewed with the Monitor and delivered to the DIP Lenders and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by the DIP Lenders;

(e) advise the Applicants in their development of the Plan, if any, and any amendments to the Plan;

(f) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) monitor all payments, obligations and any transfers as between the MPXI Entities;

(h) receive funds advanced by the DIP Lenders and to disburse such funds to the Applicants pursuant to the terms of the DIP Term Sheet, including any actions or activities incidental thereto;

(i) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the MPXI

Entities, to the extent that is necessary to adequately assess the Applicants' business and financial affairs or to perform its duties arising under this Order;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

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

25. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property or be deemed to take possession of the Property, pursuant to any provision of any federal, provincial or other law respecting, among other things, the manufacturing, possession, processing and distribution of cannabis or cannabis products including, without limitation, under the *Cannabis Act* S.C. 2018, c.16, the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, the *Excise Act, 2001*, S.C. 2002, c. 22,, the Ontario *Cannabis Licence Act*, S.O. 2018, c. 12, Sched. 2, the Ontario *Cannabis Control Act*, S.O. 2017, c. 26, Sched. 1, the *Ontario Cannabis Retail Corporation Act*, 2017, S.O. 2017, c. 26, the Alberta *Gaming, Liquor and Cannabis Act*, R.S.A. 2000, c. G-1, the Alberta *Gaming, Liquor and Cannabis Regulation*, Alta. Reg. 143/996, or other such applicable federal, provincial or other legislation or regulations (collectively, the "**Cannabis Legislation**"), and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof within the meaning of any Cannabis Legislation or otherwise, and nothing in this Order shall be construed as resulting in the Monitor being an employer or successor employer within the meaning of any statute, regulation or rule of law or equity for any purpose whatsoever.

26. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste

or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, the Ontario *Occupational Health and Safety Act,* the Alberta *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, the *Alberta Water Act*, R.S.A. 2000, c. W-3 and the Alberta *Occupational Health and Safety Act*, S.A. 2020, c. O-2.2 and all regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

27. **THIS COURT ORDERS** that, in addition to the rights and protections afforded to the DIP Lenders under this Order or at law, the DIP Lenders shall not incur any liability or obligation as a result of the carrying out of the provisions of this Order, save and except for any gross negligence or willful misconduct on its part.

28. **THIS COURT ORDERS** that that the Monitor shall provide any creditor of the Applicants, including without limitation, the DIP Lenders, with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

29. **THIS COURT ORDERS** that, in addition to the rights and protections afforded to the Monitor under the CCAA or as an officer of this Court, neither the Monitor nor its respective employees and representatives acting in such capacities shall incur any liability or obligation as a result of the appointment of the Monitor or the carrying out by it of the provisions of this Order, including under any Cannabis Legislation, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

30. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, whether incurred prior to, on or subsequent to, the date of this Order, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a weekly basis.

31. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

32. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, and the Applicants' counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $300,000, unless consented to by the DIP Lenders and permitted by further Order of this Court, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 39 and 41 hereof.

DIP FINANCING

33. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to obtain and borrow under a credit facility from the DIP Lenders in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed $2,670,000 unless permitted by further Order of this Court.

34. **THIS COURT ORDERS** that such credit facility shall be on the terms and subject to the conditions set forth in the Summary of Terms and Conditions for Credit Facility between the DIP Lenders and the Applicants dated as of July 25, 2022 (as may be amended from time to time, the "**DIP Term Sheet**"), filed.

35. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security

documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the DIP Term Sheet or as may be reasonably required by the DIP Lenders pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the DIP Lenders under and pursuant to the DIP Term Sheet and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

36. **THIS COURT ORDERS** that the DIP Lenders shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lenders' Charge**") on the Property, which DIP Lenders' Charge shall not exceed the amount of $2,670,000 (plus interest, fees and costs) or secure an obligation that exists before this Order is made. The DIP Lenders' Charge shall have the priority set out in paragraphs 39 and 41 hereof.

37. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lenders may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lenders' Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Definitive Documents or the DIP Lenders' Charge, the DIP Lenders, upon 4 business days notice to the Applicants and the Monitor, may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the DIP Term Sheet, Definitive Documents and the DIP Lenders' Charge, including without limitation, to cease making advances to the Applicants and set off and/or consolidate any amounts owing by the DIP Lenders to the Applicants against the obligations of the Applicants to the DIP Lenders under the DIP Term Sheet, the Definitive Documents or the DIP Lenders' Charge, to make demand, accelerate payment and give other 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 Applicants and for the appointment of a trustee in bankruptcy of the Applicants; and

(c) the foregoing rights and remedies of the DIP Lenders shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

38. **THIS COURT ORDERS AND DECLARES** that, unless otherwise agreed to by the DIP Lenders, the DIP Lenders shall be treated as unaffected in any Plan filed by any of Applicants under the CCAA, or any proposal filed by any of the Applicants under the *Bankruptcy and Insolvency Act* (the "**BIA**"), with respect to any advances made under the Definitive Documents.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

39. **THIS COURT ORDERS** that the priorities of the Directors' Charge, the Administration Charge and the DIP Lenders' Charge (collectively, the "**Charges**"), as among them, shall be as follows:

First - Administration Charge (to the maximum amount of $300,000);

Second - DIP Lenders' Charge (to the maximum amount of $2,670,000, plus interest, fees, and costs); and

Third - Directors' Charge (to the maximum amount of $410,000).

40. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that 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.

41. **THIS COURT ORDERS** that each of the Charges (all as constituted and defined herein) shall constitute a charge on the Property and 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.

42. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Applicants also obtain

the prior written consent of the Monitor, the DIP Lenders and the beneficiaries of the Charges, or further Order of this Court.

43. **THIS COURT ORDERS** that the Charges, the DIP Term Sheet and the Definitive Documents 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**") and/or the DIP Lenders thereunder 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 the 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**") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Term Sheet or the Definitive Documents shall create or be deemed to constitute a breach by the Applicants of any Agreement to which they are a party;

(b) 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 Applicants entering into the DIP Term Sheet, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made by the Applicants pursuant to this Order, the DIP Term Sheet or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

44. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the applicable Applicant's interest in such real property leases.

CORPORATE MATTERS

45. **THIS COURT ORDERS** that MPX International Corporation be and is hereby relieved of any obligation to call and hold an annual meeting of its shareholders until further Order of this Court.

RELIEF FROM REPORTING AND FILING OBLIGATIONS

46. **THIS COURT ORDERS** that the decision by MPXI to incur no further expenses in relation to any filings (including financial statements), disclosures, core or non-core documents, restatements, amendments to existing filings, press releases or any other actions (collectively, the "**Securities Filings**") that may be required by any federal, provincial or other law respecting securities or capital markets in Canada, or by the rules and regulations of a stock exchange, including, without limitation, the *Securities Act* (Ontario), RSO 1990, c S.5 and comparable statutes enacted by other provinces of Canada, the CSE Policies 1-10 and other rules, regulations and policies of the Canadian Securities Exchange (collectively, the "**Securities Provisions**")**,** is hereby authorized, provided that nothing in this paragraph shall prohibit any securities regulator or stock exchange from taking any action or exercising any discretion that it may have of a nature described in section 11.1(2) of the CCAA as a consequence of MPXI failing to make any Securities Filings required by the Securities Provisions.

47. **THIS COURT ORDERS** that none of the directors, officers, employees, and other representatives of MPXI nor the Monitor shall have any personal liability for any failure by MPXI to make any Securities Filings required by the Securities Provisions.

SERVICE AND NOTICE

48. **THIS COURT ORDERS** that the Monitor shall: (i) without delay, publish in the Globe and Mail, National Edition, a notice containing the information prescribed under the CCAA; and (ii) within five (5) days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against any of the Applicants of more than $1,000 (excluding individual employees, former employees with retirement savings plan entitlements, and retirees and other beneficiaries who have entitlements under any retirement savings plans), and (C) prepare a list

showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder; provided that the Monitor shall not make the claims, names and addresses of individuals who are creditors publicly available unless otherwise ordered by this Court.

49. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: https://www.ksvadvisory.com/insolvency-cases/case/MPXI.

50. **THIS COURT ORDERS** that the Applicants and the Monitor and their respective counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Applicants' creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or judicial obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2175 (SOR/DORS).

51. **THIS COURT ORDERS** that, subject to further Order of this Court in respect of urgent motions, any interested party wishing to object to the relief sought in a motion brought by the Applicants or the Monitor in these CCAA proceedings shall, subject to further Order of this Court, provide the service list in these proceedings (the "**Service List**") with responding motion materials or a written notice (including by e-mail) stating its objection to the motion and the grounds for such objection by no later than 5:00 p.m. (Toronto time) on the date that is two (2) days prior to the date such motion is returnable (the "**Objection Deadline**"). The Monitor shall have the ability to extend the Objection Deadline after consulting with the Applicants.

52. **THIS COURT ORDERS** that following the expiry of the Objection Deadline, counsel to the Monitor or counsel to the Applicants shall inform the Court, including by way of a 9:30 a.m. appointment, of the absence or the status of any objections to the motion and the judge having carriage of the motion may determine (a) whether a hearing in respect of the motion is necessary, (b) if a hearing is necessary, the date and time of the hearing, (c) whether such hearing will be in person, by telephone or videoconference, or by written submissions only, and (d) the parties from whom submissions are required. In the absence of any such determination, a hearing will be held in the ordinary course on the date specified in the notice of motion.

GENERAL

53. **THIS COURT ORDERS** that each of the Applicants, the DIP Lenders or the Monitor may from time to time apply to this Court to amend, vary or supplement this Order or for advice and directions in the discharge of its powers and duties under this Order or in the interpretation of this Order hereunder.

54. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of any of the Applicants, the Business or the Property.

55. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, Switzerland, South Africa, Malta, Australia, Lesotho, Thailand or any other country, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

56. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative

in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

57. **THIS COURT ORDERS** that any interested party (including each of the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

58. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. (Toronto time) on the date of this Order.

Chief Justice G.B. Morawetz

SCHEDULE "A"
NON-APPLICANT STAY PARTIES

MPX Australia Pty Ltd.
MPXI UK Limited
MPXI Lesotho (Pty) Ltd.
Highland Farms (Pty) Ltd.
MPXI Malta Operations Limited
MPXI Malta Property Limited
Alphafarma Operations Limited
MPXI Malta Holding Limited
MPXI SA Pty Ltd.
First Growth Holding Pty Ltd.
Salus Bioceutical (Thailand) Co., Ltd.
Salus International Management Ltd.
Holyworld SA
MPXI Labs SA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36,* AS AMENDED AND IN THE MATTER OF AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MPX INTERNATIONAL CORPORATION, BIOCANNABIS PRODUCTS LTD., CANVEDA INC., THE CING-X CORPORATION, SPARTAN WELLNESS CORPORATION, MPXI ALBERTA CORPORATION, MCLN INC., AND SALUS BIOPHARMA CORPORATION

Court File No.: CV-22-00684542-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings Commenced in Toronto

AMENDED & RESTATED
INITIAL ORDER
(amending Initial Order dated July 25, 2022)

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Lawyers for the Applicants

Court File No. CV-22-00684542-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE CHIEF	)	THURSDAY, THE 4th
	)	
JUSTICE MORAWETZ	)	DAY OF AUGUST, 2022

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 MPX INTERNATIONAL CORPORATION, BIOCANNABIS PRODUCTS LTD., CANVEDA INC., THE CING-X CORPORATION, SPARTAN WELLNESS CORPORATION, MPXI ALBERTA CORPORATION, MCLN INC., AND SALUS BIOPHARMA CORPORATION
(collectively, the "**Applicants**")

SISP APPROVAL ORDER

THIS MOTION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for an order, *inter alia*, approving the SISP (as defined below) and certain related relief, was heard this day by Zoom videoconference.

ON READING the Notice of Motion of the Applicants, the affidavit of Jeremy Blumer sworn July 28, 2022, the First report of KSV Restructuring Inc. dated July 29 (the "**First Report**"), in its capacity as monitor of the Applicants (the "**Monitor**"), filed, and on hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for the DIP Lenders, and such other counsel as were present, no one else appearing although duly served as appears from the affidavit of service of Thomas Gray sworn July 28, 2022;

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them under the Sale and Investment Solicitation Process attached hereto as Schedule "A" (the "**SISP**") or the Amended and Restated Initial Order dated August 4, 2022, as applicable.

APPROVAL OF THE SISP

3. **THIS COURT ORDERS** that the SISP (subject to any amendments thereto that may be made in accordance therewith and with this Order) be and is hereby approved and the Monitor, and the Applicants are authorized and directed to carry out the SISP in accordance with its terms and this Order, and are hereby authorized and directed to take such steps as they consider necessary or desirable in carrying out each of their obligations thereunder, subject to prior approval of this Court being obtained before completion of any transaction(s) under the SISP.

4. **THIS COURT ORDERS** that the Applicants and the Monitor and their respective Assistants, affiliates, partners, directors, employees, advisors, 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 arising or resulting from the gross negligence or wilful misconduct of the Applicants or the Monitor, as applicable, as determined by this Court.

5. **THIS COURT ORDERS** that notwithstanding anything contained herein or in the SISP, the Monitor shall not take possession of the Property or be deemed to take possession of the Property, including pursuant to any provision of the Cannabis Legislation.

6. **THIS COURT ORDERS** that the Monitor or the Applicants may apply to this Court for directions with respect to the SISP at any time.

PIPEDA

7. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act* and any similar legislation in any other applicable jurisdictions, the Applicants, the Monitor and each of their respective Assistants are hereby authorized and permitted to disclose and transfer to each Qualified Bidder personal information of identifiable individuals but only to the extent desirable or required to negotiate or attempt to complete a transaction pursuant to the SISP (a "**Transaction**"). Each Qualified Bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation for the purpose of effecting a Transaction, and if it does not complete a Transaction, shall return all such information to the Applicants or the Monitor, as applicable, or in the alternative destroy all such information and provide confirmation of its destruction if requested by the Applicants or the Monitor. The Successful Bidder(s) shall maintain and protect the privacy of such information and, upon closing of the Transaction(s) contemplated in the Successful Bid(s), shall be entitled to use the personal information provided to it that is related to the Business and/or Property acquired pursuant to the SISP in a manner that is in all material respects identical to the prior use of such information by the Applicants, and shall return all other personal information to the Applicants or the Monitor or ensure that all other personal information is destroyed and provide confirmation of its destruction if requested by the Applicants or the Monitor.

8. **THIS COURT ORDERS** that the Non-Applicant Stay Parties and their current and former directors, officers, employees, agents and advisors shall provide the Applicants and the Monitor with all information and such other assistance as reasonably required by the Applicants and the Monitor in connection with the SISP and the discharge of their duties and powers under this Order.

9. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, Switzerland, South Africa, Malta, Australia, Lesotho, Thailand or any other country, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and

to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order.

10. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

11. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. on the date of this Order.

Chief Justice G.B. Morawetz

SCHEDULE "A"

SALE AND INVESTMENT SOLICITATION PROCESS

On July 25, 2022, MPX International Corporation, BioCannabis Products Ltd., Canveda Inc., The Cin-X Corporation, Spartan Wellness Corporation, MPXI Alberta Corporation, MCLN Inc. and Salus BioPharma Corporation (collectively, the "**Applicants**") were granted an initial order (as amended and restated on August 4, 2022 and as may be further amended and/or restated from time to time, the "**Initial Order**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**", and the Applicants' proceedings thereunder, the "**CCAA Proceedings**"), by the Ontario Superior Court of Justice (Commercial List) (the "**Court**"). All capitalized terms utilized herein and not otherwise defined shall have the meaning ascribed to them in the Initial Order or the Affidavit of Jeremy Blumer sworn July 25, 2022.

Pursuant to an order dated August 4, 2022 (the "**SISP Approval Order**") the Court approved, among other things, the sale and investment solicitation process (the "**SISP**") described herein. In accordance with the SISP Approval Order, KSV Restructuring Inc., in its capacity as the Court-appointed Monitor of the Applicants (in such capacity, the "**Monitor**"), with the assistance of the Applicants and the Non-Applicant Stay Parties (collectively, the "**MPXI Entities**") will conduct the SISP.

Opportunity

1. The SISP is intended to solicit interest in and opportunities for a sale of, or investment in, all or part of the MPXI Entities' assets and business operations (the "**Opportunity**"). The Opportunity may include one or more of a restructuring, recapitalization or other form of reorganization of the business and affairs of one or more of the MPXI Entities as a going concern, or a sale of all, substantially all or one or more components of the MPXI Entities' assets (the "**Property**") and business operations (the "**Business**") as a going concern or otherwise.

2. Any sale of the Property or investment in the Business will be on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by the Monitor, the Applicants or any of their respective agents, advisors or estates, and, in the event of a sale, all of the right, title and interest of the Applicants in and to the Property to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests therein and thereon pursuant to Court orders, except as otherwise provided in such Court orders.

3. The following are the key dates of the Court-approved SISP:

Milestone	Date
Commence solicitation of interest from parties, including delivering NDA and Teaser Letter, and upon execution of NDA, Confidential Information Memorandum and access to Data Room	No later than August 5, 2022.
Binding Offer Deadline	September 8, 2022 at 5:00 p.m. EDT
Deadline to notify Qualified Bidders of Successful Bid	September 12, 2022 at 5:00 p.m. EDT

Solicitation of Interest: Notice of the SISP

4. As soon as reasonably practicable, but in any event by no later than August 5, 2022:

   (a) the Monitor and the Applicants will prepare a list of potential bidders, including: (i) parties that have approached the MPXI Entities or the Monitor indicating an interest in the Opportunity; and (ii) local and international strategic and financial parties who the Monitor and the Applicants believe may be interested in purchasing all or part of the Business or Property or investing in the MPXI Entities pursuant to the SISP (collectively, the "**Known Potential Bidders**");

   (b) the Monitor will cause a notice of the SISP (and such other relevant information which the Monitor, in consultation with the Applicants, considers appropriate) (the "**Notice**") to be published in *The Globe and Mail* (National Edition), and such international publications and/or journals as the Monitor, in consultation with the Applicants, considers appropriate;

   (c) the Applicants will issue a press release setting out the information contained in the Notice and such other relevant information which the Applicants, in consultation with the Monitor, determines is appropriate;

   (d) the Monitor, with the assistance of the Applicants, will prepare a process summary (the "**Teaser Letter**") describing the Opportunity, outlining the process under the SISP and inviting recipients of the Teaser Letter to express their interest pursuant to the SISP;

(e) the Monitor shall arrange to have each of the Notice and the Teaser Letter translated to Thai and Maltese, respectively, and advertised in the applicable jurisdictions to solicit interest in the MPXI Entities; and

(f) the Applicants, with the assistance of the Monitor, will prepare a non-disclosure agreement in form and substance satisfactory the Applicants and the Monitor (an "**NDA**").

5. The Monitor or the Applicants will send the Teaser Letter and NDA to all Known Potential Bidders by no later than August 5, 2022 and to any other party who requests a copy of the Teaser Letter and NDA or who is identified to the MPXI Entities or the Monitor as a potential bidder as soon as reasonably practicable after such request or identification, as applicable.

Qualified Bidders

6. Any party who wishes to participate in the SISP (a "**Potential Bidder**") must provide to the Monitor and the Applicants, at the addresses specified in Schedule "A" hereto (including by email transmission), with a NDA executed by it, acceptable to the Monitor, and written confirmation of the identity of the Potential Bidder, the contact information for such Potential Bidder and full disclosure of the direct and indirect principals of the Potential Bidder.

7. A Potential Bidder (who has delivered the executed NDA and letter as set out above) will be deemed a "**Qualified Bidder**" if the Monitor, in consultation with the Applicants, determines such person is likely, based on the availability of financing, experience and other considerations, to be able to consummate a sale or investment pursuant to the SISP. All Qualified Bidders will receive a Confidential Information Memorandum prepared by the Monitor and will be granted access to a virtual data room ("**Data Room**"). The DIP Lenders, the Debenture Trustee (on behalf of Debentureholders) and any company affiliated with either of the foregoing shall be deemed to be a Qualified Bidder.

8. At any time during the SISP, the Applicants may, in their reasonable business judgment and after consultation with the DIP Lenders and with the consent of the Monitor, eliminate a Qualified Bidder from the SISP, in which case such bidder will be eliminated from the SISP and will no longer be a "Qualified Bidder" for the purposes of the SISP.

9. Potential Bidders must rely solely on their own independent review, diligence, investigation and/or inspection of all information and of the Property and Business in connection with their participation in the SISP and any transaction they enter into with one or more of the MPXI Entities.

Due Diligence

10. The Monitor, in consultation with the Applicants, shall, subject to competitive and other business considerations, afford each Qualified Bidder such access to due diligence materials and information relating to the Property and Business as the Monitor, in consultation with the Applicants, may deem appropriate. Due diligence access may include management presentations, access to the Data Room, on-site inspections, and other matters which a Qualified Bidder may reasonably request and as to which the

Monitor, in its reasonable business judgment and after consulting with the Applicants, may agree. The Monitor will designate a representative to coordinate all reasonable requests for additional information and due diligence access from Qualified Bidders and the manner in which such requests must be communicated. Neither the Applicants nor the Monitor will be obligated to furnish any information relating to the Property or Business to any person other than to Qualified Bidders. Further, and for the avoidance of doubt, selected due diligence materials may be withheld from certain Qualified Bidders if the MPXI Entities, in consultation with the Monitor, determine such information to represent proprietary or sensitive competitive information.

Formal Binding Offers and Selection of Successful Bidder(s)

11. Qualified Bidders that wish to make a formal offer to purchase or make an investment in the MPXI Entities or their Property or Business shall submit a binding offer (a "**Binding Offer**")[1] that complies with all of the following requirements to the Monitor and the Applicants at the addresses specified in Schedule "A" hereto (including by email), so as to be received by them no later 5 p.m. EDT on September 8, 2022 (the "**Binding Offer Deadline**"). For greater certainty, Binding Offers must:

    (a) be submitted on or before the Binding Offer Deadline by a Qualified Bidder;

    (b) be made by way of binding, definitive transaction document(s) that is/are executed by the Qualified Bidder;

    (c) contain a clear indication of whether the Qualified Bidder is offering to:

        (i) acquire all, substantially all or a portion of the Property and/or Business (a "**Binding Sale Offer**"), or

        (ii) make an investment in, restructure, reorganize or refinance the Business and/or one or more of the MPXI Entities (a "**Binding Investment Offer**");

    (d) in the case of a Binding Sale Offer, identify or contain information in respect of the following:

        (i) the purchase price, including details of any liabilities to be assumed by the Qualified Bidder and key assumptions supporting the valuation (the "**Purchase Price**");

        (ii) a description of the Property subject to the transaction and any of the Property to be excluded;

        (iii) the Qualified Bidder's intended use of the Property subject to the transaction;

[1] A "Binding Offer" includes a Binding Sale Offer and a Binding Investment Offer.

(iv) the Qualified Bidder's proposed treatment of employees of the applicable MPXI Entities (for example, anticipated employment offers and treatment of post-employment benefits);

(v) the key terms and provisions to be included in any order of the Court approving the Binding Sale Offer, including whether such order will be a "reverse vesting order";

(vi) be accompanied by information confirming the financial capability of the Qualified Bidder and the structure and financing of the transaction (including, but not limited to, the sources of financing to fund the acquisition, evidence of the availability of such financing or such other form of financial disclosure and credit-quality support or enhancement that will allow the Applicants and the Monitor and each of their respective advisors to make a reasonable business or professional judgment as to the Qualified Bidder's financial or other capabilities to consummate the transaction and to perform all obligations to be assumed in such transaction; and the steps necessary and associated timing to obtain financing and any related contingencies, as applicable);

(vii) any anticipated corporate, licensing, securityholder, internal, Health Canada, legal or other regulatory approvals required to close the transaction, and an estimate of the anticipated time frame and any anticipated impediments for obtaining such approvals;

(viii) an acknowledgement that the Binding Sale Offer is made on an "as-is, where- is" basis;

(ix) all conditions to closing of the Binding Sale Offer;

(x) any other terms or conditions of the Binding Sale Offer; and

(xi) such other information as reasonably requested by the Applicants or the Monitor.

(e) in the case of an Binding Investment Offer, identify or contain information in respect of the following:

(i) the aggregate amount of the equity and/or debt investment to be made in the Business/the MPXI Entities in Canadian Dollars;

(ii) key assumptions supporting the valuation;

(iii) the key terms and provisions to be included in any order of the Court approving the contemplated Binding Investment Offer, including whether such order will be a "reverse vesting order";

(iv) the underlying assumptions regarding the pro forma capital structure (including the form and amount of anticipated equity and/or debt levels,

debt service fees, interest or dividend rates, amortization, voting rights or other protective provisions (as applicable), redemption, prepayment or repayment attributes and any other material attributes of the investment);

(v) a specific indication of the sources of capital for the Qualified Bidder and the structure and financing of the transaction (including, but not limited to, the sources of capital to fund the investment, preliminary evidence of the availability of such capital or such other form of financial disclosure and credit-quality support or enhancement that will allow the Applicants and the Monitor and each of their respective advisors to make a reasonable business or professional judgment as to the Qualified Bidder's financial or other capabilities to consummate the transaction, steps necessary and associated timing to obtain such capital and any related contingencies, as applicable, and a sources and uses analysis);

(vi) any anticipated corporate, licensing, securityholder, internal, Health Canada, legal or other regulatory approvals required to close the transaction, and an estimate of the anticipated time frame and any anticipated impediments for obtaining such approvals;

(vii) an acknowledgement that the Binding Investment Offer is made on an "as-is, where-is" basis;

(viii) all conditions to closing of the Binding Investment Offer;

(ix) any other terms or conditions of the Binding Investment Offer; and

(x) such other information as reasonably requested by the Applicants or the Monitor.

12. The Monitor, with the approval of the Applicants, may waive strict compliance with any one or more of the requirements specified above. For the avoidance of doubt, the completion of any Binding Offer shall be subject to the approval of the Court.

Reviewing of Binding Offers and Selection of Successful Bid(s)

13. Binding Offers will be valued based upon numerous factors, including, without limitation, items such as the Purchase Price and the net value provided by such offer, the claims likely to be created by such offer in relation to other offers, the identity, circumstances and ability of the bidder to successfully complete such transactions, the proposed transaction documents, the effects of the bid on the stakeholders of the MPXI Entities, factors affecting the speed, certainty and value of the transaction (including any licensing, Health Canada, regulatory or legal approvals or third party contractual arrangements required to close the transactions), the assets included or excluded from the offer, any related restructuring costs, and the likelihood and timing of consummating such transactions, each as determined by the Applicants, in consultation with the Monitor and the DIP Lenders.

14. The Applicants and the Monitor, in consultation with and with the approval of the DIP Lenders will: (i) review and evaluate each Binding Offer, provided that each Binding

Offer may be negotiated among the Applicants, in consultation with the Monitor, and the applicable Qualified Bidder, and may be amended, modified or varied to improve such Binding Offer as a result of such negotiations; and (ii) identify the highest or otherwise best Binding Offer(s) (the "**Successful Bid(s)**", and a Qualified Bidder making such Successful Bid, a "**Successful Bidder**") for any particular Property or the Business of the MPXI Entities in whole or part. The determination of any Successful Bid by the Applicants, in consultation with the Monitor and the DIP Lenders, shall be subject to approval by the Court.

15. The Monitor, in consultation with and with the approval of the Applicants and the DIP Lenders, shall notify each Qualified Bidder in writing as to whether its Binding Offer has been selected as a Successful Bid no later than September 12, 2022, or at such later time as the Monitor, in consultation with and with the approval of the Applicants and the DIP Lenders, deems appropriate.

16. The Applicants may, in consultation with and with the approval of the Monitor, aggregate separate Binding Offers to create one "Binding Offer".

17. The Applicants shall have no obligation to enter into a Successful Bid, and they reserve the right, after consultation with the Monitor and the DIP Lenders, to reject any or all Binding Offers.

18. Notwithstanding the process and deadlines outlined above with respect to the SISP:

    (a) the Monitor may, with the consent of the Applicants and the DIP Lenders, at any time:

        (i) in accordance with paragraph 26 herein, pause, terminate, amend or modify the SISP;

        (ii) remove any portion of the Business and the Property from the SISP;

        (iii) establish further or other procedures for the SISP; and

    (b) the Applicants may, with the consent of the Monitor and in consultation with the DIP Lenders, at any time bring a motion to the Court to seek approval of:

        (i) a sale of, or investment in, all or part of the Property or the Business whether or not such sale or investment is in accordance with the terms or timelines set out in this SISP; and/or

        (ii) a stalking horse agreement in respect of some or all of the Property or Business and related bid procedures in respect of such Property or Business.

Sale Approval Motion Hearing

19. At the hearing of the motion to approve any transaction with a Successful Bidder (the "**Sale Approval Motion**"), the Applicants shall seek, among other things, approval from

the Court to consummate any Successful Bid. All Binding Offers, other than the Successful Bid(s), if any, shall be deemed rejected by the Applicants on and as of the date of approval of the Successful Bid(s) by the Court.

Confidentiality, Stakeholder/Bidder Communication and Access to Information

20. All discussions regarding the SISP should be directed through the Monitor. Under no circumstances should the management of the MPXI Entities or any stakeholder of the MPXI Entities be contacted directly without the prior consent of the Monitor. Any such unauthorized contact or communication could result in exclusion of the interested party from the SISP. For greater certainty, nothing herein shall preclude a stakeholder from contacting potential bidders with the agreement of the Monitor to advise that the Applicants have commenced a SISP and that they should contact the Monitor if they are interested in participating in the SISP.

21. If it is determined by the Monitor, in consultation with the Applicants, that it would be worthwhile to facilitate a discussion between one or more Qualified Bidders and a stakeholder or other third party as a consequence of a condition to closing or potential closing condition identified by such Qualified Bidder, the Monitor may provide such Qualified Bidder with the opportunity to meet with the relevant stakeholder or third party to discuss such condition or potential condition, with a view to enabling such bidder to seek to satisfy the condition or assess whether the condition is not required or can be waived. Any such meetings or other form of communication will take place on terms and conditions considered appropriate by the Monitor, in consultation with the Applicants. The Monitor must be provided with the opportunity to be present at all such communications or meetings.

Access to Information and Credit Bidding by Debentureholders and/or DIP Lenders

22. Following the Binding Offer Deadline, should none of the Binding Offers received be acceptable to the DIP Lenders, including because such Binding Offers do not provide for the immediate repayment in cash of all outstanding amounts owing under the Debentures in full, the Applicants, with the consent of the Monitor and the DIP Lenders, may terminate the SISP and accept a credit bid (or such other bid) from the Debenture Trustee (on behalf of Debentureholders), the Debentureholders or the DIP Lenders for the Business and the Property.

23. Notwithstanding anything contained herein, neither the MPXI Entities nor the Monitor shall provide the Debenture Trustee (on behalf of Debentureholders) or any Debentureholder (including in its capacity as a DIP Lender) with any information relating to the Binding Offers, other than the Subject Information (as defined below), unless and until the Debenture Trustee and/or such Debentureholder(s) confirm to the Applicants and the Monitor in writing that if they submit a credit bid in the SISP, such bid shall not be for an amount greater than the amount owing under the Debentures, plus all amounts ranking in priority to the Debentures. For the purposes of this paragraph, "**Subject Information**" shall mean, subject to the Monitor's determination of whether it is appropriate to disclose: (i) the amount and form of consideration payable in respect of the outstanding obligations under the DIP Term Sheet and the Debentures; (ii) the transaction

structure and the material conditions to closing contemplated in any Binding Offer; and (iii) any other information the Monitor considers appropriate.

Supervision of the SISP

24. This SISP does not, and will not be interpreted to create any contractual or other legal relationship between the MPXI Entities and any Qualified Bidder or any other party, other than as specifically set forth in an NDA or a definitive agreement that may be signed with one or more of the MPXI Entities (including any Stalking Horse Agreement).

25. Participants in the SISP are responsible for all costs, expenses and liabilities incurred by them in connection with the submission of any Binding Offer, due diligence activities, and any other negotiations or other actions whether or not they lead to the consummation of a transaction.

26. The Applicants or the Monitor shall have the right to modify the SISP with the prior written approval of the DIP Lenders if, in their reasonable business judgment, such modification will enhance the process or better achieve the objectives of the SISP; provided that the service list in these CCAA Proceedings shall be advised of any substantive modification to the procedures set forth herein.

SCHEDULE "A"

The Monitor:

KSV Restructuring Inc.
150 King Street West, Suite 2308
Toronto, ON M5H 1J9

Attention: Noah Goldstein and Eli Brenner

Email: ngoldstein@ksvadvisory.com / ebrenner@ksvadvisory.com

with copies to:

Aird & Berlis LLP
Brookfield Place, 181 Bay St. #1800
Toronto, ON M5J 2T9

Attention: Kyle Plunkett and Sam Babe

Email: kplunkett@airdberlis.com / sbabe@airdberslis.com

The Applicants

The MPXI Entities
c/o Bennett Jones LLP
100 King Street West, Suite 3400
Toronto, ON M5X 1A5

Attention: Sean Zweig and Mike Shakra

Email: zweigs@bennettjones.com / shakram@bennettjones.com

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36,* AS AMENDED AND IN THE MATTER OF MPX INTERNATIONAL CORPORATION, BIOCANNABIS PRODUCTS LTD., CANVEDA INC., THE CING-X CORPORATION, SPARTAN WELLNESS CORPORATION, MPXI ALBERTA CORPORATION, MCLN INC., AND SALUS BIOPHARMA CORPORATION

Court File No.: CV-22-00684542-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings Commenced in Toronto

SISP APPROVAL ORDER

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Lawyers for the Applicants

APPENDIX D

Court File No. CV-19-625101-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding under the *Business Corporations Act*, R.S.O.1990, c. B.16, s. 248

BETWEEN:

NINTH SQUARE CAPITAL CORPORATION

Plaintiff

- v.-

IANTHUS CAPITAL HOLDINGS INC., MPX BIOCEUTICAL ULC,
MPX INTERNATIONAL CORPORATION,
W. SCOTT BOYES, JEREMY BUDD and MICHAEL ARNKVARN

Defendants

CONSOLIDATED STATEMENT OF CLAIM

1. The plaintiff claims:

   (a) an order declaring, if necessary, that the plaintiff is a proper person to make an application under section 248 of the *Business Corporations Act*, R.S.O.1990, c. B.16 (the "OBCA");

   (b) an order declaring that the statutory arrangement among the corporate defendants and the conduct of the defendants relating to it were oppressive and unfairly prejudicial to and unfairly disregarded the interests of the plaintiff;

   (c) damages in the amount of $3,000,000.00;

   (d) prejudgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

   (e) costs of this action on a substantial indemnity basis, plus HST; and

(f) such other order as this Honourable Court thinks fit.

The Parties

2. The plaintiff, Ninth Square Capital Corporation ("Ninth Square" or the "plaintiff"), is a corporation incorporated under the OBCA.

3. The defendant, iAnthus Capital Holdings Inc. ("iAnthus"), is a corporation incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57 (the "BCBCA") with offices in Toronto, Ontario.

4. The defendant, MPX Bioceutical ULC ("MPX ULC"), is a wholly-owned subsidiary of iAnthus that succeeded MPX Bioceutical Corporation ("MPX") on February 5, 2019, when MPX was amalgamated with 1183271 B.C. Unlimited Liability Company ("1183271") under the BCBCA. The head office of MPX ULC is in Toronto, Ontario.

5. The defendant, MPX International Corporation ("MPXI"), is a corporation incorporated under the OBCA on October 17, 2018.

6. The defendant, W. Scott Boyes ("Boyes") was the president, chief executive officer ("CEO") and chairman of the board of directors of MPX until the statutory arrangement and is the president, CEO and chairman of the board of directors of MPXI.

7. The defendant, Jeremy S. Budd ("Budd"), was the vice-president, general counsel and corporate secretary of MPX until the statutory arrangement and is the vice-president, general counsel and a director of MPXI.

8. The defendant, Michael Arnkvarn ("Arnkvarn") was the executive vice-president, sales and marketing, and a director of MPX until the statutory arrangement and is the chief operating officer of MPXI.

Sale of Spartan Wellness Corporation

9. In 2018, Ninth Square owned fifty per cent of the outstanding shares (the "Spartan Shares") of Spartan Wellness Corporation ("Spartan"), a corporation that carried on a business of distributing medical marijuana products to veterans in Canada. The other fifty per cent of Spartan Shares were owned by Veteran Grown Corporation ("Veteran").

10. On September 17, 2018, Ninth Square entered into a share purchase agreement (the "SPA"), pursuant to which it and Veteran agreed to sell their Spartan Shares to MPX; MPX agreed to purchase the Spartan Shares in exchange for common shares in MPX ("MPX Shares") and warrants to purchase MPX Shares ("MPX Warrants"). Boyes, Budd and Arnkvarn directed the negotiations relating to the SPA and acquisition of Spartan and determined MPX's position with respect to the SPA's terms. Boyes signed the SPA on behalf of MPX.

11. Arnkvarn had responsibility for the conduct of these negotiations. The negotiations were conducted by Shay Shnet, an employee of MPX, who reported to and received instructions from Arnkvarn with respect to the terms of the acquisition of Spartan.

12. MPX was incorporated under the OBCA in 1974. In 2018 it described itself as a "multinational diversified cannabis company focused on the medical and adult-use cannabis markets." It carried on business primarily in the United States ("US"), where it cultivated, produced and sold cannabis products in four states. MPX shares were listed and traded on the Canadian Securities Exchange.

13. In June, 2018, MPX acquired a Canadian corporation operating as "Canveda", which had received a cannabis cultivation licence. MPX was attempting to develop Canveda to permit production and sales, but it had no assurance of being able to do so. Its dominant value was in its US assets. Its operating history in Canada was limited; as of August, 2018, it had earned no profits in Canada and had net losses. Thus the value of the MPX Shares was largely based on its US business.

14. Under the terms of the SPA, the consideration for Ninth Square's and Veteran's Spartan Shares was $6,000,000.00. Ninth Square and Veteran were to receive a total of $3,000,000.00 in MPX Shares and $500,000.00 in MPX Warrants, that is, $1,750,000.00 each in MPX Shares and MPX Warrants, and $1,500,000.00 in MPX

Shares and $1,000,000.00 in MPX Warrants were to be paid to a fund to be established to provide services for the benefit of veterans (the "Veteran Fund").

15. On the closing of the transaction agreed to in the SPA (the "Transaction"), $375,000.00 in MPX Shares and $62,500.00 in MPX Warrants were to be issued to Ninth Square. The remaining MPX Shares and MPX Warrants were to be issued in four additional tranches based upon the cannabis sales attributable to Spartan over the twenty-four months following the date on which Canveda became fully licensed to produce, distribute and sell cannabis products in Canada (the "Milestones"). As of August, 2019, Canveda has not been licensed to distribute and sell cannabis products.

16. The MPX Shares and MPX Warrants to be paid to the Veteran Fund were also to be issued to the Veteran Fund on the closing of the Transaction and the achievement of each Milestone or if it was later, on the date of the Veteran Fund's establishment. Ninth Square and Veteran agreed to forego receipt of $500,000.00 ($250,000.00 each) relating to MPX Warrants that were to be issued to the Veteran Fund. To this date, the Veteran Fund has not been established.

17. The number of MPX Shares and MPX Warrants to be issued was to be determined based on the volume-weighted average price of MPX Shares on the Canadian Securities Exchange in the thirty days preceding September 19, 2018, when the SPA was announced by MPX. The value so determined was $0.96 per share. The exercise price of the MPX Warrants, which was to be 120 per cent of this value, was $1.15.

18. The SPA provided that it could not be assigned by a party, without the prior written consent of each other party, except in two circumstances. Prior to the closing of the Transaction, MPX was entitled to assign the SPA and all of its rights and obligations under it to an affiliate of MPX that undertook to be bound by it, but that such an assignment would not relieve MPX of its obligations under the SPA. After the closing of the Transaction, MPX was entitled to assign its rights under the SPA to a person who purchased the Spartan Shares or all of MPX's outstanding shares.

19. On September 19, 2018, MPX published a news release announcing the acquisition of Spartan. The news release quoted Arnkvarn on the benefits of the acquisition to MPX and identified Boyes as the corporate contact.

20. The closing date of the Transaction was October 1, 2018, by which date the assets and operations of Spartan were transferred to MPX. The closing of the Transaction was confirmed on October 22, 2018, when the closing documents had been completed.

21. On October 22, 2018, MPX issued to Ninth Square $375,000.00 in MPX Shares (390,625 MPX Shares) and a warrant certificate dated October 1, 2018 for 54,348 MPX Warrants ($62,500.00). The first Milestone was achieved in March, 2019. In a note to its interim financial statements for the six months ended March 31, 2019, MPXI stated

that it expected the Milestones to be achieved. Ninth Square has not received any further shares or warrants.

The Arrangement

22. When the SPA was being negotiated, MPX was also negotiating its own acquisition by iAnthus. The negotiations between MPX and iAnthus, which began in July, 2018, were led by Boyes. Budd was part of the negotiating team, and Arnkvarn knew the negotiations were being conducted. The terms of the acquisition by means of a statutory plan of arrangement (the "Arrangement") had substantially taken form before the SPA was signed; iAnthus would acquire MPX and its US assets by acquiring all of its outstanding shares, and MPX's non-US assets, including Spartan, would be spun out to a new company that would be owned by MPX's existing shareholders. MPX did not disclose the Arrangement, or its negotiations relating to it, to Ninth Square prior to the signing of the SPA and the provisions of the SPA indicated that an acquisition or merger was not under way.

23. When it signed the SPA, Ninth Square had no knowledge of these negotiations. Had it been aware of the proposed terms of the Arrangement, Ninth Square would not have signed the SPA.

24. MPXI was incorporated on October 17, 2018. The same day, iAnthus incorporated 1183271. The Arrangement was agreed to and announced by iAnthus and MPX the next day, October 18, 2018; the parties to the arrangement agreement (the

"Arrangement Agreement") were iAnthus, 1183271, MPX and MPXI. Boyes signed the Arrangement Agreement on behalf of MPXI.

25. Under the terms of the Arrangement Agreement, MPX would assign and transfer all its non-US assets and non-US liabilities to MPXI, and MPXI would acquire these assets and assume the liabilities before the Arrangement became effective; iAnthus would acquire MPX's US assets by purchasing all of the outstanding MPX Shares and having MPX continue under the BCBCA and amalgamate with 1183271 to become MPX ULC, a wholly-owned subsidiary of iAnthus. iAnthus guaranteed all of 1183271's obligations under the Arrangement Agreement.

26. Although the Arrangement Agreement provided for the assignment and transfer to MPXI of MPX's non-US assets and for the assumption by MPXI of the liabilities associated with these assets, and defined Spartan as part of these assets, it did not refer expressly to the SPA or the parties to it. As MPXI intended to concentrate on developing its Canadian assets, ownership of Spartan was a material part of the Arrangement.

27. MPX, Boyes, Budd and Arnkvarn understood that the assignment of the SPA could not be effected without Ninth Square's consent. Under the terms of the Arrangement Agreement, MPXI would become the owner of all of the Spartan Shares, but unless the SPA was assigned to MPXI, the obligations under the SPA would remain with MPX and would become obligations of MPX ULC as a result of MPX's

amalgamation with 1183271. MPX ULC would thus be responsible to issue its shares and warrants to Ninth Square when the Milestones were achieved by MPXI.

28. iAnthus and MPX announced the Arrangement on October 18, 2018. Their press release disclosed the acquisition by iAnthus of MPX and the spinoff of MPX's non-US assets to MPXI, which would be owned by MPX's existing shareholders. MPX shareholders would receive 0.1673 common share of iAnthus for each MPX Share and common shares of MPXI (0.1 MPXI common share for each MPX Share). The details of the Arrangement were disclosed by MPX in the Information Circular filed with securities regulatory authorities on December 20, 2018 in connection with the calling of a meeting of MPX's shareholders to approve the Arrangement.

29. Ninth Square first became aware of the Arrangement after the announcement on October 18, 2018. It learned of its terms after the filing of MPX's Information Circular.

30. The completion deadline under the Arrangement Agreement was January 31, 2019. On January 24, 2019, after approval of the Arrangement by MPX's shareholders, Budd, on behalf of MPX, sent Ninth Square a proposal informing it that the MPX Shares and MPX Warrants it then held would be subject to the Arrangement and that it would receive MPXI shares and warrants on achievement of the Milestones, without otherwise affecting the terms of the SPA.

31. On January 31, 2019, Budd, on behalf of MPX, sent counsel for Ninth Square an assignment agreement under which MPX would assign the SPA to MPXI, along with a form of consent to be signed by Ninth Square (the "Proposed Consent"). The accompanying email from Budd, MPX's vice-president and general counsel, said:

> Pursuant to the plan of arrangement, the shares of Spartan are being transferred from MPX Bioceutical to MPX International. The obligations of payment stay with the purchase agreement and are therefore obligations of MPX Bioceutical (iAnthus).
>
> The current purchase agreement [i.e., the SPA] doesn't contemplate a change of control transaction meaning that while Spartan will be a subsidiary of MPX International Corporation upon completion of the plan of arrangement, the agreement, including its obligations, goes with MPX Bioceutical. Accordingly, if we do nothing, your client will be entitled to receive shares/warrants of iAnthus ….

32. The assignment agreement and Proposed Consent provided that the shares and warrants to be paid to Ninth Square under the SPA would be shares and warrants of MPXI, but the share price and warrant exercise price would remain at $0.96 and $1.15, respectively. These proposed terms would have significantly altered the consideration payable under the SPA and thus have fundamentally changed the SPA Transaction. Ninth Square has not signed the Proposed Consent.

33. MPX's Information Circular stated that the transfer of MPX's non-US assets to and the assumption of its liabilities by MPXI was to occur "as of the day prior to the Effective Date." Under the Arrangement, MPX transferred its non-US assets to MPXI and received 100 MPXI common shares. This transfer was treated as a non-taxable rollover under the *Income Tax Act* (Canada).

34. The Arrangement was completed on February 5, 2019. When it announced the completion of the Arrangement, iAnthus characterized its entire business, including MPX ULC and MPX's former US assets, as one business.

35. Concurrent with the Arrangement, iAnthus and MPX ULC entered supplemental indentures with holders of debentures (and warrants) issued by a subsidiary of MPX that were convertible (exercisable) in specified circumstances into MPX Shares. These supplemental indentures acknowledged that MPX ULC was liable for MPX's obligations and provided that iAnthus assumed MPX's obligations to issue MPX Shares on conversion and exercise and that the debentureholders would receive iAnthus shares based on the consideration paid by iAnthus for MPX Shares under the Arrangement. Although Ninth Square had a similar right to receive MPX Shares and MPX Warrants, a similar offer was not made to it.

36. Under the terms of the SPA, the assignment agreement between MPX and MPXI required Ninth Square's consent. As Ninth Square has not consented to the assignment of the SPA, MPX ULC remains responsible to issue shares and warrants to Ninth Square when the Milestones are achieved; the first Milestone was achieved in March, 2019.

Effect of Conduct of MPX's Business and Affairs

37. The consideration to be received by Ninth Square under the SPA was MPX Shares and MPX Warrants of a public company, whose shares were traded on the

Canadian Securities Exchange. The Arrangement, in effect, has substituted shares and warrants of MPX ULC, a wholly-owned subsidiary of iAnthus, which are not readily transferable.

38. The value of the MPX Shares and MPX Warrants to be received by Ninth Square was based on MPX's total business, including its US assets. The Consent proposed by MPX to Ninth Square in January, 2019 would have substituted shares and warrants of MPXI at prices based on MPX's former business, even though MPX's US assets were acquired by iAnthus. MPXI's shares have a significantly lesser value. The Arrangement thus fundamentally altered the understandings in the SPA and the consideration that was to be received by Ninth Square under it.

1. The SPA

39. It was reasonable for Ninth Square to believe, when it signed the SPA, that an acquisition of MPX was not being negotiated by MPX. MPX had an obligation to disclose its negotiations concerning the Arrangement to Ninth Square before the SPA was signed. Its failure to do so, breached its obligation to act in good faith and in accordance with reasonable standards of fair dealing with respect to the negotiation and formation of the SPA.

40. By entering into the Arrangement, MPX breached the SPA. It also breached its duty to act in good faith with respect to the performance of its obligations under the SPA.

2. Oppression of Ninth Square: OBCA, s. 248

41. The Arrangement thwarted Ninth Square's reasonable expectations concerning the conduct of MPX's business and affairs. It was reasonable for Ninth Square to expect that MPX would not breach the SPA and would not take steps that would alter or negate Ninth Square's entitlement to MPX Shares and MPX Warrants.

42. Ninth Square was a securityholder of MPX with rights under the SPA to acquire additional securities on achievement of the Milestones. Under the terms of the SPA, Ninth Square is currently entitled to receive the $281,000.00 in MPX Shares and $50,000.00 in MPX Warrants that is payable on the achievement of the first Milestone.

43. In entering and implementing the Arrangement, as described above, MPX conducted its business and affairs, and its officers and directors exercised their powers in a manner that was oppressive and unfairly prejudicial to Ninth Square and unfairly disregarded Ninth Square's interests. The unfairness of MPX's conduct followed a consistent pattern of disregard for Ninth Square's interests from the inception of the SPA in September, 2018, culminating in the implementation of the Arrangement in February, 2019. MPX ULC, as MPX's successor, is responsible for this conduct.

3. iAnthus and MPXI

44. 1183271 was the vehicle used by iAnthus to acquire MPX and its US assets. Its sole director and officer was the chief executive officer of iAnthus who signed the Arrangement Agreement on behalf of both iAnthus and 1183271.

45. MPXI was created as the vehicle to retain MPX's non-US assets for MPX's shareholders. MPX's president signed the Arrangement Agreement as the president of MPXI.

46. iAnthus and MPXI were aware of the SPA and MPX's obligations under it and participated in the unfair conduct described above as parties to the Arrangement. They are also responsible for it. Boyes, Budd and Arnkvarn directed MPXI's participation in this unfair conduct.

4. The Individual Defendants

47. In negotiating the SPA and the Arrangement and in entering and implementing the Arrangement, Boyes, Budd and Arnkvarn conducted MPX's business and affairs and exercised their powers in a manner that was oppressive and unfairly prejudicial to Ninth Square and unfairly disregarded Ninth Square's interests.

48. The defendants personally benefited from the Arrangement. They sold their shares in MPX to iAnthus at a premium, received severance payments from MPX

and continued in identical or enhanced roles as directors and officers of MPXI with substantial annual compensation.

The plaintiff proposes that this action be tried at Toronto.

July 13, 2021

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Lawyers for the plaintiff

Ninth Square Capital Corporation **Plaintiff**	**v.**	**iAnthus Capital Holdings Inc., MPX Bioceutical ULC, MPX International Corporation, W. Scott Boyes, Jeremy Budd and Michael Arnkvarn** **Defendants**

Court File No. CV-19-625101-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding under the *Business Corporations Act*, R.S.O.1990, c. B.16, s. 248

Proceeding commenced at TORONTO

CONSOLIDATED STATEMENT OF CLAIM

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Lawyers for the plaintiff

APPENDIX E

No. S-1813233
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF SECTION 288 OF THE BRITISH COLUMBIA *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, C.57, AS AMENDED

AND

IN THE MATTER OF A PROPOSED ARRANGEMENT INVOLVING

MPX BIOCEUTICAL CORPAORATION and IANTHUS CAPITAL HOLDINGS, INC.

THE PETITIONERS

ORDER MADE AFTER APPLICATION
(FINAL ORDER)

BEFORE	) THE HONOURABLE JUSTICE MYERS	
	)	) 18/January/2019
	)	)

ON THE APPLICATION of MPX Bioceutical Corporation ("**MPX**") and iAnthus Capital Holdings, Inc. ("**iAnthus**")

☑ coming on for hearing at 800 Smithe Street, Vancouver, British Columbia, on 18/January/2019 and UPON HEARING David Brown, counsel for MPX and iAnthus; and no one appearing on behalf of any holders (the "**MPX Shareholders**") of MPX common shares (the "**MPX Shares**"), the holders ("**MPX Optionholders**") of options ("**MPX Options**") to acquire MPX Shares, the holders (the "**MPX Warrantholders**") of warrants ("**MPX Warrants**") to purchase MPX Shares and the holders (the "**MPX Debentureholders**") of convertible debentures (the "**MPX Convertible Debentures**") (collectively, the MPX Shareholders, MPX Optionholders, MPX Warrantholders and MPX Debentureholders: the "**MPX Securityholders**") or any other person affected; AND UPON READING the Petition to the Court herein dated December 8, 2018; AND UPON READING the Interim Order of Master Taylor made herein on December 10, 2018; AND UPON READING Affidavits #1 and 2 of Jeremy S. Budd sworn on December 8, 2018 and January 15, 2019, respectively, and the Affidavits #1 and 2 of Darlene Crimeni sworn on January 16, 2019 and January 17, 2019, respectively; AND UPON IT APPEARING that notice of the time and place of hearing this application was given to the MPX Securityholders; AND UPON the requisite approval of the MPX Securityholders having been obtained at the special meeting of MPX held on January 15, 2019; AND UPON CONSIDERING the fairness to the parties affected thereby of the terms and conditions of the Arrangement and of the transactions contemplated by the Arrangement; AND UPON BEING INFORMED that it is

the intention of the parties to rely on section 3(a)(10) of the *United States Securities Act of 1933*, as amended (the "**U.S. Securities Act**") and that the declaration of the fairness of, and the approval of, the Arrangement contemplated in the plan of arrangement, a copy of which is attached hereto as Appendix "A", by this Honourable Court will serve as the basis for an exemption from the registration requirements of the U.S. Securities Act pursuant to section 3(a)(10) thereof, for the issuance and exchange of securities of iAnthus and MPX International Corporation ("**New MPX**") in connection with the Arrangement; THIS COURT ORDERS that:

1. pursuant to the provisions of s. 291(4)(c) of the British Columbia *Business Corporations Act*, S.B.C. 2002, C. 57, as amended, (the "**BCBCA**") the Arrangement as provided for in the Plan of Arrangement, including the terms and conditions thereof and the issuances and exchanges of securities contemplated therein, is procedurally and substantively fair and reasonable to the MPX Securityholders;

2. the Arrangement as provided for in the Plan of Arrangement be and hereby is approved pursuant to the provisions of s. 291(4)(a) of the BCBCA; and

3. MPX, iAnthus, 1183271 B.C. Unlimited Liability Company and New MPX shall be entitled at any time to seek leave to vary this Order, to seek the direction of this Court as to the implementation of this Order or to apply for such further order or orders as may be appropriate.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of Lawyer for MPX Bioceutical Corporation and iAnthus Capital Holdings, Inc.
David Brown

BY THE COURT

Registrar

CHECKED

Appendix "A"

APPENDIX D
PLAN OF ARRANGEMENT

UNDER THE BUSINESS CORPORATIONS ACT (BRITISH COLUMBIA)

ARTICLE 1
INTERPRETATION

1.1 Definitions

In this Plan of Arrangement, unless there is something in the subject matter or context inconsistent therewith, the following terms shall have the respective meanings set out below and grammatical variations of those terms shall have corresponding meanings:

"**Amalco**" means the amalgamated unlimited liability company resulting from the amalgamation of MPX and AcquisitionCo pursuant to Section 2.4(k);

"**Amalgamation**" has the meaning set forth in Section 2.4(k);

"**AcquisitionCo**" means 1183271 B.C. Unlimited Liability Company, an unlimited liability company incorporated under the BCBCA, which is directly owned by iAnthus;

"**Arrangement**" means an arrangement pursuant to the provisions of Division 5 of Part 9 of the BCBCA on the terms and conditions set forth in this Plan of Arrangement, subject to any amendment or supplement thereto made in accordance therewith, herewith or made at the direction of the Court either in the Interim Order or the Final Order with the consent of iAnthus and MPX, each acting reasonably;

"**Arrangement Agreement**" means the arrangement agreement dated as of October 18, 2018 among iAnthus, AcquisitionCo, SpinCo and MPX, together with the schedules attached thereto, as amended, supplemented or restated in accordance therewith prior to the Effective Date, providing for, among other things, the Arrangement;

"**BCBCA**" means the *Business Corporations Act* (British Columbia);

"**Business Day**" means any day, other than a Saturday, a Sunday or a statutory holiday in Toronto, Ontario; Vancouver, British Columbia; or New York, New York;

"**Consideration**" means the consideration to be paid pursuant to the Plan of Arrangement in respect of each MPX Share that is issued and outstanding immediately prior to the Effective Time, consisting of: 0.1673 of an iAnthus Share; and 0.1 of a SpinCo Share;

"**Court**" means the Supreme Court of British Columbia;

"**CSE**" means the Canadian Securities Exchange;

"**Depositary**" means Alliance Trust Company;

"**Dissenting MPX Shareholder**" means a registered holder of MPX Shares who has validly exercised its dissent rights in respect of the Arrangement pursuant to Section 3.1.

"**DRS Statement**" means a statement evidencing MPX Shares issued under the name of the applicable shareholder and registered electronically in MPX's records;

"**Effective Date**" means the date upon which the Arrangement becomes effective pursuant to this Plan of Arrangement;

"**Effective Time**" means 12:01 a.m. (Vancouver time) on the Effective Date;

"**Exchange Ratio**" means the exchange ratio of 0.1673 of an iAnthus Share and 0.1 of a SpinCo Share for each MPX Share;

"**Fair Market Value**" with reference to:

i. an iAnthus Share means the amount that is the closing price of the iAnthus Shares on the CSE on the last trading day immediately prior to the Effective Date;

ii. a MPX Share means the amount that is the Fair Market Value of an iAnthus Share multiplied by 0.1673;

iii. a SpinCo Share means the amount determined by subtracting the Fair Market Value of a MPX Share from the closing price of the MPX Shares on the CSE on the last trading day immediately before the Effective Date and dividing the difference by 0.1;

"**Final Order**" means the order made after application to the Court approving the Arrangement, as such order may be amended by the Court (with the consent of the Parties, each acting reasonably) at any time prior to the Effective Date or, if appealed, then unless such appeal is withdrawn or denied, as affirmed or as amended on appeal;

"**Governmental Entity**" means any: (i) supranational, international, multinational, national, federal, provincial, territorial, state, regional, municipal, local or other government, governmental or public department, central bank, court, tribunal, arbitral body, commission, board, bureau, stock exchange or agency, whether domestic or foreign; (ii) any subdivision, agency, commission, board or authority of any of the foregoing; or (iii) any quasi-governmental or private body exercising any regulatory, expropriation, land use or occupation, or taxing authority under or for the account of any of the foregoing;

"**iAnthus**" means iAnthus Capital Holdings, Inc. a company existing under the BCBCA;

"**iAnthus Replacement Option**" has the meaning given in section 2.4(k)(iv);

"**iAnthus Shares**" means the common shares in the capital of iAnthus;

"**In-The-Money Amount**" in respect of a stock option means the amount, if any, by which the aggregate Fair Market Value at that time of the securities subject to the option exceeds the aggregate exercise price of the option;

"**Interim Order**" means the order made after application to the Court, containing declarations and directions in respect of the notice to be given and the conduct of the MPX Meeting and the Arrangement, as such order may be amended, supplemented or varied by the Court (with the consent of the Parties, each acting reasonably);

"**Letter of Transmittal**" means the letter of transmittal for use by the MPX Shareholders, in the form accompanying the MPX Circular;

"**Liens**" means mortgage, hypothec, prior claim, lien, pledge, assignment for security, security interest, option, right of first offer or first refusal or other charge or encumbrance of any kind and adverse claim;

"**MPX**" means MPX Bioceutical Corporation, a company existing under the OBCA;

"**MPX Arrangement Resolution**" means the special resolution of the MPX Shareholders approving the Plan of Arrangement substantially in the form attached as Schedule B to the Arrangement Agreement;

"**MPX Circular**" means the notice of the MPX Meeting to be sent to MPX Securityholders and the accompanying management information circular, to be prepared in connection with the MPX Meeting and the schedules, appendices and exhibits thereto, together with any amendments or modifications thereto or supplements thereof;

"**MPX Continuance**" means the continuance of MPX into the Province of British Columbia pursuant to the provisions of Sections 302 and 303 of the BCBCA;

"**MPX Convertible Securities**" means the MPX Convertible Debentures, MPX Options, MPX Warrants and the MPX Convertible Loan;

"**MPX Convertible Debentures**" means the outstanding unsecured convertible debentures of MPX, dated April 4, 2016 and June 7, 2016, with an aggregate principal amount of $110,278.50 as at the date hereof;

"**MPX Convertible Loan**" means the convertible revolving credit facility between MPX and Hi-Med, LLC, dated April 28, 2017 and amended on October 18, 2017;

"**MPX Meeting**" means the special meeting, including any adjournments or postponements thereof in accordance with the terms of this Agreement, of the MPX Securityholders to be held to consider and, if deemed advisable, to approve, as applicable, the MPX Continuance and the MPX Arrangement Resolution and for any other purpose as may be set out in the MPX Circular and agreed to in writing by the Parties;

"**MPX Options**" means outstanding options to acquire MPX Shares issued by MPX;

"**MPX Replacement Option**" means an option to purchase from MPX a MPX Share. Each MPX Replacement Option shall provide for an exercise price per MPX Replacement Option (rounded up to the nearest whole cent) equal to the exercise price per MPX Share that would otherwise be payable to acquire a MPX Share pursuant to the MPX Option it replaces less the exercise price under the SpinCo Option. All terms and conditions of a MPX Replacement Option, including the term to expiry, conditions to and manner of exercising, will be the same as the MPX Option for which it was exchanged, and shall be governed by the terms of the MPX Stock Option Plan and any document evidencing an MPX Option shall thereafter evidence and be deemed to evidence such MPX Replacement Option;

"**MPX Securityholders**" means at any time, any holder of MPX Shares, MPX Options, MPX Warrants, MPX Convertible Debentures and the MPX Convertible Loan;

"**MPX Shareholders**" means at any time, the holders of MPX Shares;

"**MPX Shares**" means the common shares in the capital of MPX;

"**MPX Stock Option Plan**" means the incentive stock option plan of MPX approved by the MPX Shareholders on September 25, 2015;

"**MPX Warrantholders**" means the holders of MPX Warrants;

"**MPX Warrants**" means the outstanding warrants to purchase MPX Shares but does not include any MPX Warrants issuable pursuant to the warrant indenture dated May 25, 2018 between Odyssey Trust Company and MPX;

"**OBCA**" means the *Business Corporations Act* (Ontario);

"**Parties**" has the meaning ascribed thereto on the first page of the Arrangement Agreement;

"**Person**" means an individual, partnership, association, body corporate, a partnership or limited partnership, a trust, a trustee, executor, administrator or other legal personal representative, a syndicate, a joint venture, government (including any Governmental Entity) or any other entity, whether or not having legal status;

"**Plan of Arrangement**" means this plan of arrangement and any amendments or variations hereto made in accordance herewith with the Arrangement Agreement and Article 5 hereof or made at the direction of the Court in either the Interim Order or Final Order with the consent of iAnthus and MPX, each acting reasonably;

"**Registrar**" means the Registrar appointed pursuant to Section 400 of the BCBCA;

"**SpinCo**" means MPX International Corporation, a company incorporated under the OBCA;

"**SpinCo Assets**" has the meaning set forth in the Arrangement Agreement;

"**SpinCo Conveyance Agreement**" means the agreement to be entered on or prior to the Effective Date between MPX and SpinCo to effect the sale and transfer of SpinCo Assets and the assumption of the SpinCo Liabilities from MPX to SpinCo, in a form satisfactory to MPX, SpinCo and iAnthus, acting reasonably;

"**SpinCo Liabilities**" means all of the liabilities of SpinCo, contingent or otherwise, which pertain to, or arise in connection with the operation of, the SpinCo Assets;

"**SpinCo Option Plan**" means a stock option plan to be adopted at the MPX Meeting for the issuance of SpinCo Options in form and substance satisfactory to MPX and SpinCo, acting reasonably, and in compliance with all applicable Laws.

"**SpinCo Option**" means an option to purchase 0.1 of a SpinCo Share at an exercise price determined by the following formula:

$$\frac{\text{original exercise price} \times (\text{Fair Market Value of a SpinCo Share} \times 0.1)}{(\text{Fair Market Value of a MPX Share} + (\text{Fair Market Value of a SpinCo Share} \times 0.1))}$$

"**SpinCo Shares**" means the common shares of SpinCo to be issued as part of the Consideration pursuant to this Plan of Arrangement;

"**Tax Act**" means the *Income Tax Act* (Canada).

Any capitalized terms used but not defined herein shall have the meaning ascribed to such terms in the Arrangement Agreement.

1.2 Sections and Headings

The division of this Plan of Arrangement into Articles, Sections, paragraphs and other portions and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation hereof. Unless otherwise indicated, all references to an "Article",

"Section" or "paragraph" followed by a number and/or letter refer to the specified Article, Section or paragraph of this Plan of Arrangement.

1.3 Number and Gender

In this Plan of Arrangement, unless the context otherwise requires, words importing the singular only shall include the plural and vice versa, words importing the use of either gender shall include both genders and neuter.

1.4 Date for any Action

If the date on which any action is required to be taken hereunder by any party hereto is not a Business Day, such action shall be required to be taken on the next succeeding day that is a Business Day.

1.5 Time

Time shall be of the essence in every matter or action contemplated hereunder. All times expressed herein or in any letter of transmittal contemplated herein are local time (Vancouver, British Columbia) unless otherwise stipulated herein or therein.

1.6 Statutory Reference

Any reference in this Plan of Arrangement to a statute includes all regulations and rules made thereunder, all amendments to such statute or regulation in force from time to time and any statute or regulation that supplements or supersedes such statute or regulation.

1.7 Certain Phrases, etc.

The words (i) "including", "includes" and "include" mean "including (or includes or include) without limitation," (ii) "the aggregate of", "the total of", "the sum of", or a phrase of similar meaning means "the aggregate (or total or sum), without duplication, of," and (iii) unless stated otherwise, "Article", "Section", and "Schedule" followed by a number or letter mean and refer to the specified Article or Section of or Schedule to this Plan of Arrangement.

1.8 Currency

Unless otherwise stated, all references in this Plan of Arrangement to amounts of money are expressed in lawful money of Canada.

ARTICLE 2
EFFECT OF THE ARRANGEMENT

2.1 Arrangement Agreement

This Plan of Arrangement is made pursuant to, is subject to the provisions of, and forms a part of the Arrangement Agreement, except in respect of the sequence of the steps comprising the Arrangement, which shall occur in the order set forth herein.

2.2 Binding Effect

This Plan of Arrangement is made pursuant to the provisions of the Arrangement Agreement and constitutes an arrangement as referred to in Section 288 of the BCBCA.

2.3 Effect of the Arrangement

The Arrangement will become effective at, and be binding at and after, the Effective Time on: (i) MPX; (ii) iAnthus; (iii) AcquisitionCo; (iv) Amalco; (v) SpinCo; (vi) MPX Shareholders; (vii) holders of MPX Options; (viii) MPX Warrantholders; (ix) holders of MPX Convertible Debentures; (x) the holder of the MPX Convertible Loan; and (xi) the Depositary.

2.4 Arrangement

Prior to the Effective Time, MPX shall continue to British Columbia pursuant to sections 302 and 303 of the BCBA and will become a British Columbia company under the BCBCA.

Commencing at the Effective Time, the following shall occur and shall be deemed to occur, except to the extent otherwise indicated, in the following order without any further act or formality:

(a) each MPX Share held by a Dissenting MPX Shareholder shall, without any further action by or on behalf of such Dissenting MPX Shareholder, be deemed to have been transferred and assigned to iAnthus in consideration for a debt claim against iAnthus determined and payable in accordance with Section 3.1, and the name of each such holder shall be removed from the register of the MPX Shares maintained by or on behalf of MPX and iAnthus shall be deemed to be the transferee of such MPX Shares and shall be entered in the register of the MPX Shares maintained by or on behalf of MPX;

(b) the outstanding principal amount pursuant to the MPX Convertible Debenture will be converted into units comprised of MPX Shares and MPX Warrants at the conversion price set forth in the applicable MPX Convertible Debenture;

(c) the outstanding principal amount pursuant to the MPX Convertible Loan will be converted into MPX Shares at the conversion price set forth in the MPX Convertible Loan;

(d) the SpinCo Option Plan will come into force;

(e) MPX shall assign and transfer to SpinCo and SpinCo shall accept the SpinCo Assets, on the terms and conditions set out in the SpinCo Conveyance Agreement and, as consideration therefor SpinCo shall assume the SpinCo Liabilities and issue to MPX 100 fully-paid and non-assessable SpinCo Shares and MPX and SpinCo shall file an election under section 85 of the Tax Act as specified in the Arrangement Agreement;

(f) MPX will subscribe for 100 additional SpinCo Shares for aggregate consideration of US$4,000,000 utilizing cash of MPX;

(g) the issued and outstanding SpinCo Shares shall be subdivided so that the number of outstanding SpinCo Shares is equal to one tenth of the number of outstanding MPX Shares;

(h) MPX will resolve to distribute the SpinCo Shares to MPX Shareholders on a return of share capital pursuant to a reorganization of MPX's business and a distribution of proceeds from a disposition of MPX's property outside the ordinary course of MPX's business;

(i) simultaneously with step 2.4(h), notwithstanding the terms of the MPX Options, all unvested MPX Options shall vest immediately, and each MPX Option will be exchanged for a fully-vested MPX Replacement Option and a fully-vested SpinCo Option. The term to expiry, conditions to and manner of exercising, and all other terms and conditions of a MPX Replacement Option or a SpinCo Option, will be the same as the MPX Option for which it is exchanged and any document evidencing an MPX Option shall thereafter

evidence and be deemed to evidence such MPX Replacement Option or SpinCo Option, as the case may be. It is intended that subsection 7(1.4) of the Tax Act apply to such exchange of options. Accordingly, and notwithstanding the foregoing, if required, the exercise price of a MPX Replacement Option or a SpinCo Option, as the case may be, will be increased *nunc pro tunc* such that the aggregate In-The-Money Amount of the MPX Replacement Option and the In-The-Money Amount of the SpinCo Option immediately after the exchange does not exceed the In-The-Money Amount of the MPX Option immediately before the exchange;

(j) the SpinCo Shares shall be distributed by MPX to the MPX Shareholders on a return of share capital pursuant to a reorganization of MPX's business and a distribution of proceeds from a disposition of MPX's property outside the ordinary course of MPX's business;

(k) AcquisitionCo and MPX will amalgamate pursuant to the BCBCA (the "**Amalgamation**"), to continue as one unlimited liability company, Amalco, and upon the Amalgamation,

(i) the by-laws of Amalco shall be the same as the by-laws of MPX;

(ii) the articles of Amalco shall be the same as the articles of MPX;

(iii) each issued and outstanding MPX Share other than those held by iAnthus will be exchanged for 0.1673 an iAnthus Share;

(iv) each MPX Replacement Option shall be exchanged for an option (each, a "**iAnthus Replacement Option**") to purchase from iAnthus 0.1673 of a iAnthus Share (and when aggregated with the other similar iAnthus Replacement Options of a holder of such options resulting in a fraction of a iAnthus Share, they shall be rounded down to the nearest whole number of iAnthus Shares). Such iAnthus Replacement Option shall provide for an exercise price per iAnthus Replacement Option (rounded up to the nearest whole cent) equal to the exercise price per MPX Share that would otherwise be payable pursuant to the MPX Replacement Option it replaces. All terms and conditions of a iAnthus Replacement Option, including the term to expiry, conditions to and manner of exercising, will be the same as the MPX Replacement Option for which it was exchanged, and shall be governed by the terms of the MPX Option Plan and any document evidencing a MPX Replacement Option shall thereafter evidence and be deemed to evidence such iAnthus Replacement Option. It is intended that subsection 7(1.4) of Tax Act apply to such exchange of options. Accordingly, and notwithstanding the foregoing, if required, the exercise price of a iAnthus Replacement Option will be increased *nunc pro tunc* such that the In-The-Money Amount of the iAnthus Replacement Option immediately after the exchange does not exceed the In-The-Money Amount of the MPX Replacement Option immediately before the exchange;

(v) the property of MPX and AcquisitionCo shall continue to be the property of Amalco;

(vi) all rights, contracts, permits and interests of MPX and AcquisitionCo shall continue as rights, contracts, permits and interests of Amalco and, for greater certainty, the Amalgamation shall not constitute a transfer or assignment of the rights or obligations of MPX or AcquisitionCo under any such rights, contracts, permits, and interests;

(vii) Amalco shall continue to be liable for the obligations of MPX and AcquisitionCo shall be unaffected;

(viii) all existing causes of action, claims or liabilities to prosecution with respect to MPX and AcquisitionCo may continue to be prosecuted by or against Amalco;

(ix) all civil, criminal or administrative actions or proceedings pending by or against MPX or AcquisitionCo shall be unaffected; and

(x) all convictions against, or rulings, orders or judgments in favour of or against MPX or AcquisitionCo may be enforced by or against Amalco.

2.5 Transfers Free and Clear

Any transfer of securities pursuant to this Plan of Arrangement shall be free and clear of any Liens or other claims of third parties of any kind.

2.6 Fully Paid Shares

All iAnthus Shares and SpinCo Shares issued pursuant to this Plan of Arrangement shall be fully paid and non-assessable, and iAnthus and SpinCo respectively shall be deemed to have received the full consideration therefor and such non-cash consideration shall have a value that is not less in value than the fair equivalent of the money that iAnthus and SpinCo respectively would have received had the applicable iAnthus Shares and SpinCo Shares been issued for money.

2.7 Adjustment to Consideration

Notwithstanding anything to the contrary contained in this Plan of Arrangement, if between the date of the Arrangement Agreement and the Effective Time, the issued and outstanding MPX Shares or the issued and outstanding iAnthus Shares shall have been changed into a different number of shares or a different class by reason of any stock split, reverse stock split, dividend of iAnthus or MPX Shares, reclassification, redenomination or the like, then the Consideration and any other dependent items, including the Exchange Ratio, shall be appropriately adjusted to provide to MPX and iAnthus and their respective shareholders the same economic effect as contemplated by the Arrangement Agreement and this Plan of Arrangement prior to such action and as so adjusted shall, from and after the date of such event, be the Consideration to be paid per MPX Share, the Exchange Ratio or other dependent item, subject to further adjustment in accordance with this sentence.

2.8 United States Tax Matters

The Amalgamation is intended to be treated as a "reorganization" within the meaning of Section 368(a)(1)(A) of the Code, and this Plan of Arrangement and Arrangement Agreement will constitute a "plan of reorganization" for purposes of Sections 354 and 361 of the Code for United States federal income Tax purposes. Prior to and at the Effective Time of the Amalgamation, Acquisition Co will be treated as a "disregarded entity" of iAnthus under United States Treasury Regulation Section 301.7701-3(b)(ii) for U.S. federal income tax purposes. iAnthus will make any election that may be necessary to treat Acquisition Co as a disregarded entity. Immediately following the Amalgamation, iAnthus will own all of the outstanding equity of Amalco and Amalco will be treated as a "disregarded entity" under United States Treasury Regulation Section 301.7701-3(b)(ii) for U.S. federal income tax purposes. iAnthus will make any election that may be necessary to treat Amalco as a disregarded entity. iAnthus represents that it has no current plan or intention to make or cause to be made, an election to change Amalco's classification as a disregarded entity and has no current plan or intention to cause or permit Amalco to issue

additional shares of its equity that would result in iAnthus owning less than 100 percent of the outstanding equity of the Amalco.

ARTICLE 3
RIGHTS OF DISSENT

3.1 Rights of Dissent for MPX Shareholders

Registered holders of MPX Shares may exercise rights of dissent with respect to such shares pursuant to and in the manner set forth in Division 2 of Part 8 of the BCBCA and this Section 3.1 in connection with the MPX Continuance and the Arrangement, as modified by the Interim Order and this Section 3.1; provided that, notwithstanding Division 2 of Part 8 of the BCBCA, the written objection to the MPX Arrangement Resolution must be received by MPX not later than 5:00 p.m. (Eastern time) two Business Days immediately preceding the date of the MPX Meeting (as it may be adjourned or postponed from time to time). Registered holders of MPX Shares who duly exercise such rights of dissent and who:

(a) are ultimately entitled to be paid fair value for their MPX Shares shall be entitled to be paid by iAnthus such fair value, notwithstanding anything to the contrary contained in Section 245 of the BCBA, and will not be entitled to any other payment or consideration, including any iAnthus Shares and SpinCo Shares to which such holder would have been entitled under the Plan of Arrangement had such holder not exercised dissent rights in respect of MPX Shares; or

(b) are ultimately not entitled, for any reason, to be paid fair value for their MPX Shares shall be deemed to have participated in the Plan of Arrangement on the same basis as a non-dissenting holder of MPX Shares,

but in no case shall MPX, iAnthus, SpinCo, or any other Person be required to recognize such holders as holders of MPX Shares after the Effective Time, and the names of such holders of MPX Shares shall be deleted from the registers of holders of MPX Shares at the Effective Time.

In addition to any other restriction under Division 2 of Part 9 of the BCBCA, in no circumstances shall holders of MPX Options, MPX Warrants, MPX Convertible Debentures and the MPX Convertible Loan be entitled to any dissent rights.

3.2 Delivery of Consideration

(a) Following receipt of the Final Order and prior to the Effective Date in accordance with the terms of the Arrangement Agreement, iAnthus and SpinCo shall deposit with the Depositary, for the benefit of MPX Securityholders: (i) such number of iAnthus Shares, and (ii) such number of SpinCo Shares, in each case, as is necessary to be delivered to the MPX Securityholders in order to effect the exchange or settlement under Section 2.4 of this Plan of Arrangement.

(b) Subject to surrender to the Depositary of a certificate or DRS Statement which immediately prior to the Effective Time represented outstanding MPX Shares, together with a duly completed and executed Letter of Transmittal and such additional documents and instruments as the Depositary may reasonably require, following the Effective Time the holder of such surrendered certificate or DRS Statement shall be entitled to receive in exchange therefor, and the Depositary shall deliver to such holder, the iAnthus Shares and the SpinCo Shares which such holder has the right to receive under Section 2.4 of this Plan of Arrangement, less any iAnthus Shares and the SpinCo Shares withheld pursuant to Section 3.6 and any certificate or DRS Statement so surrendered shall forthwith be cancelled.

(c) Until surrendered as contemplated by this Section 3.2, each certificate or DRS Statement that immediately prior to the Effective Time represented MPX Shares shall be deemed after the Effective Time to represent only the right to receive, upon such surrender, the iAnthus Shares and the SpinCo Shares to which the holder thereof is entitled in lieu of such certificate or DRS Statement as contemplated by Section 2.4 and this Section 3.2, less any iAnthus Shares and the SpinCo Shares withheld pursuant to Section 3.6. Any such certificate or DRS Statement formerly representing MPX Shares not duly surrendered on or before the sixth anniversary of the Effective Date shall:

(i) cease to represent a claim by, or interest of, any former holder of MPX Shares of any kind or nature against or in MPX, iAnthus, or SpinCo (or any successor to any of the foregoing); and

(ii) be deemed to have been surrendered to iAnthus and shall be cancelled.

(d) No MPX Shareholder or holder of MPX Convertible Securities shall be entitled to receive any consideration with respect to such MPX Convertible Securities other than the consideration to which such holder is entitled in accordance with Section 2.4 and, for greater certainty, no such holder will be entitled to receive any interest, dividends, premium or other payment in connection therewith.

3.3 Distributions with Respect to Unsurrendered Certificates or DRS Statements

No dividend or other distribution declared or paid after the Effective Time with respect to iAnthus Shares or SpinCo Shares shall be delivered to the holder of any certificate or DRS statement formerly representing MPX Shares unless and until the holder of such certificate shall have complied with the provisions of Section 3.2. Subject to applicable law and to Section 3.6 at the time of such compliance, there shall, in addition to the delivery of the iAnthus Shares and the SpinCo Shares, be delivered to such holder, without interest, the amount of any dividend or other distribution declared or made after the Effective Time with respect to the iAnthus Shares and SpinCo Shares to which such holder is entitled in respect of such holder's iAnthus Shares and SpinCo Shares.

3.4 No Fractional Shares

No fractional iAnthus Shares and SpinCo Shares shall be issued to any person pursuant to this Plan of Arrangement. The number of iAnthus Shares and SpinCo Shares to be issued to any person pursuant to this Plan of Arrangement shall be rounded down to the nearest whole iAnthus Share or SpinCo Shares, as applicable.

3.5 Lost Certificates or DRS Statements

In the event any certificate or DRS Statement which immediately prior to the Effective Time represented one or more outstanding MPX Shares that are ultimately entitled to iAnthus Shares and SpinCo Shares, shall have been lost, stolen or destroyed, upon the making of an affidavit or statutory declaration of that fact by the person claiming such certificate or DRS Statement to be lost, stolen or destroyed and who was listed immediately prior to the Effective Time as the registered holder thereof on the securities registers maintained by or on behalf of MPX, the Depositary will deliver in exchange for such lost, stolen or destroyed certificate or DRS Statement a certificate representing the iAnthus Shares and SpinCo Shares that such holder is entitled to receive in exchange for such lost, stolen or destroyed certificate or DRS Statement, provided the holder to whom the iAnthus Shares and SpinCo Shares be delivered shall, as a condition precedent to the delivery, give a bond satisfactory to iAnthus or SpinCo as applicable, and the Depositary (each acting reasonably) in such sum as iAnthus or SpinCo as applicable and the

Depositary may direct, or otherwise indemnify iAnthus and/or SpinCo as applicable and the Depositary in a manner satisfactory to iAnthus and/or SpinCo as applicable and the Depositary, each acting reasonably, against any claim that may be made against iAnthus and/or SpinCo or the Depositary with respect to the certificate or DRS Statement alleged to have been lost, stolen or destroyed.

3.6 Withholding Rights

iAnthus, SpinCo, MPX, Amalco the Depositary, as applicable, shall be entitled to deduct and withhold from any amount payable or any iAnthus Shares and SpinCo Shares payable or consideration otherwise deliverable to any former MPX Securityholder such amounts as they may be required to deduct and withhold therefrom under any provision of applicable Laws in respect of taxes. To the extent that any amounts are so deducted and withheld, such amounts shall be treated for all purposes hereof as having been paid to the person to whom such amounts would otherwise have been paid, provided that such withheld amounts are actually remitted to the appropriate Governmental Entity. To satisfy the amount required to be deducted or withheld from any payment to any such MPX Securityholder, iAnthus, SpinCo, MPX, Amalco, or the Depositary, as applicable, may sell or otherwise dispose of any portion of the iAnthus Shares or the SpinCo Shares deliverable to such holder as is necessary to provide sufficient funds to enable iAnthus, SpinCo, MPX, Amalco, or the Depositary, as applicable, to comply with such deduction and/or withholding requirements.

3.7 Calculations

All calculations and determinations made by iAnthus, MPX, or the Depositary, as applicable, for the purposes of this Plan of Arrangement shall be conclusive, final, and binding.

ARTICLE 4
WARRANTS

4.1 Warrants

Notwithstanding the terms of the MPX Warrants, each MPX Warrantholder shall be entitled to receive (and such holder shall accept) upon the exercise of such holder's MPX Warrants, in lieu of MPX Shares to which such holder was theretofore entitled upon such exercise, and for the same aggregate consideration payable therefor, the number of iAnthus Shares and SpinCo Shares which the holder would have been entitled to receive as a result of the transactions contemplated by this Arrangement if, immediately prior to the Effective Date, such holder had been the registered holder of the number of MPX Shares to which such holder would have been entitled if such holder had exercised such holder's MPX Warrants immediately prior to the Effective Time. Each MPX Warrant shall continue to be governed by and be subject to the terms of the applicable MPX Warrant certificate, if applicable, subject to any supplemental exercise documents issued by iAnthus and SpinCo (as they mutually agree, each acting reasonably) to holders of MPX Warrants to facilitate the exercise of the MPX Warrants and the payment of the corresponding portion of the exercise price with each of them.

4.2 Exercise of Warrants Post-Effective Time

Upon any valid exercise of a MPX Warrant after the Effective Time, iAnthus shall issue the necessary number of iAnthus Shares and SpinCo shall issue the necessary number of SpinCo Shares, necessary to settle such exercise, provided that iAnthus or SpinCo, as applicable, has

received the portion of the MPX Warrant exercise price such that the MPX Warrant exercise price is divided between iAnthus and SpinCo as follows:

(a) iAnthus shall receive a portion of the exercise price equal to the original exercise price of the MPX Warrant less the exercise price payable to SpinCo as determined in accordance with 4.2(b) below; and

(b) SpinCo shall receive a portion of the exercise price determined in accordance with the following formula:

$$\frac{\text{original exercise price} \times (\text{Fair Market Value of a SpinCo Share} \times 0.1)}{(\text{Fair Market Value of a MPX Share} + (\text{Fair Market Value of a SpinCo Share} \times 0.1))}$$

ARTICLE 5
AMENDMENTS

5.1 Amendments to Plan of Arrangement

(a) iAnthus and MPX may amend, modify and/or supplement this Plan of Arrangement at any time and from time to time prior to the Effective Time, provided that each such amendment, modification and/or supplement must (i) be set out in writing; (ii) be approved by iAnthus and MPX in writing; (iii) filed with the Court and, if made following the MPX Meeting, approved by the Court; and (iv) communicated to MPX Shareholders if and as required by the Court.

(b) Any amendment, modification or supplement to this Plan of Arrangement may be proposed by iAnthus or MPX at any time prior to the MPX Meeting (provided that the other Party shall have consented thereto in writing) with or without any other prior notice or communication, and if so proposed and accepted by the Persons voting at the MPX Meeting (other than as may be required under the Interim Order), shall become part of this Plan of Arrangement for all purposes.

(c) Any amendment, modification or supplement to this Plan of Arrangement that is approved or directed by the Court following the MPX Meeting shall be effective only if (i) it is consented to in writing by each of iAnthus and MPX (in each case, acting reasonably), and (ii) if required by the Court, it is consented to by MPX Shareholders voting in the manner directed by the Court.

(d) Any amendment, modification or supplement to this Plan of Arrangement may be made following the Effective Date unilaterally by iAnthus, provided that it concerns a matter which, in the reasonable opinion of iAnthus, is of an administrative nature required to better give effect to the implementation of this Plan of Arrangement and is not adverse to the economic interest of any holder or former holder of MPX Convertible Securities.

(e) This Plan of Arrangement may be withdrawn prior to the Effective Time in accordance with the terms of the Arrangement Agreement.

ARTICLE 6
MISCELLANEOUS

6.1 Further Assurances

Notwithstanding that the transactions and events set out herein shall occur and shall be deemed to occur in the order set out in this Plan of Arrangement without any further act or formality, each of iAnthus and MPX as parties to the Arrangement Agreement shall make, do and execute, or cause to be made, done and executed, all such further acts, deeds, agreements, transfers, assurances, instruments or documents

as may reasonably be required by either of them in order further to document or evidence any of the transactions or events set out herein.

6.2 Paramountcy

From and after the Effective Time:

(a) this Plan of Arrangement shall take precedence and priority over any and all rights related to MPX Shares and MPX Convertible Securities issued and outstanding prior to the Effective Time;

(b) the rights and obligations of the holders of MPX Shares, and MPX Convertible Securities and the Depositary and any trustee and transfer agent therefor, shall be solely as provided for in this Plan of Arrangement; and

(c) all actions, causes of action, claims or proceedings (actual or contingent, and whether or not previously asserted) based on or in any away relating to MPX Shares and the MPX Convertible Securities shall be deemed to have been settled, compromised, released and determined without any liability except as set forth herein.

APPENDIX F

AMENDED THIS Aug. 12, 2021 PURSUANT TO
MODIFIÉ CONFORMÉMENT À

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X
☒ RULE/LA RÈGLE 26.02 (c)

☐ THE ORDER OF Justice Koehnen
X L'ORDONNANCE DU

Court File No.: CV-19-625101-00CL

DATED/FAIT LE May 28, 2021

Christina Irwin
REGISTRAR
SUPERIOR COURT OF JUSTICE

Digitally signed by Christina Irwin
DN: cn=Christina Irwin, o=Ministry of the Attorney General, ou=Superior Court of Justice, email=christina.irwin@ontario.ca, c=CA
Date: 2021.08.20 09:44:31 -04'00'

GREFFIER
SUPERIOR COURT OF JUSTICE

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding under the *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 248

B E T W E E N :

NINTH SQUARE CAPITAL CORPORATION

Plaintiff

- v. -

iANTHUS CAPITAL HOLDINGS INC., MPX BIOCEUTICAL ULC,
MPX INTERNATIONAL CORPORATION,
W. SCOTT BOYES, JEREMY BUDD and MICHAEL ARNKVARN

Defendants

FRESH AS AMENDED STATEMENT OF DEFENCE AND COUNTERCLAIM OF THE DEFENDANTS MPX INTERNATIONAL CORPORATION, W. SCOTT BOYES, JEREMY BUDD AND MICHAEL ARNKVARN

Introduction

1. On February 5, 2019, MPX Bioceutical Corporation ("**MPX**") completed an arrangement under the *Business Corporations Act* (British Columbia) (the "**Arrangement**"). Under the Arrangement, MPX's shareholders exchanged their publicly traded shares for a fraction of a share of each of iAnthus Capital Holdings Inc. ("**iAnthus**") and a new public company, MPX International Corporation ("**MPXI**"). MPX options, warrants and other securities became similarly exercisable for iAnthus and MPXI shares.

2. Effectively, iAnthus acquired MPX, which became a wholly owned subsidiary containing the business' U.S. assets, while the non-U.S. assets were spun out into MPXI. The arrangement was unanimously recommended by MPX's Board of Directors (the "**MPX Board**"), following a recommendation from a special, independent committee of the MPX Board (the "**Special Committee**"), and approved by MPX's shareholders and the Supreme Court of British Columbia.

3. The plaintiff, Ninth Square Capital Corporation (the "**plaintiff**" or "**Ninth Square**"), did not dissent or object to the Arrangement in Court. In fact, MPX shares and warrants held by the plaintiff were exchanged, or became exercisable (as the case may be), for iAnthus and MPXI shares at a substantial premium pursuant to the Arrangement. Nonetheless, the plaintiff commenced an action in relation to the Arrangement in Ontario against MPX Bioceutical ULC ("**MPX ULC**"), as successor to MPX, MPXI and iAnthus, which action was subsequently amended to add the three individual defendants: W. Scott Boyes, Jeremy Budd and Michael Arnkvarn (the "**Individual Defendants**").

4. In its consolidated statement of claim, Ninth Square alleges that the Arrangement disregarded its interests as a party to a share purchase agreement that it had entered into with MPX in September 2018 (the "**SPA**"). Under the terms of the SPA, the plaintiff was to receive shares and warrants of MPX upon the achievement of certain performance milestones. When that obligation was assigned to MPXI in connection with the Arrangement, the plaintiff was offered equivalent iAnthus and/or MPXI Shares. However, the plaintiff refused.

5. The plaintiff now seeks an order for immediate payment of $3,000,000 in cash. It asks the court for an order against MPX ULC and MPXI under s. 248 of the *Business Corporations Act*, RSO 1990, c B.16 (the "**OBCA**") (the oppression remedy). It further claims that the Individual Defendants should be held personally liable because certain of them negotiated the SPA and the Arrangement Agreement (defined below) and signed them on behalf of MPX.

6. The plaintiff's claim against these defendants cannot succeed. As described herein, the plaintiff was never told that MPX wouldn't be acquired by another party. It held no reasonable expectation that such a transaction wouldn't take place before the milestones were met, and it never objected to the transaction when it had the opportunity. Moreover, the plaintiff cannot have any reasonable expectation that it would receive anything other than securities if and when the milestones are met. The plaintiff was not treated in a way that was oppressive, unfairly prejudicial to or unfairly disregarded its interests. As for the Individual Defendants, even if amounts are owing to the plaintiff, they could not be held personally liable. The Supreme Court of Canada has held that they cannot be held personally liable in circumstances like these, where they did nothing more than discharge their duties to MPX in good faith and at the direction of the MPX

Board and the Special Committee that was formed to oversee the negotiation of the Arrangement.

MPXI and the Individual Defendants

7. This Fresh as Amended Statement of Defence is filed on behalf of MPXI and the Individual Defendants, who are now employed or otherwise engaged by MPXI.

8. MPXI was incorporated under the OBCA on October 17, 2018. It was formerly named 2660528 Ontario Inc. and is referred to in the Plan of Arrangement described below as "SpinCo". It was formed for the purpose of, *inter alia,* acquiring the non-U.S. assets and liabilities of MPX under the terms of the Plan of Arrangement. MPXI did not exist at the time that the SPA or the Arrangement was being negotiated.

9. The defendant W. Scott Boyes ("**Boyes**") was the President, Chief Executive Officer and Chairman of the MPX Board until the Plan of Arrangement. He is now the President, Chief Executive Officer and Chairman of the board of directors of MPXI.

10. The defendant Jeremy Budd ("**Budd**") was the Vice-President, General Counsel and Corporate Secretary of MPX until the Plan of Arrangement. He was not a director of MPX. He is now the Executive Vice-President, General Counsel, Corporate Secretary and a director of MPXI.

11. The defendant Michael Arnkvarn ("**Arnkvarn**") was the Vice-President, sales and marketing of MPX until the Plan of Arrangement. He is now the Chief Operating Officer, Canada of MPXI. Arnkvarn was not a director of MPX and is not a director of MPXI.

12. The defendants admit the allegations contained in paragraphs 2, 3, 5, 6 and the first sentence of paragraph 10; paragraph 24; the first two sentences of paragraphs 28 and the first two sentences of paragraph 33; and the first sentence of paragraph 34 of the statement of claim.

13. Except as otherwise expressly admitted herein, the defendants deny or have no knowledge of the balance of the allegations contained in the statement of claim.

Share Purchase Agreement

14. On September 17, 2018, the SPA was entered into between MPX, on one hand, and Ninth Square and Veteran Grown Corporation ("**Veteran Grown**"), on the other hand. As alleged, the SPA contemplated the sale of all of the shares of Spartan Wellness Corporation ("**Spartan**") by Ninth Square and Veteran Grown to MPX.

15. Spartan is a Canadian organization that, among other things, assists veterans in gaining access to medical cannabis in Canada.

16. The SPA was negotiated between arm's length, commercially sophisticated parties.

17. Contrary to the allegation at paragraph 10 of the statement of claim, the Individual Defendants did not "direct the negotiations" relating to the SPA or determine MPX's position with respect to its terms. Arnkvarn did not have responsibility for the negotiations. The approval of the SPA and the acquisition was subject to the approval of the MPX Board.

18. During the period that the SPA was being negotiated, and thereafter, the plaintiff did not hold an expectation that no negotiations would take place between MPX and another party or that MPX wouldn't later be acquired by another party. To the extent that it did hold such an expectation, it wasn't reasonable.

19. Contrary to the allegation at paragraph 22 of the statement of claim that "the provisions of the SPA indicated that an acquisition or merger was not underway", the SPA contained no such representation. These defendants deny that MPX represented in the SPA or otherwise that there were no negotiations underway in relation to an acquisition or merger.

20. To the extent that there was such a representation, which is denied, the plaintiff did not rely upon it and suffered no damages as a result.

21. Under the terms of the SPA, Ninth Square was issued 390,625 common shares and 54,348 warrants at closing. Pursuant to the SPA, Ninth Square and Veteran Grown were also to be issued a fixed number of common shares in the capital of MPX ("**MPX Shares**") and a fixed number of MPX common share purchase warrants ("**MPX**

Warrants") upon the occurrence of each of milestones 1 to 4 (the "**Milestones**"). The number of MPX Shares and MPX Warrants was calculated by reference to the specified dollar values in section 2.3 of the SPA, divided by the "MPX Share Price" of $0.96 (fixed by reference to the 30-day volume weighted average price from the date of the announcement of the SPA pursuant to section 2.3.1.5) and the related "Exercise Price" of $1.15, respectively.

22. Given that the purchase price under the SPA was always to be paid through the issuance of a fixed number of securities, the plaintiff cannot have had any reasonable expectation that it would be paid in cash prior to, or upon, achievement of the Milestones. The defendants plead that Ninth Square had no such expectation.

23. These defendants further deny that there has been a breach of the SPA or that Ninth Square would not have signed the SPA had it been aware of the proposed terms of the Arrangement, as alleged at paragraph 23 of the statement of claim.

24. Nothing in the SPA precluded MPX from entering into the Arrangement Agreement (defined below). Nothing in the SPA precluded MPX from being sold; required MPX to maintain the listing of the MPX Shares on the Canadian Securities Exchange or other stock exchange; or required MPX to maintain its status as a "reporting issuer". It was open to the plaintiff to include such terms in the SPA, but it did not do so.

25. It is not open to Ninth Square to try and renegotiate the terms of the SPA after the fact.

26. The transaction contemplated by the SPA closed on or about October 22, 2018, effective October 1, 2018.

27. The plaintiff only became a securityholder of MPX (or any of the defendants) on October 22, 2018 being the closing date of the transaction contemplated by the SPA.

Plan of Arrangement; Assignment of Liabilities

28. These defendants acknowledge that, in the summer of 2018, representatives of MPX and iAnthus began discussing the possibility of a potential transaction between the parties. On July 12, 2018, the parties entered into a confidentiality agreement.

29. These defendants deny the allegation at paragraph 39 of the statement of claim that "MPX had an obligation to disclose its negotiations concerning the Arrangement to Ninth Square before the SPA was signed". There was no such obligation. Furthermore, or in the alternative, MPX and the Individual Defendants were not legally permitted to disclose the fact or substance of the discussions with iAnthus to Ninth Square.

30. On August 29, 2018, the MPX Board established the Special Committee to consider the proposal from iAnthus, any approaches from other parties and MPX's ongoing consideration of strategic alternatives. The Special Committee was independent of management of MPX, and none of the Individual Defendants was a member of the Special Committee. The Special Committee retained financial and legal advisors to provide it with advice.

31. Contrary to the allegations at paragraph 22 of the statement of claim, it was the Special Committee that led the process of evaluating and negotiating the potential business combination with iAnthus.

32. On October 11, 2018, the parties entered into an exclusivity agreement. Between October 12, 2018 and October 18, 2018, MPX and iAnthus, together with their legal and financial advisors, negotiated a draft Arrangement Agreement. During this period, the Special Committee provided direction on matters requiring negotiation. To the extent that the Individual Defendants, or any of them, were involved, they remained subject to the direction of the Special Committee.

33. Up until October 17, 2018, there were no assurances that an arrangement or other transaction would be entered into with iAnthus. These defendants specifically deny the allegation at paragraph 22 of the statement of claim that the terms of the acquisition had "substantially taken form" before September 17, 2018 or the implication that, by that time, the transaction with iAnthus was certain to take place. That is simply untrue.

34. However, on October 17, 2018, a draft Arrangement Agreement reached final form. At that point, the Special Committee met to consider the draft Arrangement Agreement and receive the advice of its financial and legal advisors. With the benefit of a fairness opinion from an independent financial advisor that the consideration being received was fair, from a financial point of view, to the MPX shareholders, the Special Committee concluded that the arrangement was in the best interests of MPX

shareholders and unanimously resolved to recommend to the MPX Board that it support the Arrangement and recommend to MPX securityholders that they vote in favour of the arrangement.

35. On October 17, 2018, the MPX Board met to consider the draft Arrangement Agreement, to receive the report and the recommendations of the Special Committee and to receive the advice of financial and legal advisors. Having taken into account the fairness opinion and other factors, the MPX Board unanimously resolved to recommend that MPX securityholders vote to approve the Arrangement. There were eight members of the MPX Board. While the Individual Defendant, Scott Boyes, was a member of the MPX Board, neither of the other two Individual Defendants sat on the MPX Board.

36. The defendant MPXI was incorporated on October 17, 2018 for purposes of participating in the Arrangement.

37. On October 18, 2018, iAnthus, 1183271 B.C. ULC ("**AcquisitionCo**"), SpinCo (MPXI) and MPX entered into an arrangement agreement (the "**Arrangement Agreement**"). That same day, the plan of arrangement (the "**Plan of Arrangement**") was publicly announced by dissemination of a press release. In that press release, MPX announced the substantive terms of the transaction (as discussed below), including the fact that MPX shares would be exchanged, that the transaction would involve the spin-out of all of the non-U.S. businesses of MPX to MPXI, and that the transaction would take place by way of Court-approved plan of arrangement. The press release further provided notice that the Arrangement Agreement would thereafter be filed on SEDAR.

38. Accordingly, the plaintiff was aware, or ought to have been aware, of the Arrangement before closing on the sale of Spartan to MPX pursuant to the terms of the SPA, as described above. It nonetheless elected to close on the sale of Spartan.

39. Under the terms of the Arrangement Agreement, MPX's non-U.S. assets and non-U.S. liabilities would be spun-out to MPXI, which would then be owned by MPX's shareholders.

40. Following the spin-out of the non-U.S. assets and non-U.S. liabilities, iAnthus would acquire MPX's U.S. assets through AcquisitionCo by having AcquisitionCo purchase all of the issued and outstanding MPX Shares. MPX would then amalgamate

with AcquisitionCo to become MPX ULC, a wholly- owned subsidiary of iAnthus.

41. As part of the Arrangement, each holder of a MPX Share would be entitled to receive 0.1673 iAnthus shares (representing a 30.6% premium based on the closing price of iAnthus shares and MPX Shares on October 17, 2018) and 0.1 SpinCo (MPXI) shares for each MPX Share.

42. The Arrangement Agreement provides under section 2.4 (Arrangement) that, commencing on the "Effective Time", certain steps shall occur and shall be deemed to occur, including the following:

> (a) MPX shall assign and transfer to SpinCo and SpinCo shall accept the SpinCo Assets, on the terms and conditions set out in the SpinCo Conveyance Agreement and, as consideration therefore SpinCo shall assume the SpinCo Liabilities and issue to MPX 100 fully-paid and non-assessable SpinCo Shares and MPX and SpinCo shall file an election under section 85 of the Tax Act as specified in the Arrangement Agreement;
>
> (b) MPX will subscribe for 100 additional SpinCo Shares for aggregate consideration of U.S.$4,000,000 utilizing cash of MPX;
>
> (c) the issued and outstanding SpinCo Shares shall be subdivided so that the number of outstanding SpinCo Shares is equal to one tenth of the number of outstanding MPX Shares;
>
> (d) MPX will resolve to distribute the SpinCo Shares to MPX Shareholders…. [Emphasis added]

43. "SpinCo Assets" are defined to include, among other things "MPX Australia PTY Ltd., Salus BioPharma Corporation, Biocannabis Products Ltd., 8423695 Canada Inc., CinG-X Corporation, Spartan Wellness Corporation and such other non-U.S. MPX Subsidiaries as may be acquired or incorporated prior to the Effective Date and as permitted under this Agreement…" [Emphasis added]

44. "SpinCo Liabilities" are defined as "all of the liabilities of SpinCo, contingent or otherwise, which pertain to, or arise in connection with the operation of, the SpinCo Assets". [Emphasis added]

45. The obligation to pay any remaining portion of the purchase price under the SPA

is a contingent liability that pertains to Spartan and is, therefore, a "SpinCo Liability" that was deemed assumed by MPXI as one of the steps in the Arrangement Agreement.

46. In connection with the Plan of Arrangement:

(a) An Interim Order was issued by the Supreme Court of British Columbia on or about December 10, 2018 providing for the calling and holding of a meeting of the MPX Securityholders (as defined in the Arrangement Agreement), including the holders of MPX Shares, and providing for notice in respect of the Arrangement and the meeting;

(b) A Management Information Circular was issued to holders of MPX Shares and filed with security regulatory authorities, disclosing the details of the Arrangement and providing MPX Securityholders with a copy of the Plan of Arrangement;

(c) A meeting was held on January 15, 2019, at which time the Arrangement was approved by 99.44% of the votes cast by holders of MPX Shares eligible to vote at the meeting and 99.55% of the votes cast by all of the MPX Securityholders eligible to vote at the meeting; and

(d) the Arrangement was approved by the Supreme Court of British Columbia as being fair and reasonable at a hearing held on or about January 18, 2019.

47. Ninth Square was at this time both a shareholder and warrantholder of MPX. As such, it was bound by the terms of the Arrangement.

48. Moreover, Ninth Square had access to the information in the Management Information Circular and was aware of the terms of the Arrangement. Ninth Square was, or should have been, aware that, following completion of the Arrangement, MPX Shares would no longer be publicly traded; its MPX Shares would be exchanged for shares of iAnthus and MPXI; no person would be issued MPX Shares going forward; and it would no longer be practical to satisfy the balance of the purchase price under the SPA through the issuance of MPX Shares and MPX Warrants.

49. However, Ninth Square did not appear at the January 2019 hearing to object to the Arrangement. It is now estopped from objecting to the fairness of the Arrangement.

50. The Arrangement was completed on February 5, 2019.

51. It was only at that time that the plaintiff became a shareholder of MPXI.

52. On February 5, 2019, MPX and MPXI entered into a Conveyance Agreement to memorialize the transfer of the SpinCo Assets and SpinCo Liabilities from MPX to SpinCo (MPXI) (the "**Conveyance Agreement**"), as contemplated by the Plan of Arrangement. Under section 2.1 of the Conveyance Agreement, MPX sold, conveyed, assigned and/or transferred, as applicable, to MPXI the SpinCo Assets and all of its right, title and interest in and to the SpinCo Assets, and MPXI thereby purchased, accepted and/or assumed, as applicable, from MPX the SpinCo Assets. Section 3.1 of the Conveyance Agreement further provides:

> On the terms and subject to the conditions of this [Conveyance Agreement], [MPX] agrees, effective as of the Effective Time, to assume and be responsible for and thereafter honour, perform, discharge and pay as and when due, the SpinCo Liabilities.

53. These defendants deny the allegation at paragraph 46 of the statement of claim that the Individual Defendants directed MPXI's participation in the Arrangement.

MPXI Was Assigned the Obligations under the SPA

54. In connection with the Plan of Arrangement, MPXI was assigned (and agreed to assume) all of the rights and obligations of MPX under the SPA.

55. To the extent that they were not assigned as part of the Arrangement, which is not admitted but expressly denied, the rights and obligations under the SPA were assigned to MPXI by agreement.

56. The defendants deny that the assignment of MPX's rights and obligations under the SPA to MPXI required Ninth Square's consent and plead that the assignment of MPX's rights and obligations to it was valid.

57. The Individual Defendants specifically deny that they "understood that the assignment of the SPA could not be effected without Ninth Square's consent", as alleged at paragraph 27 of the statement of claim.

58. Without limitation, section 8.9.3 of the SPA provided that, after the close of the transactions contemplated that agreement, MPX could assign any or all of its rights under the SPA to any person who purchased all or substantially all of the Spartan shares – and made express reference to a purchase by way of plan of arrangement. It was an implied term of the SPA that the assignment contemplated by section 8.9.3 of the SPA included not just MPX's "rights" under the SPA, but also its liabilities and obligations under the SPA. Under the terms of the Arrangement, MPXI became the purchaser of all of the issued and outstanding shares of Spartan and, therefore, the rights and obligations under the SPA could be assigned to it without the need for Ninth Square's consent.

59. To the extent that the assignment of MPX's rights and obligations under the SPA to MPXI was not valid, which is not admitted but expressly denied, the defendants are not responsible for any loss of the plaintiff alleged in the statement of claim.

MPXI Is Prepared to Provide Securities upon the Achievement of the Milestones

60. To the extent that any of the Milestones have been achieved, which is not admitted but expressly denied, MPXI is prepared to provide Ninth Square with iAnthus and MPXI securities equivalent to the number of MPX Shares and MPX Warrants that would otherwise have been issued under the SPA (subject to the Counterclaim, described below) and converted in accordance with the terms of the Arrangement. In particular, MPXI is prepared to provide Ninth Square with 0.1673 iAnthus shares and 0.1 MPXI shares for each MPX Share to which it would have otherwise been entitled. As an alternative (and subject to the Counterclaim), MPXI has also been prepared to allow Ninth Square to elect to receive MPXI securities (rather than iAnthus and MPXI securities) equivalent to the MPX Shares and MPX Warrants that would otherwise have been issued under the SPA.

61. MPXI denies that there was any fundamental alteration of the understandings in the SPA or the consideration that was to be received by Ninth Square under it.

No Oppression related to the SPA or the Plan of Arrangement

62. There is no basis to establish liability on the part of MPXI pursuant to section 248 of the OBCA or otherwise in relation to the SPA or the Arrangement. MPXI denies that the plaintiff held any reasonable expectation that was violated or that it undertook any conduct that was oppressive, unfairly prejudicial to or unfairly disregarded the plaintiff's interests. Among other things:

(a) The Arrangement itself was not oppressive, and the plaintiff held no reasonable expectation at any relevant time that MPX wouldn't be acquired by another company. MPX did not undertake any conduct that was oppressive, unfairly prejudicial to or unfairly disregarded the plaintiff's interests;

(b) The Arrangement did not fundamentally alter the understandings in the SPA or the consideration that was to be received by Ninth Square under it, as alleged at paragraph 38 of the statement of claim. To the extent that it did so, which is not admitted, it was in a manner that was fair and reasonable and undertaken pursuant to a Court-ordered process;

(c) To the extent that the SPA or the Arrangement is held to be oppressive, which is denied, MPXI did not act oppressively. It was only incorporated after the SPA had been entered into. MPXI did not cause the Arrangement to take place. MPXI did not participate in the negotiation of the Arrangement or acquire any assets until February 2019. MPXI did not participate in any "unfair conduct" as a party to the Arrangement, and there is no basis upon which MPXI would be held responsible for any such conduct;

(d) Until the plaintiff acquired shares of MPXI in February 2019, it was not a "complainant" or "proper person" (as contemplated by the OBCA) in respect of a claim for oppression in relation to the conduct of MPXI, and the plaintiff did not have a relevant interest as a "security holder, creditor, director or officer of [MPXI]" that was disregarded;

(e) The plaintiff held no reasonable expectation that MPXI would do anything

other than what it was incorporated to do: undertake the steps contemplated by the Arrangement; and

(f) Nothing in MPXI's acquisition of the "SpinCo Assets" or the "SpinCo Liabilities" breached any obligation or violated any reasonable expectation, or was oppressive, unfairly prejudicial to or unfairly disregarded the plaintiff's interests.

63. Similarly, there is no basis to find the Individual Defendants personally liable for oppression. Among other things:

(a) The plaintiff is not a "complainant" or "proper person" in respect of a claim for oppression, and the plaintiff did not have a relevant interest as a "security holder, creditor, director or officer of [MPX]" that was disregarded;

(b) The plaintiff did not hold any reasonable expectation in relation to MPX or MPXI that was violated, and MPX and MPXI did not undertake any conduct that was oppressive, unfairly prejudicial to or unfairly disregarded the plaintiff's interests;

(c) The Individual Defendants did not cause the SPA or the Arrangement to be entered into and cannot be said to be implicated in any oppressive conduct;

(d) There is no basis upon which it would be "fit" or "fair" to rectify any allegedly oppressive conduct by requiring the Individual Defendants to compensate the plaintiff personally;

(e) An order that the Individual Defendants personally compensate the plaintiff would not vindicate the reasonable expectations of the plaintiff in its capacity as a corporate stakeholder;

(f) MPX and MPXI are not closely held companies controlled by the Individual Defendants and the Individual Defendants did not increase their control of those companies by their conduct;

(g) The Individual Defendants did not misuse a corporate power, they were

not motivated by bad faith in relation to the plaintiff and they did not breach a personal duty that they owed as directors of MPX or MPXI;

(h) The Individual Defendants were not in a position to approve the SPA or the Arrangement on their own;

(i) The Plan of Arrangement was negotiated at the direction of the independent Special Committee and approved by the Special Committee with the benefit of financial and legal advice; the full, eight-person MPX Board; and the securityholders;

(j) The Individual Defendants were not on the Special Committee, and did not influence the Special Committee or the MPX Board to make a decision. To the extent that they were involved, the other Individual Defendants were acting at the instructions of the independent Special Committee in implementing the Plan of Arrangement;

(k) The Individual Defendants did not act in their personal interest or in order to obtain a personal benefit. They acted in the ordinary course of their roles, in compliance with their fiduciary duties to MPX and MPXI and in the best interests of MPX and MPXI ;

(l) The Individual Defendants were not acting for some ulterior purpose (other than to negotiate the acquisition of Spartan or consummate the Arrangement as directed by the Special Committee and the MPX Board, as applicable);

(m) The Individual Defendants did not ask for, or orchestrate, any personal benefits in connection with their Arrangement. Any perceived personal benefits arising from the Arrangement came about without their direct involvement and are not a sufficient basis to ascribe personal liability to the Individual Defendants; and

(n) The Individual Defendants did not conceal any personal benefits that they received.

64. In the statement of claim, the plaintiff claims damages of $3 million. There is no

basis for the plaintiff to claim a payment of cash from MPXI. The plaintiff never had a reasonable expectation that it would be paid cash upon the occurrence of the various Milestones under section 2.3 of the SPA.

65. If the plaintiff is entitled to any damages as a result of any act or omission of the defendants, which is not admitted but expressly denied, the damages claimed are excessive, speculative and/or remote and the plaintiff has failed to mitigate its loss and take reasonable steps to avoid harm.

66. The defendants plead and rely upon Part XVII of the OBCA and in particular sections 245 and 248.

67. To the extent that any of the Milestone payments are or become payable, which is not admitted, the defendants plead the defence of legal, contractual and/or equitable set-off of its claims for breach of representation and breach of the Restrictive Covenant, described in defendants' Counterclaim, below.

68. After giving effect to set-off, no amounts are payable to the plaintiff and no securities are required to be issued to it.

69. These defendants request that Ninth Square's claim as against them be dismissed with costs.

COUNTERCLAIM

70. These defendants claim the following:

(a) The amount of $1,000,000.00 in damages for breach of contract and as a claim for indemnification, or such greater amount as may be established at trial;

(b) An order prohibiting Ninth Square and its affiliates from breaching the Restrictive Covenant (defined below);

(c) Pre- and post-judgment interest in accordance with the *Courts of Justice Act*;

(d) Their costs of this Counterclaim, plus all applicable taxes;

(e) Such further and other relief as this Honourable Court deems just.

71. The defendants repeat and rely upon the Fresh as Amended Statement of Defence for purposes of this Counterclaim.

MedReleaf Debt

72. Under section 3.1.6 of the SPA, Ninth Square and Veteran Grown jointly and severally represented and warranted that Spartan had no outstanding indebtedness, except as disclosed in Schedule 3.1.6 thereto, and agreed to jointly and severally indemnify and save the "Purchaser Indemnified Parties" harmless for and from any Loss suffered as a result of a breach of such representation or warranty.

73. In or about May 2019, the defendants became aware that Ninth Square and Veteran Grown had failed to disclose that Spartan had a debt of approximately $50,000, plus HST, owing to MedReleaf Corporation at the time that the SPA was entered into. MPXI and/or Spartan have suffered a "Loss" of that amount under the terms of the SPA for which Ninth Square is obligated to indemnify them.

Breach of the Restrictive Covenant

74. Under section 4.1.6 of the SPA (the "**Restrictive Covenant**"), Ninth Square agreed that, during the two-year period following October 2018, it would not, and would cause its affiliates not to, directly or indirectly, own, control, manage, operate, conduct, engage in, participate in, consult with, perform services for, lend money to, guarantee the debts or obligations of, permit its name to be used by or in connection with, or otherwise carry on, a business anywhere in Canada that competes with the business of providing goods or services to veterans related to cannabis as conducted as of October 1, 2018 (the "**Business**").

75. Emmanuel Paul directly or indirectly controls Ninth Square and signed the SPA on its behalf. Mr. Paul is an affiliate of Ninth Square for purposes of the Restrictive Covenant.

76. Despite the Restrictive Covenant, Mr. Paul has been engaged in a business that competes with the Business since October 1, 2018. Specifically, Mr. Paul has been engaged in the business operated by the Ananda Clinics Inc., Our Clinic and/or Altius Health (together, "**Our Clinic**"), which offer goods or services to veterans related to cannabis. The full particulars of Mr. Paul's role lie within the exclusive knowledge of Ninth Square. However, Mr. Paul remains a director of Ananda Clinics Inc**.**

77. Under the terms of the SPA, if it or its affiliates breach the Restrictive Covenant, Ninth Square is obligated to pay an amount equal to the gross revenue and other fees generated by or attributable to the prohibited activity for the twelve month period ending on the date on which such person first acted in violation of the Restrictive Covenant, which amount may be set off against any amount owing or to become owing to Ninth Square under the SPA and/or in reduction and cancellation of any MPX Shares and MPX Warrants to which Ninth Square may be entitled under the SPA.

78. Giving effect to the right of set off, no amounts are, or will be, owing to Ninth Square as a result of the occurrence of the Milestones under the SPA.

79. Furthermore, or in the alternative, MPXI has the right under the SPA (in addition to any other remedies) to obtain injunctive or other equitable relief to prevent any actual or threatened breach of the Restrictive Covenant.

80. The defendants propose that this Counterclaim be tried together with the main Action or immediately thereafter.

August 2, 2021

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Ninth Square Capital Corporation Plaintiff	v.	**iAnthus Capital Holdings Inc., MPX Bioceutical ULC, MPX International Corporation, W. Scott Boyes, Jeremey Budd and Michael Arnkvarn** Defendants	Court File No.: CV-19-625101-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding under the *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 248

Proceeding commenced at Toronto

FRESH AS AMENDED STATEMENT OF DEFENCE AND COUNTERCLAIM OF THE DEFENDANTS MPX INTERNATIONAL CORPORATION, W. SCOTT BOYES, JEREMY BUDD and MICHAEL ARNKVARN

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Court File No./N° du dossier du greffe: CV-19-00625101-00CL

Court File No.: CV-19-625101-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

Proceeding under the Business Corporations Act, RSO 1990, c. B16, s. 248

B E T W E E N :

NINTH SQUARE CAPITAL CORPORATION

Plaintiff

- and -

IANTHUS CAPITAL HOLDINGS, INC., MPX BIOCEUTICAL ULC, ~~and~~ MPX INTERNATIONAL CORPORATION, W. SCOTT BOYES, JEREMY BUDD and MICHAEL ARNKVARN

Defendants

AMENDED STATEMENT OF DEFENCE AND CROSSCLAIM OF IANTHUS CAPITAL HOLDINGS, INC. AND MPX BIOCEUTICAL ULC

1. The defendants iAnthus Capital Holdings, Inc. ("**iAnthus**") and MPX Bioceutical ULC ("**New MPX**"), admit the allegations contained in paragraphs 2, 3, 5, 6, 7, 8 and ~~13~~17 of the ~~Amended~~ Consolidated Statement of Claim (the "**Claim**").

2. iAnthus and New MPX have no knowledge of the allegations contained in paragraph 11 of the Claim.

3. On September 6, 2019, iAnthus and New MPX delivered a Demand for Particulars regarding various allegations included in the pre-consolidated Amended Statement of Claim dated August 21, 2019. On September 10, 2019, Ninth Square Capital Corporation ("**Ninth Square**") delivered Responses to the Demand for Particulars ("**Ninth Square's Response to Particulars**").

4. Except to the extent admitted herein, New MPX and iAnthus deny the allegations contained throughout the remainder of the Claim and Ninth Square's Response to

Particulars, and further deny that Ninth Square suffered damages or is entitled to any relief, as pleaded in paragraph 1 of the Claim or otherwise.

THE PARTIES AND OTHER ACTORS

5. The defendant, iAnthus, is a company incorporated pursuant to the laws of British Columbia. iAnthus owns, operates, and partners with best-in-class regulated cannabis operations across the United States. iAnthus is publicly traded on the Canadian Securities Exchange ("**CSE**").

6. The defendant, New MPX, is a company incorporated pursuant to the laws of British Columbia. New MPX is the wholly-owned subsidiary of iAnthus. New MPX was formed on February 5, 2019 by the Amalgamation (defined below) between MPX Bioceutical Corporation ("**Old MPX**") and 1183271 B.C. Unlimited Liability Company ("**118 Co.**"). 118 Co. was a wholly owned subsidiary of iAnthus.

7. Old MPX was a company incorporated pursuant to the laws of Ontario. Prior to the Amalgamation, it was also publicly traded on the CSE. Old MPX was a multinational diversified cannabis company and had operations in Canada and the United States. Of significance, Old MPX's subsidiary operating as "Canveda" (subsequently renamed Canveda Inc.) became a Health Canada licensed producer in or around June 12, 2017. Canveda's operations in Canada, and licence with Health Canada, are assets with bona fide value.

8. The Defendant, MPX International Corporation ("**MPX-I**"), also referred to as "SpinCo", was incorporated in October of 2018 pursuant to the laws of Ontario. MPX-I was formerly known as 2660528 Ontario Inc., but changed its name to MPX International Corporation in November of 2018. MPX-I is a cannabis company, and is focussed on the Canadian and global cannabis markets. Its common shares began trading on the CSE on February 6, 2019. MPX-I is not an affiliate of either iAnthus or New MPX. MPX-I on the one hand, and iAnthus and New MPX on the other, are not under common control.

9. The Defendant, W. Scott Boyes ("**Boyes**"), was Old MPX's President, CEO and Chairman of the board of directors. Boyes is currently the President, CEO Chairman of the board of directors of MPX-I.

10. The Defendant, Jeremy S. Budd ("**Budd**"), was Old MPX's Vice President, General Counsel and Corporate Secretary. Budd is currently the Executive Vice President, General Counsel and a director of MPX-I.

11. The Defendant, Michael Arnkvarn ("**Arnkvarn**"), was Old MPX's Executive Vice President, Sales and Marketing. Arnkvarn is currently the Chief Operating Officer of MPX-I.

12. The plaintiff, Ninth Square, is a company incorporated pursuant to the laws of Ontario.

OLD MPX ACQUIRES SPARTAN WELLNESS CORPORATION FROM NINTH SQUARE

13. Pursuant to a Share Purchase Agreement dated September 17, 2018 (the "**SPA**"), Old MPX acquired all of the issued and outstanding shares of Spartan Wellness Corporation ("**Spartan**") from Ninth Square and Veteran Grown Corporation ("**Veteran**"). This transaction (the "**Spartan Acquisition**") closed on October 22, 2018.

14. Spartan is a Canadian organization that assists veterans with physical and psychological conditions by attempting to reduce or eliminate opioid dependency through redirection to medical cannabis.

15. The SPA provided that the purchase price shall be up to $6 million, subject to adjustment, and that it be satisfied by the issuance of common shares and warrants in Old MPX over time. More specifically, the SPA provided that $375,000 of Old MPX shares and $62,500 of Old MPX warrants be issued to Ninth Square on closing, and that additional shares and warrants in Old MPX be issued contingent upon the achievement of the four milestones specified in the SPA (the "**Milestones**"). Upon closing of the Spartan Acquisition, and pursuant to the SPA, Old MPX issued 390,625 Old MPX shares and

53,848 Old MPX warrants to Ninth Square. Accordingly, as of October 22, 2018, Ninth Square was a both a shareholder and warrantholder of Old MPX.

16. As payment of the purchase price under the SPA was to be in the form of securities, Ninth Square had no reasonable expectation that it would be paid in cash. There is, accordingly, no basis for Ninth Square to claim damages in the amount of $3 million.

17. iAnthus and New MPX deny that any of the Milestones have been reached. Each of the four Milestones are defined in the SPA as requiring a certain volume of aggregate sales attributable to Spartan. Spartan has not been issued a licence from Health Canada and for that reason, it is not permitted to sell cannabis under the laws of Canada or anywhere else. Accordingly, no cannabis sales are or can be attributable to Spartan for the purposes of the Milestones.

18. Milestones 2 through 4 are also linked to the licensing of, and cannabis sales made by Canveda. Canveda is currently authorized by Health Canada to sell a subset of cannabis products (specifically plants and seeds in either dried or fresh form) to other licence holders and provincial and territorial government agencies through wholesale arrangements, and directly to Canadian patients for medical use. However, Canveda does not have a licence to sell cannabis oil and is accordingly not "fully licensed" and may never be fully licensed. Accordingly, no cannabis sales are or can be attributable to Canveda for the purposes of the Milestones.

19. Since none of Milestones have been achieved, as a threshold matter, iAnthus and New MPX deny that any payments are owing to Ninth Square under the SPA, as alleged in the Claim or otherwise.

20. In the alternative, if Milestone 1 was achieved, which is not admitted but specifically denied, none of the remaining Milestones have been achieved and there is no assurance that they ever will be. Accordingly, there is no basis for Ninth Square to claim any amounts in relation to same.

THE ARRANGEMENT

21. On October 18, 2018, Old MPX and iAnthus entered into an agreement (the "**Arrangement Agreement**") governing a transaction whereby iAnthus (through New MPX) acquired all of the issued and outstanding shares of Old MPX (the "**Arrangement**").

22. The Arrangement proceeded by way of a plan of arrangement (the "**Plan of Arrangement**") under the British Columbia *Business Corporations Act,* SBC 2002, c 57 ("**BCBCA**"), and was subject to court approval. The Supreme Court of British Columbia (the "**BC Court**") granted that approval by order dated January 18, 2019 (the "**Approval Order**").

23. The Arrangement was completed on February 5, 2019. In accordance with the Arrangement Agreement, Plan of Arrangement, and Approval Order, New MPX retained control of all of Old MPX's American operations, while the international operations (including those in Canada) were spun out into the newly formed MPX-I.

MPX-I Purchases Spartan and Assumes Old MPX's Liabilities

24. As pleaded below, by operation of the Arrangement, MPX-I assumed the liability to pay Ninth Square any consideration owing to it under the SPA (namely, the shares and warrants contingent upon the Milestones under the SPA having been reached).

25. The Arrangement Agreement defined the term "SpinCo" to mean "2660528 Ontario Inc.". 2260528 Ontario Inc. is the former corporate name of MPX-I, and thus all references to "SpinCo" throughout the transaction documents are to MPX-I.

26. Pursuant to s. 4.8 of the Arrangement Agreement:

(a) Old MPX agreed to sell to MPX-I, and MPX-I agreed to purchase, the "SpinCo Assets"; and

(b) MPX-I agreed to assume, and Old MPX agreed to cause MPX-I to assume, all of the "SpinCo Liabilities".

27. Pursuant to s. 1.1 of the Arrangement Agreement:

(a) "SpinCo Assets" means, among other things, "Spartan Wellness Corporation", and "all current assets related to" Spartan; and

(b) "SpinCo Liabilities" means "all of the liabilities of SpinCo, contingent or otherwise, which pertain to, or arise in connection with the operation of, the SpinCo Assets".

28. The sale and transfer of the Spinco Assets and Spinco Liabilities from Old MPX to MPX-I (i.e. SpinCo) was effected by way of a Conveyance Agreement dated February 5, 2019 (the "**Conveyance Agreement**").

29. Under s. 2.1 of the Conveyance Agreement, Old MPX "hereby sells, conveys, assigns and/or transfers" the SpinCo Assets to MPX-I, and all of [Old MPX's] "right, title and interest in and to the SpinCo Assets" and MPX-I (as SpinCo) "hereby purchases, accepts and/or assumes" from Old MPX the SpinCo Assets. Spartan is expressly defined as a SpinCo Asset. Accordingly, by purchasing the SpinCo Assets, MPX-I purchased, accepted, and assumed the Spartan corporation, including all of its issued and outstanding shares, and all assets related thereto.

30. Further, s. 3.1 of the Conveyance Agreement, titled Assumption of Assumed Liabilities, provides:

> On the terms and subject to the conditions of this Agreement, SpinCo [MPX-I] agrees, effective as of the Effective Time, to assume and be responsible for and thereafter honour, perform, discharge and pay as and when due, the SpinCo Liabilities.

31. Old MPX's obligation to satisfy the purchase price in the SPA by issuing shares and warrants to Ninth Square is a "SpinCo Liability" because the payment obligation pertains to and arises in connection with the operation of the SpinCo Assets (i.e., Spartan). Therefore, MPX-I assumed Old MPX's obligation to pay any amounts owing under the SPA to Ninth Square pursuant to the Arrangement Agreement and Conveyance Agreement.

The Plan of Arrangement

32. The Plan of Arrangement provided that 118 BC Co. and Old MPX would amalgamate pursuant to the BCBCA, and continue under the BCBCA as New MPX (the "**Amalgamation**").

33. This Amalgamation was to take place ***after*** the SpinCo Assets and SpinCo Liabilities were transferred from Old MPX to MPX-I.

34. Section 2.4 of the Plan of Arrangement set out precise sequencing for the various steps that must occur under the Arrangement. Upon the Plan of Arrangement becoming effective on February 5, 2019:

> the following shall occur and shall be deemed to occur, except to the extent otherwise indicated, in the following order and without any further act or formality:
>
> […]
>
> (e) [Old] MPX shall assign and transfer to SpinCo [MPX-I] and SpinCo [MPX-I] shall accept the SpinCo Assets, on the terms and conditions set out in the SpinCo Conveyance Agreement and, as consideration therefor SpinCo [MPX-I] shall assume the SpinCo Liabilities […]
>
> […]
>
> (k) [118 BC Co] and [Old] MPX will amalgamate pursuant to the BCBCA to continue as one unlimited liability company, [New MPX].

35. Section 2.4 of the Plan of Arrangement therefore provides that the SpinCo Assets and SpinCo Liabilities (including MPX-I's contingent liability for any shares and warrants to be issued to Ninth Square under the Spartan Acquisition, as pleaded above) were transferred to MPX-I ***before*** the Amalgamation. Accordingly, no obligations under the Spartan Acquisition remained with Old MPX to be assumed by New MPX as part of the Amalgamation.

Shareholder and Court Approval of the Arrangement

36. As acknowledged in paragraph 28 ~~23~~ of the Claim, iAnthus and Old MPX issued a press release announcing the Arrangement on October 18, 2019. Ninth Square accordingly knew, or ought to have known, of the Arrangement prior to the closing of the Spartan Acquisition.

37. The details of the Arrangement, along with a copy of the Plan of Arrangement, were provided to shareholders of Old MPX in a management information circular that was filed with securities regulatory authorities on December 11, 2018.

38. The Arrangement was also subject to shareholder and court approval. To this end, a special meeting of Old MPX securityholders was held on January 15, 2019. As a shareholder of Old MPX, Ninth Square was given notice of this meeting. It raised no objections to the Arrangement.

39. Thereafter, the Supreme Court of British Columbia ("**BC Court**") approved the Acquisition as being fair and reasonable by Order dated January 18, 2019 (the "**Arrangement Order**"). Appendix A to the Arrangement Order is the Plan of Arrangement.

40. Ninth Square had access to the management information circular referred to above, was aware of the terms of the Arrangement and received notice of the return of the application in which Old MPX and iAnthus sought court approval of the Arrangement. Ninth Square did not attend the court hearing, file submissions, or otherwise object to the BC Court's approval of the Arrangement.

41. In granting the Arrangement Order, as noted in the preamble, the BC Court considered, among other things, "the fairness to the parties affected thereby of the terms and conditions of the Arrangement of the transactions contemplated by the Arrangement". The Arrangement Order expressly provides that "the Arrangement as provided for in the Plan of Arrangement, including the terms and conditions thereof and the issuances and exchanges of securities contemplated therein, is procedurally and substantively fair and reasonable to the MPX Securityholders". That includes Ninth Square.

42. Consequently, Ninth Square was, or should have been, aware that following the Arrangement, Old MPX shares would no longer be publicly traded and the purchase price would no longer be satisfied by the issuance of Old MPX shares and warrants.

43. Having failed or chosen not to avail itself of any of the avenues available to object to the fairness of the Arrangement, Ninth Square has waived its rights to do so. It is now estopped from doing so.

The Arrangement Assigned Old MPX's Obligations under the SPA to MPX-I

44. The practical effect of the Arrangement outlined above and as provided for under the Plan of Arrangement is the assignment of Old MPX's rights and obligations under the SPA to MPX-I. This is so regardless of the assignment provisions of the SPA set out in paragraphs 8.9 of the SPA.

45. Section 6.2 of the Plan of Arrangement, titled Paramountcy, provides that:

(a) the Plan of Arrangement "shall take precedence and priority over any and all rights related to" Old MPX shares and warrants "issued and outstanding prior to the Effective Time";

(b) "the rights and obligations of the holders of" Old MPX shares and warrants "shall be solely as provided for in this Plan of Arrangement"; and

(c) "all actions, causes of action, claims or proceedings (actual or contingent, and whether or not previously asserted) based on or in any way relating to" Old MPX shares and warrants shall be deemed to have been settled, compromised, released, and determined without any liability except as set forth herein".

46. Further, under s. 2.3 of the Plan of Arrangement, the Arrangement is binding on Old MPX shareholders and warrantholders. Ninth Square is therefore bound by the terms of the Plan of Arrangement – including the express assignment and transfer to SpinCo [MPX-I] of the SpinCo Assets (Spartan) and assumption by SpinCo [MPX-I] of the

SpinCo Liabilities (including the obligation to pay Ninth Square for Spartan).

47. Further, or in the alternative, iAnthus and New MPX deny that Ninth's Square's consent to the assignment of rights to MPX-I under the SPA was required. Section 8.9.3 of the SPA provided that, after the Spartan Acquisition closed, Old MPX may assign any or all of its rights under the SPA to any person who purchases the Spartan shares. Under the Arrangement, MPX-I became the purchaser of all of the issued and outstanding shares of Spartan, and thus the requirements for an assignment under s. 8.9.3 of the SPA were met, without the need for Ninth Square's approval.

48. It was an implied term of the SPA that the assignment contemplated by s. 8.9.3 of the SPA included not just Old MPX's "rights" under the SPA, but its liabilities and obligations under the SPA as well. Any other interpretation of s. 8.9.3 of the SPA would result in a commercial absurdity.

49. iAnthus and New MPX acknowledge that, on January 24, 2019, ~~Old MPX's Vice President and General Counsel, Jeremy~~ Budd ~~("**Budd**"),~~ sent Ninth Square a proposal indicating that, going forward, the purchase price for the Spartan shares under the SPA would be satisfied by the issuance of shares and warrants in MPX-I, as pleaded in paragraph 30 ~~25~~ of the Claim.

50. As pleaded in paragraph 31 ~~26~~ of the Claim, iAnthus and New MPX further acknowledge that on January 31, 2019 Budd sent Ninth Square an assignment agreement and form of consent to assign the SPA to MPX-I. Budd did so under cover of an email indicating that, among other things, pursuant to the Plan of Arrangement the obligation to pay for the Spartan shares under the SPA will remain with iAnthus and if the proposed assignment agreement is not executed, Ninth Square will be entitled to receive shares and warrants in iAnthus upon the Milestones being achieved. iAnthus and New MPX deny, however, that this was the effect of the Plan of Arrangement.

51. In fact, and as pleaded more particularly below, MPX-I has at all times since acknowledged that it, and not iAnthus or New MPX, is obliged to issue its shares and

warrants to Ninth Square as payment of the purchase price under the SPA. Notably, Budd became General Counsel to MPX-I immediately following the Arrangement.

The Debentures Issued by a Subsidiary of Old MPX

52. As pleaded in paragraph 35 ~~30~~ of the Claim, holders of debentures (and warrants) issued by a subsidiary of Old MPX entered into an extraordinary resolution to amend the base indenture governing such debentures immediately prior to the execution of the Arrangement Agreement. Specifically, the base indenture required Old MPX to "use reasonable commercial efforts to maintain the listing of its common shares on the CSE, and to maintain its status as a 'reporting issuer' not in default of the requirements of the Applicable Securities Legislation".

53. In order to facilitate the closing of iAnthus' acquisition of Old MPX under the Arrangement Agreement, the requisite number of debenture holders agreed to amend the base indenture to permit iAnthus to assume the obligations provided it use reasonable commercial efforts to maintain the listing of its common shares on the CSE, and to maintain its status as a "reporting issuer" not in default of the requirements of applicable Canadian securities legislation. The debenture (and warrant) holders were entitled to shares of iAnthus because that is the agreement the debenture (and warrant) holders bargained for.

54. By contrast, however, the SPA does not contain such a provision. Contrary to paragraph 35 ~~30~~ of the Claim, the difference in treatment of the Old MPX debenture (and warrant) holders and Ninth Square resulted from Ninth Square failing to secure such a provision in the SPA.

MPX-I Has Acknowledged its Responsibility to Ninth Square

55. Consistent with the above, MPX-I has publically recognized and acknowledged its obligation to issue its shares and warrants to Ninth Square as payment of the purchase price upon the achievement of the Milestones referred to in the SPA. In Note 4 to its Interim Condensed Consolidated Financial Statements ending March 31, 2019 (the "**March Financial Statements**"), MPX-I reported on its "acquisition of 100% of the

outstanding shares in the capital of Spartan Wellness Corporation by paying a total purchase price of up to $6,000,000" and summarized the allocation of the purchase price to the identifiable assets and liabilities of the Spartan Acquisition.

56. Note 14 to MPX-I's March Financial Statements, addressing contingent consideration, provides: "As part of the agreement to acquire all of the outstanding shares of Spartan Wellness Corporation as outlined in Note 4, ***the Corporation has committed to providing the sellers with common shares and warrants based on the achievement of agreed sales milestones***" (emphasis added). MPX-I expressly acknowledged that it "expects these milestones to be achieved," and estimated the liability at $3,986,286.

57. In addition to the above, on July 29, 2019, MPX-I entered into a Substituted Consideration Agreement with Veteran (the other vendor of Spartan shares under the SPA), pursuant to which MPX-I agreed to issue MPX-I shares and warrants to Veteran as payment of the purchase price owed to it upon achievement of the Milestones. According to MPX-I, Milestone 1 was achieved in the third quarter of 2019, which is not admitted but denied. Nevertheless, based on its belief that Milestone 1 was achieved, MPX-I consequently issued 439,453 MPX-I shares (at a deemed value of $0.64 per MPX-I share) and 64,935 MPX-I warrants (exercisable at $0.77 per MPX-I share for a term of three years) to Veteran under the Substituted Consideration Agreement.

58. Accordingly, and as evidenced by MPX-I's issuance of shares and warrants to Veteran, iAnthus and New MPX plead that all of Old MPX's rights - and by necessary implication, all obligations - under the SPA have been assigned to MPX-I following MPX-I's acquisition of all of the shares of Spartan. Further, iAnthus and New MPX plead that pursuant to the Arrangement, MPX-I is liable for any consideration payable to Ninth Square upon the achievement of the Milestones.

59. In the alternative, if this Court finds that New MPX has assumed Old MPX's obligations under the SPA, iAnthus and New MPX plead that Ninth Square is entitled to New MPX shares and warrants only upon the achievement of the Milestones.

NO BREACHES OF THE SPA OR THE DUTY OF GOOD FAITH

60. iAnthus and New MPX did not breach the SPA or the duty of good faith, as alleged in the Claim or otherwise. All actions of iAnthus and New MPX have been to effect good corporate governance and protect the best interests of iAnthus, New MPX, and their stakeholders.

61. Contrary to paragraph 38 ~~33~~ of the Claim, the Arrangement did not fundamentally alter the understandings in the SPA or the consideration that Ninth Square was to receive. iAnthus and New MPX deny that Ninth Square would not have signed the SPA had it been aware of the terms of the Arrangement.

62. Contrary to paragraph 39 ~~34~~ of the Claim, Old MPX was not obliged and was under no duty to disclose its negotiations concerning the Arrangement to Ninth Square before the SPA was executed, and it was unreasonable for Ninth Square to assume, when negotiating the SPA, that Old MPX would not be subsequently acquired.

63. Contrary to paragraph 22 ~~17~~ of the Claim and paragraph 1 of Ninth Square's Response to Particulars, neither s. 8.9 nor any other provision of the SPA indicate that no acquisition or merger involving Old MPX was underway. The representations and warranties Old MPX gave to Ninth Square are expressly set out in s. 3.3 of the SPA. Section 3.3 of the SPA does not contain any representation or warranty that Old MPX was not engaged in merger or acquisition discussions, that Old MPX would remain publically listed, or that Ninth Square would receive shares or warrants in a publically traded company as payment of the purchase price under the SPA in the event that Old MPX was acquired by or merged with another company.

64. Share purchase agreements frequently require the purchaser to provide covenants to the vendor with respect to post-closing business operations and corporate structure. Such covenants can be important to a vendor where some or all of the purchase price is paid for in shares (or other securities) of the purchaser. If a vendor wants to ensure that a purchaser's shares remained listed, it could include the following covenant in the share purchase agreement:

> For a period of 24 months from closing, the [purchaser], or any successor thereto, will: (i) use reasonable commercial efforts to maintain the listing of its common shares on the Canadian Securities Exchange, or such other stock exchange in Canada and (ii) maintain its status as a "reporting issuer" not in default of the requirements of applicable securities legislation in Canada.

65. Ultimately, post-closing covenants are negotiating points between vendors and purchasers. Ninth Square and its principals are sophisticated investors and were represented by legal counsel. If Ninth Square wanted to ensure that Old MPX's shares remained listed on the CSE (or other stock exchange), Ninth Square could have, and should have, included a covenant requiring same. The SPA did not include any covenant requiring Old MPX to remain listed on the CSE (or any other stock exchange) post-closing. Accordingly, even if Ninth Square was entitled to payments contemplated in the Milestones, which is not admitted but denied, there is no requirement under the SPA for Old MPX to provide securities that trade on the CSE (or other stock exchange).

66. Moreover, and as pleaded above, s. 8.9.3 of the SPA permitted Old MPX to assign its rights under the SPA to a purchaser of all or substantially all of the shares of Old MPX ("whether pursuant to a take-over bid, ***statutory arrangement***, or otherwise" (emphasis added)). Accordingly, and contrary to Ninth Square's allegations, the parties to the SPA expressly contemplated a potential acquisition of Old MPX, including one proceeding by way of a plan of arrangement.

67. It is not open to Ninth Square to endeavour, as it does by issuing its Claim, to renegotiate the terms of the SPA.

IANTHUS AND NEW MPX DID NOT ENGAGE IN OPPRESSIVE OR UNFAIRLY PREJUDICIAL CONDUCT

Jurisdiction – The OBCA Does Not Apply to iAnthus and New MPX

68. Both iAnthus and New MPX are incorporated pursuant to the BCBCA. As BCBCA corporations, iAnthus and New MPX are not "corporations" within the meaning of the Ontario *Business Corporations Act*, RSO 1990 c B 16 ("**OBCA**"). Moreover,

neither iAnthus nor New MPX are affiliates, as defined in the OBCA, of MPX-I, which is an OBCA corporation. Consequently, neither iAnthus nor New MPX are subject to the oppression remedy in s. 248 of the OBCA.

69. Ninth Square's oppression claims against iAnthus and New MPX are outside the jurisdiction of the Ontario Superior Court of Justice. This Court has no jurisdiction to adjudicate this aspect of the Claim, which is within the exclusive jurisdiction of the BC Court.

No Oppressive or Unfairly Prejudicial Conduct

70. Further, or in the alternative, contrary to the allegations made in the Claim and Ninth Square's Response to Particulars, iAnthus and New MPX did not engage in a course of conduct which was oppressive or unfairly prejudicial to, or which unfairly disregarded the interests of Ninth Square, as alleged in the Claim or otherwise.

71. The consequences of the Arrangement were well within Ninth Square's reasonable expectations. As pleaded above, the Arrangement received court and shareholder approval. Ninth Square was given notice of the special meeting of Old MPX shareholders on January 15, 2019 and of the application to approve the Arrangement Order on January 18, 2019. Ninth Square's failure to avail itself of any of the opportunities available to object to the Arrangement does not make the Arrangement oppressive.

72. Contrary to the allegations in paragraphs 37 ~~32~~ and 38 ~~33~~ of the Claim, and as pleaded above, the SPA does not contain a covenant requiring Old MPX to continue to maintain a public listing of the consideration shares.

73. Ninth Square and its principals are sophisticated investors. If Ninth Square wanted to ensure that a future transaction involving Old MPX would not affect the value of the consideration it was to receive under the SPA, it could and should have bargained with Old MPX to include such contractual protections in the SPA. Its failure to do so does not render iAnthus and New MPX's conduct unfair or oppressive.

74. Further, or in the alternative, Ninth Square does not have standing to seek an oppression remedy against iAnthus and New MPX, and is not a "complainant" or "proper person" as those terms are contemplated by the OBCA.

75. Accordingly, for the reasons pleaded above, Ninth Square is not entitled to any relief as against iAnthus and New MPX pursuant to section 258 of the OBCA, or otherwise.

NINTH SQUARE SUFFERED NO DAMAGES AND IS NOT ENTITLED TO ANY RELIEF

76. iAnthus and New MPX deny that Ninth Square has suffered any damages or losses, as alleged in the Claim or otherwise, and puts Ninth Square to the strict proof thereof.

77. Further, or in the alternative, if Ninth Square has suffered any harm or loss, which iAnthus and New MPX deny, such harm or loss was not in any way caused by iAnthus and New MPX, as alleged in the Claim or otherwise.

78. Further, or in the alternative, any harm or loss suffered by Ninth Square, which is not admitted but denied, was caused or contributed to solely by the actions of MPX-I, Boyes, Budd and/or Arnkvarn and not by iAnthus or New MPX.

79. In the further alternative, if Ninth Square suffered damages, which iAnthus and New MPX deny, the damages claimed are exaggerated, excessive, remote and not recoverable at law. Further, or in the alternative, the damages claimed by Ninth Square results from its failure to mitigate same.

80. In the further alternative, if Ninth Square is entitled to damages from iAnthus and or New MPX, which is denied, iAnthus and New MPX claim the right to set off against any such damages the full amount of damages they have suffered as a result of Ninth Square's breaches of the SPA. More specifically, s. 4.1.6 of the SPA provides that, for two years following the closing of the Spartan Acquisition, Ninth Square shall not, and shall cause its affiliates (defined in the SPA to include any person or individual who directly or indirectly controls Ninth Square) not to, directly or indirectly, own, control, manage, operate, conduct, engage in, participate in, consult with, perform services for,

lend money to, guarantee the debts or obligations of, permit such Vendor's name to be used by or in connection with, or otherwise carry on, a business anywhere in the Territory (defined in the SPA as Canada) that competes with the Business (defined in the SPA to mean the business of providing goods or services to Veterans related to cannabis) as conducted as of the Closing Date.

81. Emmanuel Paul, who directly or indirectly controls Ninth Square, participates in one or more businesses (including Ananda Clinics Inc., Our Clinic and Altius Health) that compete with Veteran in violation of s. 4.1.6 of the SPA. In particular, Our Clinic offers a program designed for Canadian Forces veterans that assists with applications for cannabis therapy. iAnthus and New MPX are, as a result, entitled to set off the monetary remedies provided for in s. 4.1.6.5 of the SPA as against any damages to which Ninth Square may be found entitled.

82. For the foregoing reasons, iAnthus and New MPX submit that the Claim should be dismissed against them, with costs on a substantial indemnity basis.

CROSSCLAIM

83. The defendants, iAnthus and New MPX, claim against the defendants, MPX-I, Boyes, Budd and Arnkvarn:

(a) contribution and indemnity in respect of any amounts for which iAnthus and New MPX may be adjudged liable in the main action;

(b) further, or in the alternative, an order requiring MPX-I to issue shares and warrants to Ninth Square upon achievement of the Milestones referred to in the SPA;

(c) pre-judgment and post-judgment interest on the above pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

(d) their costs of this action and crossclaim on a substantial indemnity basis; and

(e) such further and other relief as this Honourable Court may deem just.

84. iAnthus and New MPX repeat and rely upon the allegations contained in their Amended Statement of Defence herein.

85. To the extent that Ninth Square suffered any losses as alleged in the Claim, such losses were wholly caused by, or materially contributed to, or exacerbated by, the actions and/or omissions of MPX-I, Boyes, Budd and/or Arnkvarn, the particulars of which are, to the extent not pleaded above, known to MPX-I, Boyes, Budd and/or Arnkvarn.

86. iAnthus and New MPX propose that this crossclaim be tried by a Judge sitting in the Commercial List in the City of Toronto, at the same time as the main action in this proceeding.

September 30, 2019

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CORPORATION and IANTHUS CAPITAL HOLDINGS, INC. et al
Plaintiff Defendants

Court File No.: CV-19-625101-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List
Proceeding commenced at Toronto

AMENDED STATEMENT OF DEFENCE AND CROSSCLAIM OF IANTHUS AND MPX BIOCEUTICAL ULC

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APPENDIX G

Court File No.: CV-22-00684542-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MPX INTERNATIONAL CORPORATION, BIOCANNABIS PRODUCTS LTD., CANVEDA INC, THE CING-X CORPORATION, SPARTAN WELLNESS CORPORATION, MPXI ALBERTA CORPORATION, MCLN INC., AND SALUS BIOPHARMA CORPORATION

STATEMENT OF LAW

September 20, 2022

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Counsel to KSV Restructuring Inc. in its capacity as Court-Appointed Monitor of the Applicants

TO: **SERVICE LIST**

INTRODUCTION

1. KSV Restructuring Inc. is the court-appointed monitor (the "**Monitor**") of MPX International Corporation ("**MPXI**"), BioCannabis Products Ltd., Canveda Inc., The CinG-X Corporation, Spartan Wellness Corporation, MPXI Alberta Corporation, MCLN Inc., and Salus BioPharma Corporation (collectively, the "**Applicants**" and each an "**Applicant**") in the Applicants' *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") proceeding (the "**CCAA Proceeding**").

2. The Monitor files this statement of law to assist the Ontario Superior Court of Justice (Commercial List) (the "**Court**") with a determination in regards to the motion brought by Ninth Square Capital Corporation ("**Ninth Square**"), returnable September 29, 2022.

3. Except where necessary, background facts are as otherwise set out in the Second Report of the Monitor dated September 20, 2022 (the "**Second Report**"). Terms undefined herein are as used within the Second Report.

4. In summary:

   (a) in a 2019 arrangement (the "**Arrangement**") under the British Columbia *Business Corporations Act* (the "**BCBCA**"),[1] the following transactions occurred:

      (i) MPX Bioceutical Corporation ("**MPX**") spun out its non-US assets into MPXI, an Ontario *Business Corporations Act* (the "**OBCA**")[2] corporation; and

      (ii) MPX, with its remaining US assets, amalgamated with 1183271 B.C. Unlimited Liability Corporation to form MPX Bioceutical ULC ("**MPX ULC**");

   (b) Ninth Square brought its lawsuit (the "**Ninth Square Litigation**") against, among others, MPXI, MPX ULC and the following individuals:

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[1] *Business Corporations Act*, S.B.C. 2002, c.57.
[2] *Business Corporations Act*, R.S.O. 1990, c.B.16.

(i) Scott Boyes, a former director and officer of MPX and a current director of MPXI and two other Applicants;

(ii) Jeremy Budd, a former officer of MPX and a current director and/or officer of MPXI and two other Applicants; and

(iii) Michael Arnkvarn, a former officer of MPX and a current director and/or officer of MPXI and two other Applicants,

(collectively, the "**Individual Defendants**");

(c) the Ninth Square seeks, among other things, damages in the amount of $3,000,000 for prejudice suffered by Ninth Square resulting from oppressive conduct in connection with the Arrangement;

(d) MPXI is now an Applicant in the CCAA Proceeding; and

(e) Ninth Square's present motion seeks a declaration from the Court that the stay in the CCAA Proceeding does not apply to the Individual Defendants in their capacity as directors and/or officers of MPX/MPX ULC, such that the Ninth Square Litigation should proceed against the Individual Defendants despite the ongoing CCAA Proceeding.

LEGAL ISSUES

5. This Statement of Law seeks to present the Court with a preliminary summary of relevant statutory and jurisprudential considerations of the following legal issues:

(a) the nature of the relationships between the corporate entities MPX, MPXI and MPX ULC and, in particular:

(i) the legal relationship between a predecessor amalgamating corporation (MPX) and the new amalgamated corporation (MPX ULC);

(ii) the legal relationship between a parent corporation (MPX) and the 'spun-out' subsidiary corporation (MPXI); and

(b) the principals of interpretation applicable to interpreting an order made under the CCAA and, in particular, in interpreting stay provisions in favour of directors and officers.

A. THE STAY OF PROCEEDINGS

6. The amended and restated initial order in the CCAA Proceeding, dated July 25, 2022 (the "**Amended & Restated Initial Order**"), imposes a stay of any proceedings against the Monitor, the applicants in the CCAA Proceeding (the "**Applicants**") and certain of the Applicant's international affiliates (together with the Applicants, the "**MPXI Entities**"), and each of their respective employees and representatives acting in such capacities, or affecting the Business or the Property, as such terms are defined in the Amended & Restated Initial Order:

> 14. **THIS COURT ORDERS** that until and including October 21, 2022, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of any MPXI Entity or the Monitor or their respective employees and representatives acting in such capacities, or affecting the Business or the Property, except with the written consent of the MPXI Entities and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of any MPXI Entity or affecting the Business or the Property, are hereby stayed and suspended pending further Order of this Court.

7. The Amended & Restated Initial Order also imposes a stay of all proceedings against the officers and directors of the MPXI Entities:

> 19. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers (or similar person) of any MPXI Entities with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of any MPXI Entity whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

8. The above stay provisions in paragraphs 14 and 19 of the Amended & Restated Initial Order, and the stays of proceedings they impose are referred to herein, collectively, as the "**Stay Language**" and the "**Stay**", respectively.

9. The Stay Language prevents the commencement or continuation of any litigation against any MPXI Entity, including MPXI, or its officers and directors until October 21, 2022. However, as MPX ULC is not an MPXI Entity, the question before this court is whether the Stay Language applies to the Individual Defendants in their capacity as directors or officers of MPX ULC or of its predecessor by amalgamation, MPX.

B. THE NATURE OF CORPORATE RELATIONSHIPS

(i) What is the legal relationship between MPX and MPX ULC?

10. Under the BCBCA, an amalgamated company remains subject to and continues to be liable for the obligations of its predecessors by amalgamation:

> 279 Amalgamating corporations are amalgamated and continue as an amalgamated company under this Division . . .
>
> . . .
>
> 282(1) At the time that amalgamating corporations are amalgamated as an amalgamated company under this Division,
>
> . . .
>
> (g) the property, rights and interests of each amalgamating corporation continue to be the property, rights and interests of the amalgamated company,
>
> (h) the amalgamated company continues to be liable for the obligations of each amalgamating corporation,
>
> (i) an existing cause of action, claim or liability to prosecution is unaffected,
>
> (j) a legal proceeding being prosecuted or pending by or against an amalgamating corporation may be prosecuted, or its prosecution may be continued, as the case may be, by or against the amalgamated company, and

(k) a conviction against, or a ruling, order or judgment in favour of or against, an amalgamating corporation may be enforced by or against the amalgamated company.

11. In *Rolin Resources Inc. v. CB Supplies Ltd.*,[3] the Supreme Court of British Columbia (the "**BCSC**") described the effect of sections 79 and 82 of the BCBCA:

> 63 . . . Pursuant to s. 282(g)-(i) of the *Business Corporations Act*, S.B.C. 2002, c. 57 (the "*BCA*"), the property, rights and interests of the amalgamating companies continue to be the property, rights and interests of the amalgamated company, the amalgamated company continues to be liable for the obligations of the amalgamating companies, and any existing cause of action, claim or liability to prosecution is unaffected by the amalgamation.
>
> . . .
>
> 153 . . . the BCA does not provide that upon amalgamation, the company is dissolved or ceases to exist; rather, s. 279 refers to the amalgamating company as "continuing". This is consistent with the statutory provisions as to the effect of the amalgamation in s. 282 of the BCA which expressly provide that the amalgamating company's rights, interests and obligations continue in the amalgamated company.

12. The effect of sections 179 and 182 of the BCBCA, as described in *Rolin Resources*, is that MPX was continued in MPX ULC, and MPX ULC continued to be liable for the obligations of MPX.

(ii) What is the legal relationship between MPX ULC and MPXI?

13. A 'spin-off' is a transaction where a parent company incorporates a new subsidiary and transfers to that subsidiary certain of the parents' assets, usually those used in a distinct business division. The parent company then dividends shares of that subsidiary to the shareholders of the parent company.

14. Although the BCBCA contains no specific reference to, or definition of, a spin-off transaction, certain features of the spinoff of MPXI from MPX were authorized by the

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[3] *Rolin Resources Inc. v. CB Supplies Ltd.*, 2018 BCSC 2018. **[*Rolin Resources*]**

arrangement provisions of section 288 of the Act:

> 288(1) Despite any other provision of this Act, a company may propose an arrangement with shareholders, creditors or other persons and may, in that arrangement, make any proposal it considers appropriate, including a proposal for one or more of the following:
>
> . . .
>
> (d) a division of the business carried on by the company;
>
> (e) a transfer of all or any part of the money, securities or other property, rights and interests of the company to another corporation in exchange for money, securities or other property, rights and interests of the other corporation;
>
> (f) a transfer of all or any part of the liabilities of the company to another corporation;
>
> (g) an exchange of securities of the company held by security holders for money, securities or other property, rights and interests of the company or for money, securities or other property, rights and interests of another corporation;
>
> . . .

15. On its face, the BCBCA does not provide for the corporate continuation of a parent in its spun-off subsidiary, in the manner in which it provides for the continuation of amalgamating corporations in the resulting amalgamated company. A parent corporation and its spun-off subsidiary thus each have the "capacity and the rights, powers and privileges of an individual of full capacity" under section 30 of the BCBCA, and thus separate legal personalities.[4]

16. The OBCA, being MPXI's governing statute, is consistent with the BCBCA on the point. Under section 15 of the OBCA, each corporation has the "capacity and the rights, powers and privileges of a natural person.[5] The effect of section 15, and the exceptions thereto, are explained by the Ontario Court of Appeal in *O'Reilly v. ClearMRI Solutions Ltd.*:

> 43 A corporation is a distinct legal entity with the powers and privileges

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[4] BCBCA, *supra* note 1, at s. 30; *Re Walter Energy Canada Holdings, Inc.*, 2017 BCSC 709, at para 131.
[5] OBCA, *supra* note 2, at s. 15.

> of a natural person: OBCA, s. 15. These powers and privileges include owning assets in its own right, carrying on its own business, and being responsible only for obligations it has itself incurred.
>
> 44 The fact that one corporation owns the shares of or is affiliated with another does not mean they have common responsibility for their debts, nor common ownership of their businesses or assets. A corporation's business and assets are not, in law, the business or assets of its parent corporation: *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, 141 O.R. (3d) 1 at paras. 57-58, leave to appeal refused, [2018] S.C.C.A. No. 255; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560 at para. 34. Similarly, a parent (shareholder) corporation is not liable, as such, for the debts and obligations of a subsidiary: OBCA, s. 9
>
> 45 The fact that corporations are related and coordinate their activities does not, in and of itself, change this paradigm. Ontario law rejects a "group enterprise theory" under which related corporations that operate closely would, by that very fact, be considered to jointly own their businesses or be liable for each other's obligations. Although the group might, from the standpoint of economics, appear as a unit or single enterprise, the legal reality of distinct corporations governs: *Meditrust Healthcare Inc. v. Shoppers Drug Mart (2002)*, 2002 CanLII 41710 (ON CA), 61 O.R. (3d) 786 (C.A.) at paras. 29-31; *Yaiguaje*, at paras. 76-77.
>
> 46 Corporate separateness has exceptions – the court may pierce the corporate veil and hold a parent corporation liable for obligations nominally incurred by a subsidiary corporation that is a mere façade:
>
> > …in order to ignore the corporate separateness principle, the court must be satisfied that: (i) there is complete control of the subsidiary, such that the subsidiary is the "mere puppet" of the parent corporation; and (ii) the subsidiary was incorporated for a fraudulent or improper purpose or used by the parent as a shell for improper activity: *Yaiguaje*, at para. 66. [Citations omitted].
>
> 47 As the test for piercing the corporate veil makes clear, control by one corporation over another, on its own, does not make the controlling corporation liable for the obligations of the controlled corporation; a fraudulent or improper purpose must also be present.[6]

17. Ninth Square is not, on the present motion, arguing for an exception to corporate separateness in the case of MPX ULC and MPXI as that would trigger application of the very Stay which Ninth Square wishes to avoid. On the other side, the Monitor would not

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[6] *O'Reilly v. ClearMRI Solutions Ltd.*, 2021 ONCA 385, at paras 43 to 47.

expect MPXI or the Individual Defendants to argue that MPXI was spun-off for a fraudulent of improper purpose. Thus, if no exception to corporate separateness applies, MPX ULC and MPXI must have separate legal personalities. The reference to the "MPXI Entities" in the Stay Language would therefore not cover MPX ULC.

18. Even as a separate legal person, MPXI could have assumed certain obligations of its parent. The Arrangement is appended to and approved by an order made on January 18, 2019 by the Honourable Justice Myers of the BCSC, a copy of which is appended to the Second Report at Appendix "E". The Arrangement provides, at subsection 2.4(e):

> MPX shall assign and transfer to SpinCo and SpinCo shall accept the SpinCo Assets, on the terms and conditions set out in the SpinCo Conveyance Agreement and as consideration therefor SpinCo shall assume the SpinCo Liabilities and issue to MPX 100 fully-paid and non-assessable SpinCo Shares and MPX and SpinCo shall file an election under section 85 of the Tax Act as specified in the Arrangement Agreement.

where "Spinco" is the name given to MPXI in the Arrangement.

19. The Spinco Liabilities which MPXI was to assume are defined the Arrangement as "all of the liabilities of SpinCo, contingent or otherwise, which pertain to or arise in connection with the operation of the SpinCo Assets". There is no explicit concept of excluded liabilities as would often appear in a CCAA asset purchase agreement.

20. The transfer of the non-US business and assets from MPX to MPXI was effected by a Conveyance Agreement dated February 5, 2019 (the "**Conveyance Agreement**"). At Section 3.1, the Conveyance Agreement states that MPXI agrees "to assume and be responsible for and thereafter honour, perform, discharge an pay as and when due, the SpinCo Liabilities". The assumption of the SpinCo Liabilities is also included, at section 2.1, as part of the consideration to be paid by MPXI. The term "SpinCo Liabilities" is not defined in the Conveyance Agreement, except, at section 1.1, by general reference to the Arrangement Agreement dated as of October 18, 2018 between, among others, MPXI and MXP ULC's predecessors (the "**Arrangement Agreement**"). The definition in the Arrangement Agreement is the same as in the Arrangement: "all of the liabilities of SpinCo, contingent or otherwise, which pertain to or arise in connection with the operation of the

SpinCo Assets".

21. As in the Arrangement, there is there is no explicit concept of excluded liabilities in either the Conveyance Agreement or the Arrangement Agreement.

B. INTERPRETATION OF CCAA ORDERS

22. In *Re Afton Food Group Ltd.*,[7] this Honourable Court held that, when interpreting an order made pursuant to the CCAA, the Court should look first to the plain meaning of the Order, and only adopt a liberal interpretation and consider the purpose of the CCAA if there is ambiguity or a gap or omission:

> In applying these principles to the issues before me, I conclude that it is only if a provision of the CCAA Order is ambiguous or there is a gap or omission, that the Court should adopt a liberal interpretation and consider the purpose of the CCAA, attempt to balance the interests of the parties and consider what would be a commercially reasonable interpretation of the order. In the first instance, I should assume that the parties carefully drafted the terms of the CCAA Order and to the extent that the order is clear and unambiguous, I should interpret the order in accordance with its plain meaning and not engage in a "broad judicial interpretation". In doing so I am entitled to assume that the terms of the CCAA Order reflect the agreement negotiated between the parties, within the legal parameters that the court will impose, and that the agreement was codified in the order approved by the court.[8] [*emphasis added*]

23. Below are excerpts from the blackline of the Applicants' proposed form of initial Order against the Commercial List's Model CCAA Order, which was included at Tab 4 of the Applicants' Notice of Application. These excerpts show how closely the Stay Language tracks the language of the Model Order stay provisions.

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[7] *Re Afton Food Group Ltd.*, 21 CBR (5th) 102, 18 BLR (4th) 34, 2006 CanLII 16365.
[8] *Ibid*, at para. 23.

NO PROCEEDINGS AGAINST THE ~~APPLICANT~~MPXI ENTITIES OR ~~THE~~THEIR RESPECTIVE PROPERTY

11. ~~14.~~ **THIS COURT ORDERS** that until and including ~~[DATE – MAX. 30 DAYS]~~**August 4, 2022**, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of ~~the Applicant~~**any MPXI Entity** or the Monitor **or their respective employees and representatives acting in such capacities**, or affecting the Business or the Property, except with the written consent of the ~~Applicant~~**MPXI Entities** and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of ~~the Applicant~~**any MPXI Entity** or affecting the Business or the Property, are hereby stayed and suspended pending further Order of this Court.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

16. ~~19.~~ **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers ~~of the Applicant~~**(or similar position) of any MPXI Entity** with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of ~~the Applicant~~**an MPXI Entity** whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicant**s**, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicant**s** or this Court.

24. The substantive change in the fifth line of the first paragraph above (which would become paragraph 14 in the Amended & Restated Initial Order) creates some overlap with second paragraph (which would become paragraph 19). The only further change to these Stay Provisions in paragraphs 14 and 19 of the Amended & Restated Initial Order was a change of the date in the definition of "Stay Period" from August 4, 2022 to October 21, 2022.

25. One point to note about the Stay Language at paragraph 19 of the Amended & Restated Initial Order (equivalent to paragraph 16 in the above blackline excerpt) is that it covers "any claim against the directors or officers . . . that relates to any obligations of an MPXI Entity". Since all of the defendants in the Ninth Square Litigation, which includes MPXI and the Individual Defendants, are asserted to be liable for the same alleged damages, Ninth Square's claim against the directors and officers of MPXI does relate to an obligation of

an MPXI Entity. On a plain reading of paragraph 19, the Stay Language likely is sufficient to bring the Ninth Square Litigation within the scope of the Stay.

26. If this Court finds the Stay Language of paragraphs 14 and/or 19 of the Amended & Restated Initial Order to be ambiguous or finds a gap or omission therein, it can look both to the purpose of the CCAA in general and, more specifically, the purpose of the section 11.03 provision for stays in favour of directors and officers.

27. In *Century Services Inc. v. Canada (Attorney General)*, the Supreme Court of Canada described the purpose of the CCAA as being to "permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.[9] In *Re Nortel Networks Corp.*, the Ontario Court of Appeal described the purpose of the CCAA as being "to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, to the end that the company is able to continue in business" and stated that the power to stay proceedings under section 11 of the CCAA was the primary instrument provided to achieve this purpose.[10]

28. *Century Services* and *Nortel* were both decided in proceedings to which the amendments to the CCAA which came in force in September, 2009 did not yet apply. Among the 2009 amendments was the new section 36, which allows a CCAA company to sell assets outside of the ordinary course of business. How this amendment affected the overall purpose of the CCAA is relevant insofar as the Applicants have chosen to conduct a sale and investment solicitation process aimed at an eventual section 36 sale or sales.

29. Since the 2009 amendments, Courts now sometimes speak of the purpose of the CCAA in more general terms. In his majority SCC decision in *Canada v. Canada North Group Inc.*, Justice Côté described the purpose of the CCAA as being simply "to avoid bankruptcy and maximize value for all stakeholders".[11] In *Re Clothing for Modern Times Ltd.*, Justice Brown, as he then was, explained how pursuit of a going concern sale can serve the purpose of the CCAA as set out in *Century Services*, even if it is only the business but not the

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[9] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, at para 15. **[*Century Services*]**
[10] *Re Nortel Networks Corporation*, 2009 ONCA 833, at para. 16. **[*Nortel*]**
[11] *Canada v. Canada North Group Inc.*, 2021 SCC 3, at paragraph 1.

CCAA company that carries on:

> . . . a continuation under the CCAA to enable a going-concern sale of the Costa Blanca business and assets would be consistent with the purposes of the CCAA. Such a sale likely would maximize the recovery for the two remaining secured creditors, CIC and CMT Sourcing, preserve employment for many of the 500 remaining employees, and provide a tenant to the landlords of the 35 remaining Costa Blanca stores. Avoidance of the social and economic losses which would result from a liquidation and the maximization of value would best be achieved outside of a bankruptcy.[12]

30. In *Credit Suisse AG v. Great Basin Gold Ltd.*, the BCSC described the purpose of stays in favour of directors and officers under section 11.03 of the CCAA as consistent with the objective of furthering a CCAA company's restructuring efforts by: (i) inducing management to remain involved in the ongoing restructuring, which is benefitted by their knowledge and expertise; and (ii) avoiding the allocation of time and resources to actions against directors and officers of the restructuring debtor.[13] In his decision accompanying the Amended & Restated Initial Order, Chief Justice Morawetz also pointed to retention of management as the purpose of a CCAA section 11.03 director's charge.[14]

C. SUMMARY

31. To summarize:

(a) MPXI and MPX ULC have separate legal personalities, MPXI is not automatically liable for the obligations of MPX ULC or its predecessor MPX and the reference to the "MPXI Entities" in the Stay Language does not cover MPX ULC;

(b) the Arrangement and the various agreements by which it was consummated are inconclusive in determining what obligations MPXI contractually assumed in the roll out from its parent (and MPX ULC's predecessor by amalgamation, MPX) and thus unhelpful in determining if any liabilities pursued in the Ninth Square Litigation were assumed by MPXI; and

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[12] *Re Clothing for Modern Times Ltd.*, 2011 ONSC 7522 [Commercial List], at para. 13.
[13] *Credit Suisse AG v. Great Basin Gold Ltd.*, 2015 BCSC 1199 at para 32. **[*Great Basin Gold*]**
[14] *MPX International Corporation*, 2022 ONSC 4348, at para 66.

(c) because the Ninth Square Litigation names MPXI as a defendant, with the same liabilities as Individual Defendants, the Ninth Square Litigation is a claim relating to obligations of a MPXI Entity, and thus is subject to the Stay in favour of directors and officers.

32. The above is submitted to this Honourable Court to assist in a determination of the Ninth Square motion for a declaration that the Stay is inapplicable to the Individual Defendants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of September, 2022.

Aird & Berlis LLP

AIRD & BERLIS LLP

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 MPX INTERNATIONAL CORPORATION, BIOCANNABIS PRODUCTS LTD., CANVEDA INC., THE CING-X CORPORATION, SPARTAN WELLNESS CORPORATION, MPXI ALBERTA CORPORATION, MCLN INC., AND SALUS BIOPHARMA CORPORATION

Court File No.: CV-22-00684542-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

STATEMENT OF LAW

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Lawyers for the Monitor

Court File No.: CV-22-00684542-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MPX INTERNATIONAL CORPORATION, BIOCANNABIS PRODUCTS LTD., CANVEDA INC, THE CING-X CORPORATION, SPARTAN WELLNESS CORPORATION, MPXI ALBERTA CORPORATION, MCLN INC., AND SALUS BIOPHARMA CORPORATION

BOOK OF AUTHORITIES OF THE MONITOR

September 20, 2022

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Counsel to KSV Restructuring Inc. in its capacity as Court-Appointed Monitor of the Applicants

TO: **SERVICE LIST**

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TAB 1

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rolin Resources Inc. v. CB Supplies Ltd.,* 2018 BCSC 2018

Date: 20181116
Docket: S166496
Registry: Vancouver

Between:

Rolin Resources Inc.
Dakirs Investments Inc.

Plaintiffs

And

CB Supplies Ltd.

Defendant

And

Dakirs Investments Inc.

Defendant by Counterclaim

And

Freidoun Alagheband

Third Party

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Plaintiffs, Defendant by Counterclaim and Third Party:	R. Hira, Q.C. K. Bienvenu
Counsel for the Defendant:	M. A. Davis S. M. Green
Place and Date of Summary Trial:	Vancouver, B.C. June 27-29, 2018
Place and Date of Judgment:	Vancouver, B.C. November 16, 2018

INTRODUCTION

[1] This is a cost recovery action by which the plaintiffs seek to recover approximately $500,000, being the costs of the environmental cleanup of its contaminated property. Some years ago, the defendant CB Supplies Ltd. was conducting business operations on the site.

[2] The matter is complicated by a number of circumstances, including: the history and nature of CB Supplies Ltd.'s operations in terms of proving the contamination and who caused it; the ownership history of the site; and the corporate ownership of CB Supplies Ltd.

[3] The ownership of CB Supplies Ltd. changed some years ago such that the individuals who directed and benefitted from its previous business operations are no longer involved with the company. The new shareholders have no connection to the activities that are said to have caused some or all of the contamination. Things are further complicated by the fact that one of the previous shareholders of CB Supplies Ltd. is now the driving force behind the corporate plaintiffs who are seeking recovery.

[4] CB Supplies Ltd. raises a number of issues in defence of the action and says that the action should be dismissed. CB Supplies Ltd. has filed a counterclaim against one of the plaintiffs by which it seeks indemnity for any amounts to be paid. Alternatively, it says that the third party, Freidoun Alagheband, should be held solely responsible for any cleanup costs relating to the contamination.

[5] All parties have brought competing applications to determine this matter by summary trial and all parties are adamant that it is suitable for summary trial.

BACKGROUND FACTS

[6] The following are my findings of fact, unless otherwise indicated.

a) The Parties

[7] The plaintiffs Rolin Resources Inc. (“Rolin”) and Dakirs Investments Inc. (“Dakirs”) are B.C. companies incorporated in January and March 1989 respectively.

[8] The defendant CB Supplies Ltd. (“CB1”) was a B.C. company incorporated in November 1962. Seymour Industries Ltd. (“Seymour”) was a B.C. company incorporated in November 1965.

[9] On January 1, 2013, CB1, Seymour and other companies in the operating group amalgamated. The new amalgamated company also became known as CB Supplies Ltd. (”CB2”). The amalgamation also included another company which was part of the group, Vanguard Pipe & Fittings Ltd. (“Vanguard”),

[10] Accordingly, CB2 (i.e., the named defendant) is the successor company to CB1, Seymour, Vanguard and the other companies.

[11] The individuals involved in this action are: the third party Freidoun Alagheband (“Fred”); Saiid Assefi (“Sid”); Reza (Ray) Nassiri Tousi (“Ray”) and Flory Renko (“Flory”). As the parties have referred to these persons by their first name in their submissions, I will do so in these reasons, meaning no disrespect.

b) History of the Site (1971-1990)

[12] The subject property is located at 4641 Byrne Road in Burnaby, B.C. (the “Property”).

[13] Prior to 1971, the Property was a residential area with no previous industrial or business use likely to cause contamination.

[14] From 1971 to June 1989, CB1 and Seymour leased the Property and they operated an integrated metal foundry and machine shop on the premises. The individuals or entities that owned the Property or who were involved in CB1 and Seymour’s operations during this time are not involved in this litigation.

[15] In June 1989, Rolin (Fred's company), together with other individuals and other corporations, formed a joint venture to acquire the Property (the "Joint Venture"). The Joint Venture was a vehicle for this investment, which was to be largely held by the Alagheband and Assefi families. For administrative purposes, legal title to the Property was registered in the name of Dakirs in trust for the benefit of the members of the Joint Venture.

[16] At the same time, the Joint Venture acquired the shares in CB1 and Seymour. The prominent individuals involved in the Joint Venture, either as shareholders, directors, officers or managers of CB1 and Seymour's management and operations, were Fred and Sid. Fred lived in the Lower Mainland and ran the day-to-day operations, working out of the Property on a daily basis. Sid lived in Ontario and did not handle the day-to-day management of the companies.

[17] For a few months following the acquisition, Fred ran the foundry operations. Fred and Sid later decided to stop CB1 and Seymour's foundry and machine shop business operations on the Property, considering it to be obsolete. Accordingly, no foundry operations took place on the Property after that time. CB1 and Seymour continued to occupy the Property.

[18] In 1990, the foundry equipment in the building was removed. In addition, three pits in the building on the Property, which were required for the foundry operations (namely, the furnace, moulding and conveyor pits), were backfilled to grade and covered with concrete. This process was undertaken on the recommendation of, and done by employees of, CB1 and Seymour.

[19] Both Fred and Sid knew and approved of work being performed in relation to the building and specifically, the foundry pits, as part of the decommissioning of the foundry. Fred supervised these operations and approved of the specifics of the work performed. Sid, who continued to live out east, did not participate in the decision as to specifically how the decommissioning would be accomplished nor did he direct how it would be done.

[20] As I will also discuss below, the theory advanced by Rolin and Dakirs is that the Property became contaminated by reason of the placement of contaminated foundry sands into some or all of the pits before they were covered with concrete and the later leaching of contaminants from these pits into the surrounding areas of the Property.

[21] After this decommissioning work was done in 1990, CB1 and Seymour continued operating their businesses from the Property, using it for warehousing activities. There is no suggestion by any party that those continued operations caused or contributed to any contamination.

c) Early Contamination Concerns (2003-2009)

[22] In 2003, the operating companies in the group, including CB1 and Seymour, were seeking new financing. The lender required that an environmental assessment be completed.

[23] In 2003, D. Kelly Environmental Consulting Ltd ("D. Kelly"), an environmental engineering company, performed the first environmental assessment of the Property.

[24] On December 12, 2003, D. Kelly issued its report entitled "Stage 2 Preliminary Site Investigation". The firm investigated the Property, completing various boreholes and testing soil and groundwater at various locations around the building. D. Kelly discovered the presence of metal contaminants in the soil, generally limited to the area at the north end of the Property. There was no investigation relating to the former foundry pits located inside the building.

[25] In the executive summary of its Stage 2 report, D. Kelly stated:

> Elevated metals in soils in the identified areas on the north end of the property could be addressed by selective excavation and removal of the material for remediation at a licensed facility.
>
> In our opinion remediation of groundwater on the property would not be warranted …

[26] In December 2003, Dakirs paid $6,211.35 to D. Kelly for a supplementary report to the Stage 2 preliminary site investigation. Fred states that this invoice was in addition to prior invoices issued by D. Kelly for their earlier reports and paid by Dakirs amounting to approximately $18,000.00, although there is no documentary evidence to support payment of this amount.

[27] In August 2004, Dakirs paid Sumas Remediation Services Ltd. (“Sumas Remediation”) $12,000.00 to remove the contaminated soil located north of the building on the Property.

[28] By 2005, the other Joint Venture partners had sold their interests in Dakirs and CB1, leaving the Alagheband and Assefi families (directed by Fred and Sid) with ownership and control of the business operations and the Property.

[29] In 2009, the issue of possible contamination of the Property arose again when the operating companies, including CB1 and Seymour, needed further financing. The lender required an environmental report.

[30] In 2009, Pottinger Gaherty Environmental Consultants Ltd. (“PGL”) was retained to assess the Property. PGL concluded that the remediation process performed by Sumas Remediation in 2004 had been properly completed. Dakirs paid $16,855.48 for this work.

[31] To this point in time, Dakirs and Rolin had not received notice from any governmental authority that the Property did not comply with environmental laws.

d) Sale of Shares of CB1 and Seymour (2010-2011)

[32] In early 2010, Monarch-McLaren (1981) Inc. (“Monarch”) expressed an interest in purchasing shares in the operating companies in the group, including CB1 and Seymour. In early April 2011, Monarch presented a written proposal to purchase the shares for $7 million.

[33] The shareholders of Monarch are members of the Lowe family.

[34] On April 21, 2011, Howard Rubinoff, Monarch's lawyer, sent an email to CB1 and Seymour's lawyer, John Morgan. Amongst other things, Mr. Rubinoff's email included a "Due Diligence Checklist" by which CB1 and Seymour were to disclose, among other things, "known environmental risks relating to the business" and provide copies of any reports by environmental consultants in respect of the Property.

[35] Fred states that he was not satisfied with the Monarch offer.

[36] At that time, the Alagheband and Assefi families (represented by Fred and Sid) each held 46.5% of the shareholdings in the Joint Venture. Ray held 7%. One document governing their relationship was a shareholder's agreement dated November 15, 2010 (the "Shareholders Agreement").

[37] On April 28, 2011, Fred exercised the "shotgun" provision in Article 4 of the Shareholders Agreement and offered to purchase the outstanding shares of the operating companies (including CB1, Seymour and Vanguard) from Sid for $3 million. This offer essentially pegged the enterprise value at $6 million. Not surprisingly, Sid considered that Fred, in making this offer, intended to solely benefit from the $1 million upside that could be obtained by a later sale of the operating companies to Monarch at $7 million.

[38] Fred's offer included a provision that mutual releases would be exchanged in the transaction as between the offerors and offerees, meaning in part that, if Sid accepted the offer, the operating companies would provide a full release to Sid.

[39] On June 24, 2011, in accordance with the Shareholders Agreement, Sid reversed the shotgun offer and agreed to purchase Fred's interest in the operating companies on the same terms and conditions set out in Fred's April 28, 2011 offer. Given that both offers had mirrored provisions, in doing so, Sid therefore also agreed that mutual releases would be provided, meaning that Fred would be released by the operating companies (including CB1) upon transfer of Fred's shares to Sid.

[40] On July 27, 2011, Sid's offer to purchase Fred's shares closed by which Fred received $3 million and he transferred his shares to Sid. Fred also resigned his positions with CB1 and Seymour. As part of the closing, the operating companies (including CB1 and Seymour) provided a general release to Fred on that date, by which they released him from any and all actions, causes of action and claims that they had or may have against him.

[41] After the closing, CB1 and Seymour, now owned by Sid, continued to occupy the Property. By that time, there was also a formal lease agreement between Vanguard and Dakirs relating to use of the Property, as I will discuss in more detail below.

[42] Sid continued to maintain an ownership interest in the Property through Dakirs.

e) Contamination is "Found" (August 2011-2017)

[43] In August 2011, immediately after Sid's purchase of his shares, Fred took certain actions on behalf of Rolin/Dakirs suggesting that the Property was contaminated and that CB1 and Seymour were responsible for the cost of remediation.

[44] In particular, on August 23, 2011, within a few weeks of the closing, Fred's lawyers sent a letter to CB1 and Seymour's lawyers about the "environmental issue" relating to the Property. The lawyer asserted that, even though the prior investigations had not revealed any problems, both clients (i.e., Fred and Sid) had, since 2003, a "mutual view" that the area under the building was contaminated. This was the area where the foundry pits were located that had been filled and covered in early 1990. In the letter, it was suggested that CB1 and Seymour would have "primary responsibility in law for any investigation and remediation" of the Property.

[45] The timing and content of this letter raise many issues.

[46] It is clear from this letter, and confirmed later in his evidence, that Fred thought that Monarch's purchase of Sid's shares in CB1 had still not occurred. The letter suggests to CB1 and Seymour that any potential purchaser would have to be told of the contamination, referring no doubt to Fred's understanding that Sid intended to proceed to a sale of his shares in CB1 and Seymour to Monarch after having exercised the shotgun to acquire Fred's shares.

[47] Fred was partly wrong. In late July 2011, shortly after Sid closed the shotgun transaction and before Fred's lawyer's letter was received by Sid, Monarch closed its purchase of Fred's shares in CB1 and Seymour which had been acquired by Sid under the shotgun transaction. In fact, Monarch was well aware of and assisted Sid in that shotgun transaction, since Sid obtained financing from Monarch in order to pay the $3 million to Fred for those shares pursuant to a loan agreement between Monarch and Sid dated June 20, 2011.

[48] Fred was not aware that Monarch was financing Sid's shotgun offer.

[49] There is no indication in the documents produced as to any representations being made by Sid to Monarch/the Lowes concerning environmental matters, prior to entering into the above agreements by which Monarch would loan $3 million for Sid to acquire Fred's shares and by which Monarch would later acquire those same shares. Sid denies that he made any representations concerning environmental matters, either in documents or otherwise.

[50] In any event, and despite the plaintiffs' arguments otherwise, the extent of disclosure in relation to Monarch and the Lowe's due diligence with respect to environmental matters is not particularly relevant to a determination of the issues. Nor am I able to draw any adverse inferences about the extent of that disclosure in these circumstances.

[51] Sid states that, at the time of the 2011 transactions, he had no knowledge of any contamination in the Property and that CB1 was responsible for that contamination. He says that Rolin/Dakirs/Fred's lawyers' August 2011 letter was the

first indication of any such issue. Sid further states that at no time before that date did Fred ever disclose to him that Fred "suspected" or knew that there was environmental contamination under the building on the Property.

[52] Similarly, John Lowe, and his son Warren Lowe, members of the Lowe family, state that prior to the June/July 2011 transactions, there had been no indication of any environmental concerns relating to the Property either from Sid or Fred. In deciding to proceed to purchase the shares, and as part of Monarch's due diligence, the Lowes reviewed various loan agreements executed by CB1 and also, Vanguard's lease with Dakirs.

[53] CB2 also alleges that on or about August 11, 2011, Fred undertook certain actions even before the August 23, 2011 letter was sent that indicates that he was well aware that the Property was contaminated by reason of the foundry operations and the filling of the pits.

[54] Ray, one of CB1's employees since 1998, states that one or two weeks after Sid bought Fred's shares, he received a call from Fred. He states that Fred asked him to deliver a message to Sid to the effect that, if Sid wanted to close a later share sale "without trouble", Sid should pay Rolin $500,000. Fred does not dispute the allegations concerning his discussions with Ray. Sid considered that this "offer" was intended to compensate Fred for what otherwise might have been his half of the upside in accepting Monarch's offer at $7 million.

[55] Warren Lowe also refers to a telephone discussion he had with Fred on August 11, 2011. He states that Fred made a "veiled threat" that he "should be careful with what you are doing" which Mr. Lowe as meaning in relation to Monarch's acquisition of Sid's shares in CB1 and Seymour. Mr. Lowe did not disclose his then existing agreements with Sid. He advised Sid of the call and dismissed Fred's statements as a "scare tactic". Fred acknowledges having called Warren Lowe on August 11, 2011 and Mr. Lowe's recollection of what was said by Fred to him.

[56] Sid has also produced an email dated August 12, 2011 from John Morgan, CB1's lawyer, in which Mr. Morgan states that Fred called him that day to "elicit proposals" or "suggestions" for remediation of the Property. This evidence, adduced for the truth of what was said during that discussion, is not admissible on this summary trial.

[57] In February 2012, Sid and Fred agreed that Rolin would retain an environmental consultant, Keystone Environmental Ltd. ("Keystone"), to determine whether contaminants continued to be present at the Property. The intention was to obtain a Certificate of Compliance from the Ministry of Environment under the relevant environmental legislation.

[58] In March 2012, Monarch purchased the remaining shares held by Sid and Ray in the operating companies, including CB1 and Seymour. By this time, the fact that environmental issues existed was known to everyone, including Sid and the Lowes/Monarch. Sid states that by this time, even with this knowledge, Monarch had "no choice" but to purchase his remaining shares.

[59] As a result, as of March 2012, Monarch became the sole shareholder of the operating companies. Sid's only involvement after that time was his continued ownership with Fred in the Property, through Dakirs.

[60] In June 2012, Keystone provided a Phase I Environmental Site Assessment.

[61] In October 2012, Keystone provided a Phase II Environmental Site Assessment. The cost of this report and the earlier report was $29,033.83, which Rolin paid.

[62] The Phase I and Phase II Environmental Site Assessments determined that the former foundry pits located beneath the building floor were not remediated during Sumas Remediation's work in 2004 and that the Property remained contaminated. In particular, copper, zinc, antimony, lead and tin associated with the former foundry operations were identified as existing at concentrations greater than permitted standards.

[63] In January 2013, CB1, Seymour, Vanguard and the other operating companies amalgamated into CB2. Pursuant to s. 282(g)-(i) of the *Business Corporations Act*, S.B.C. 2002, c. 57 (the "*BCA*"), the property, rights and interests of the amalgamating companies continue to be the property, rights and interests of the amalgamated company, the amalgamated company continues to be liable for the obligations of the amalgamating companies, and any existing cause of action, claim or liability to prosecution is unaffected by the amalgamation.

[64] Accordingly, it is agreed that, if CB1 and/or Seymour had any liabilities prior to the amalgamation, they now continue with CB2.

[65] In May 2013, Sid accepted an offer to sell his and his family's shares in Dakirs to Fred. By that time, the environmental issues had come to the fore and they were factored into the purchase price. Since then, Sid has had no involvement in the Property. As part of those transactions, Sid received a release in respect of any claims under the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*EMA*").

[66] Accordingly, as of June 2013, Rolin became the sole beneficial owner of the Property and Rolin held all of the outstanding shares in Dakirs. Dakirs continued to hold legal title to the Property in trust for Rolin. Both Rolin and Dakirs were then controlled by Fred or other Alagheband family members.

[67] In October 2015, Keystone provided an updated work plan and budget for environmental services necessary to secure a Certificate of Compliance based on Keystone's earlier work which had identified metal contaminants present in the soil and groundwater beneath the building's floor on the Property.

[68] On January 1, 2016, CB2 vacated the Property when the lease with Vanguard ended. This left Rolin/Dakirs in a position to proceed with the remediation of the Property toward obtaining a Certificate of Compliance from the B.C. Ministry of Environment. Rolin arranged for the following:

a) Between March 2016 and December 2016, Tervita Corporation ("Tervita") performed certain work on the Property including removal of

hazardous and contaminated material for which it was paid $76,544.36; and

b) Between May 2015 and October 2017, Keystone performed certain assessments and directed remediation work on the Property, including the activities of Tervita, for which it was paid $230,623.10.

[69] In September 2017, Keystone prepared a report updating the site investigation and providing confirmation of the remediation work done. Keystone confirmed that soil and waste soils associated with the foundry pits had been excavated after having identified the presence of copper, zinc, antimony, tin and/or lead in the sands within the pits. Keystone also indicated that dissolved copper and zinc found in groundwater could be associated with either fill from the pits or from an off-site source but that, after the removal of the soils, those levels had stabilized or decreased.

[70] In October 2017, on behalf of the plaintiffs, Keystone applied for a Certificate of Compliance. At that time, Rolin paid $22,050.00 in fees to Keystone for that purpose.

[71] On January 22, 2018, the Ministry of Environment issued a Certificate of Compliance to Rolin stating that the Property had been satisfactorily remediated to meet the applicable remediation standards.

[72] Rolin/Dakirs also asserts that due to the remediation work being undertaken on the Property in 2016, they were unable to rent the Property for certain months, resulting in a loss of $97,300.00.

[73] Accordingly, the total remediation costs claimed by Rolin and Dakirs and for which they seek judgment against CB2 is $508,618.12, calculated as follows:

Dakirs	
D. Kelly (2003 Stage 1 Site Investigation)	$18,000.00
D. Kelly (2003 Stage 2 Site Investigation)	$ 6,211.35
Sumas Remediation (2004 soil removal)	$12,000.00
PGL (2009 remediation assessment)	$16,855.48

Dakirs Paid	**$53,066.83**
Rolin	
Keystone (2012 Phase I and II assessments)	$29,033.83
Keystone (2015-2017 remediation)	$230,623.10
Tervita (2016 materials removal)	$76,544.36
Certificate of Compliance (2017)	$22,050.00
Rolin Paid	**$358,251.29**
SUBTOTAL Remediation Costs	**$411,318.12**
Rolin/Dakirs - Loss of rental revenue (2016)	$97,300.00
TOTAL	**$508,618.12**

SUMMARY TRIAL

[74] This application was an example of a dilemma that commonly arises when a summary trial is scheduled close in time to when the actual trial is scheduled.

[75] This application was heard over three days in late June 2018. At that time, the trial was also scheduled for 10 days commencing August 20, 2018, or only six weeks later.

[76] As the summary trial progressed, it became apparent that there were some issues which would normally convince the presiding judge (if not the parties) that a summary trial was not appropriate. These included issues of credibility concerning the evidence of the principal actors involved, being Fred and Sid. They also included issues as to the competing expert reports. The resolution of both issues by a presiding judge would normally have been greatly assisted by hearing the *viva voce* testimony of Fred, Sid and the experts.

[77] In the face of those matters, during argument, I raised the issue with the parties. In particular, I advised them that, despite their agreement that the matter was suitable and appropriate to be resolved by summary trial, I may take a different view based on my later review of the evidence and the issues. After such a review and consideration of the evidence, it was possible that I could conclude that I was unable to find the necessary facts to decide the issues or that it was unjust to decide the issues by summary trial: *Supreme Court Civil Rules*, Rule 9-7(15)(a).

[78] On a more practical note, I advised the parties that it was a virtual certainty that my reasons concerning the suitability of a summary trial would not be delivered within a few weeks, since I would have to undertake a detailed review of the extensive materials provided to me. As such, it was apparent that any negative conclusion on the appropriateness of a summary trial would result in the parties losing the trial dates in late August 2018 and losing the timelier and summary result they had hoped for. In other words, the dilemma for the parties was to choose to proceed with the summary trial or simply leave the matter to be decided at trial in August.

[79] Despite the Court voicing these concerns, the parties remained adamant throughout the summary trial that it was appropriate to proceed in this manner and that they were agreeable to a decision on the issues in this fashion even with the evidentiary issues. However, the parties asked that I provide my conclusion as to the suitability of the summary trial at the conclusion of argument, so that they could consider whether simply to proceed to trial in August.

[80] Accordingly, at the conclusion of argument, I indicated to the parties that I was satisfied that a summary trial was appropriate in the circumstances. At that time, all parties reaffirmed their strong desire that I proceed in this fashion, knowing that the August trial dates were to be cancelled. I have no doubt that the parties see this three day summary trial as the most economical and timely manner to resolve this dispute, as it avoids the substantial costs of a 10 day trial.

STATUTORY SCHEME

[81] There is no dispute as to the applicable statutory scheme and its purpose and effect. This cost recovery action is governed by Division 3 of Part 4 of the *EMA* and the *Contaminated Sites Regulations,* B.C. Reg. 375/96 (the "*CSR*"). The *EMA* came into force in 2004, having replaced the earlier environmental legislation in force since 1997, being the *Waste Management Act*, R.S.B.C. 1996, c. 482.

[82] Section 47 of the *EMA* sets out the general principles of liability for remediation of contaminated sites. Section 47(1) states that "responsible persons",

namely those who are responsible for remediation of a contaminated site, are "absolutely, retroactively, and jointly and separately liable to any person" for "reasonably incurred costs of remediation of the contaminated site".

[83] Section 45 of the *EMA* identifies who are potentially "responsible persons", based on the definitions set out in s. 39 of the *EMA*. Those relevant to this action include:

a) A current "owner" or "operator" of the site, being a person who is in possession, has the right of control or occupies or controls the use of the site (s. 45(1)(a));

b) A previous "operator" of the site, an operator being a person who is or was in control of or responsible for any operation located on a contaminated site (s. 45(1)(b));

c) A person who produced a "substance" and by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or part, caused the site to become a contaminated site ("substance" is not defined in the *EMA* but referenced in s. 11 of the *CSR*) (s. 45(1)(c)(i) and(ii)); and

d) Directors, officers, employees or agents are included within the expansive definition of "person" (s. 39(1)). Section 35(4) of the *CSR* also provides that for such a person to be liable in an action under s. 47(5) of the *EMA*, the plaintiff must prove that the director, officer, employee or agent "authorized, permitted or acquiesced in the activity which gave rise to the cost of remediation".

[84] Section 46 of the *EMA*, informed by ss. 19-33 of the *CSR*, sets out exemptions for someone who might otherwise be considered a responsible person. No issue in that respect arises in this trial.

[85] The foundational principle underlying the *EMA* is the "polluter pays". The statutory objective is to require polluters to pay the cost of contamination cleanup, even if their polluting activities had not been prohibited or had been authorized at the

time that they occurred: see *J.I. Properties Inc. v. PPG Architectural Coatings Canada Inc.*, 2015 BCCA 472 at paras. 29-32.

[86] Until such time as a certificate of compliance is issued under s. 53(3) of the *EMA*, a "responsible person" remains absolutely, retroactively, and severally liable for the cost remediation: *J.I. Properties* at paras. 47-50.

[87] A recovery action, such as this one, is specifically authorized by s. 47(5) of the *EMA*. At para. 42 of *Dolinsky v. Wingfield,* 2015 BCSC 238, this Court articulated that in a cost recovery action the plaintiff must first establish that:

> The property is a "contaminated site" as defined in s. 39 of the *EMA* (see *EMA*, s. 47(8));
>
> a) The defendant is a "responsible person" under s. 45 of the *EMA* (see *EMA*, s. 47(9)(a)); and
>
> b) The plaintiff has incurred reasonable "costs of remediation" as defined in s. 47(3) of the *EMA* (see *EMA*, s. 47(9)(b)).

[88] Once the plaintiff establishes the above facts, the onus shifts to the defendant. Liability will be imposed upon the defendant unless it can prove that it meets all the elements of a statutory exemption under s. 46 of the *EMA*, i.e., that it is not a "responsible person": *Dolinsky* at para. 43.

[89] A defendant may respond to a costs recovery action in ways beyond proving that it is not a "responsible person" under the *EMA*.

[90] Firstly, even if a person is a "responsible person", s. 35(1) of the *CSR* provides that other defences or counterclaims, whether legal or equitable, may be asserted in respect of determining the compensation payable:

> 35 (1) For the purposes of determining compensation payable under section 47 (5) of the Act, a defendant named in a cost recovery action under that section may assert all legal and equitable defences, including any right to obtain relief under an agreement, other legislation or the common law.

[91] Secondly, a defendant may claim contribution from other "responsible persons". Section 35(3) of the *CSR* provides:

> (3) For the purpose of section 47 of the Act, any compensation payable by a defendant in an action under section 47 (5) of the Act is a reasonably incurred cost of remediation for that responsible person and the defendant may seek contribution from any other responsible person in accordance with the procedures under section 4 of the *Negligence Act*.

[92] Here, CB2 asserts that Rolin and Dakirs are also "responsible persons". In addition, in its third party action, CB2 asserts that Fred is a "responsible person". On that basis, CB2 seeks contribution from them in respect of payment of the remediation costs.

[93] Accordingly, within the statutory scheme, it is necessary to identify all "responsible persons", whether they are the defendant, the plaintiff or any other person.

[94] In response, Rolin/Dakirs assert that, if they are also "responsible persons", they are "minor contributors". Minor contributors are relieved of the joint and several liability and their liability will be limited to the amount allocated to them: *EMA*, s. 50.

[95] Thirdly, even if the plaintiff succeeds in proving that some or all of the defendants are "responsible persons", the regulatory scheme allows for another separate but distinct process, namely a discretionary apportionment of the cleanup costs by the court among the "responsible persons": *J.I. Properties* at paras. 39-40, 61. The allocation issue is an important one in this case.

[96] The allocation provisions are found in s. 47(9)(c) and (d) of the *EMA* and provide the Court with authority to come to a "fair and just" allocation:

> 47**.** (9) The court may determine in accordance with the regulations, unless otherwise determined or established under this Part, any of the following:
>
> …
>
> (c) the apportionment of the reasonably incurred costs of remediation of a contaminated site among one or more responsible persons in accordance with the principles of liability set out in this Part;
>
> (d) such other determinations as are necessary to a fair and just disposition of these matters.

[97] Section 35(2) of the *CSR* governs the exercise of this allocation discretion*:*

> 35 (2) In an action between 2 or more responsible persons under section 47 (5) of the Act, the following factors must be considered when determining the reasonably incurred costs of remediation:
>
> (a) the price paid for the property by the person seeking cost recovery;
>
> (b) the relative due diligence of the responsible persons involved in the action;
>
> (c) the amount of contaminating substances and the toxicity attributable to the persons involved in the action;
>
> (d) the relative degree of involvement, by each of the persons in the action, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated;
>
> (e) any remediation measures implemented and paid for by each of the persons in the action;
>
> (f) other factors relevant to a fair and just allocation.

[98] Fourthly, a defendant in a costs recovery action may assert causes of action against persons other than those arising under the *EMA*.

[99] Here, CB2 has filed a counterclaim against Dakirs claiming indemnity based on the lease with Vanguard.

[100] In addition, CB2's third party action against Fred claims damages against him on the basis of negligence, negligent or fraudulent misrepresentation, and breach of the duty of good faith.

[101] Fred asserts that the general release given to him by CB1 in 2011 as part of the shotgun share transaction is a complete answer to all of CB2's allegations against him in this action.

ISSUES

[102] The issues for determination are as follows:

a) Is the Property a "contaminated site"?

b) Who are the "responsible persons"?

c) Are Rolin, Dakirs and Fred "minor contributors"?

d) Is the cause of action statute barred?
e) Are the costs claimed “reasonable”?
f) How should the cleanup costs be allocated?
g) Is the release in favour of Fred effective?
h) Is Dakirs liable to CB2 under the lease?
i) Are Rolin/Dakirs and Fred otherwise liable to CB2?

(A) IS THIS A “CONTAMINATED SITE”?

[103] It is not disputed that, due to the presence of contamination identified by Keystone in its reports, the Property was a “contaminated site” within the meaning of the *EMA* and *CSR.*

[104] There are competing theories as to whether or not the contamination was caused by CB1 and Seymour’s activities on the Property, including their metal foundry and machine shop operations until 1990. In my view, this issue has more relevance to the allocation issue, but I will discuss it at this stage, given that it informs many of the issues discussed below.

[105] As stated above, CB1 and Seymour operated a metal foundry and machine shop from 1971 to June 1989 when CB1 and Seymour’s shares were purchased by the Joint Venture. After the Joint Venture purchased the shares, those companies continued their operations for a few months until early 1990 when the foundry was shut down.

[106] Beyond this general description, there is some evidence as to CB1’s operations during the period before the involvement of the Joint Venture in 1989.

[107] Inside the building on the Property were three pits, the furnace, moulding and conveyor pits. Flory began employment with CB1 in 1963. He worked as an employee of CB1 in the machine shop on the Property during the 1970s and 1980s. He states that copper fittings were manufactured using a sand casting method as part of the business operations. Moulds would compress the sand around the shape of a pipe and the moulds would be poured. After cooling, the moulds would be dumped into the conveyor pit. The furnace pit, surrounded by thick concrete, had

three gas furnaces to melt the copper/brass. He acknowledged that during these operations, sand infused with some metal would be swept from the floor.

[108] There is no evidence that any environmental issues, including soil contamination, arising from the foundry operations, were identified before the Joint Venture took over in 1989.

[109] There is conflicting evidence as to when, and with what certainty, the environmental issues came to the fore.

[110] Fred's evidence is that when the Joint Venture purchased CB1 and Seymour's shares in June 1989, he and Sid were not made aware of any such issues.

[111] Sid states that, shortly after acquiring the shares, Fred discovered evidence of certain issues, which he proposed would be addressed before the next post-closing payment to the vendors. Sid states that those issues included asbestos located behind one of the factory walls and

> … foundry sand piled outside of the building but on the Property which Fred believed could have contaminated the Property.

[112] Sid also says the above contamination issues, along with an unrelated issue, resulted in a $250-275,000 reduction of the purchase price. Finally, Sid states that, when he next visited the Property, the asbestos was contained and Fred "showed [him] that the foundry sands had been removed".

[113] I accept Sid's evidence and find that both Sid and Fred were made aware of these issues immediately after closing. If nothing else, this represented a "red flag" concerning the distinct possibility of contamination of the Property arising from foundry sands produced during the foundry operations, whether before or after the acquisition by the Joint Venture.

[114] The evidence becomes more specific in respect of the decommissioning of the foundry by removal of the equipment and the actions taken in relation to the furnace, moulding and conveyor pits, which were part of the foundry operations.

[115] Fred states that the pits were “backfilled to grade and covered with concrete”. He then states that all of the shareholders of CB1 and Seymour (including him and Sid) knew that the foundry operations were being shut down, that the foundry equipment was to be removed, and that “foundry sands were being put into the three pits in issue … and that the pits would be covered”.

[116] Flory states that, in 1990, the moulding pit was filled with “river sand” and, as best as he can recall, a few bags of fire retardant insulation, before being covered with concrete. Consistent with Fred’s evidence, Flory states that the conveyor pit was emptied but then filled with “used moulding sand left over from the manufacturing process”, also before being covered in concrete. Similarly, he states that the furnace pit was partially filed with “used moulding sand”. He confirmed his discovery evidence to the effect that he understood that this used sand was contaminated because it had previously been used in the foundry operations.

[117] Flory states that Sid was not present when this work was done. He also states that he received instructions from his supervisor to do this work and that he also understood that Fred, the “boss”, had instructed his supervisor as part of Fred’s overall management of CB1 and Seymour’s operations.

[118] The causation issue is addressed by the evidence of two experts who have prepared reports for this trial.

[119] Rolin, Dakirs and Fred rely upon the evidence of Michael Farnsworth.

[120] Mr. Farnsworth is a senior manager working in Keystone’s contaminated sites group. His first opinion is dated April 5, 2018. He has extensive experience in the assessment, management and remediation of contaminated properties.
Mr. Farnsworth has been involved as the project manager in the assessment of the Property since 2012 when Keystone first became involved. He is a co-author of Keystone’s 2012 Phase I and II reports. He was the senior project manager for Keystone’s 2015 report. Finally, Mr. Farnsworth was the senior project manager involved in the preparation of Keystone’s September 2017 report which led to the

issuance of the Certificate of Compliance. I am not aware of CB2 having objected to Mr. Farnsworth's qualifications and his abilities since his work began in 2012.

[121] I readily conclude that Mr. Farnsworth has extensive knowledge of the Property and is more than qualified to provide the opinions found in his report.

[122] CB2 relies on the expert report of Tadd Berger. He is employed by Pinchin Ltd. as its regional practice leader and the operations manager of Pinchin's environmental due diligence and remediation group. He is also well qualified in the field sufficient to provide an environmental opinion, although he had no direct involvement with the Property. He simply reviewed the previous materials, including the extensive reports since 2003. His report, essentially a critique of Mr. Farnsworth's April 5, 2018 opinion, is dated May 30, 2018.

[123] In reply to Mr. Berger's opinion, Mr. Farnsworth prepared a further opinion dated June 13, 2018.

[124] I distill the following preliminary points from these expert reports:

a) The results of D. Kelly's investigations and assessment in 2003 (outside the building) indicated contaminant levels in the soil and groundwater higher than *CSR* standards in respect of copper, zinc, antimony and lead. The contaminants found were consistent with that expected from foundry operations. Also, these contaminants found in the groundwater were consistent with the concept of metals leaching from the soil contamination identified in the 2003 D. Kelly report (soil which was subsequently remediated and removed by Sumas Remediation);

b) Copper and zinc are constituent elements of foundry operations as they are used to create the alloy brass;

c) The 2012 Keystone investigation, which then included the pits and area in the vicinity of the pits, similarly found such contaminants (copper, zinc, antimony, tin and/or lead). Fred's evidence is that foundry sand went into the pits. Groundwater testing also revealed similar contaminants; and

d) Both Mr. Farnsworth and Mr. Berger agree that foundries have been known to cause this type of contamination. Foundry operations are an "industrial land use" subject to the *CSR*: see *CSR*, ss. 1, 11, 12, Schedule 2(C1).

[125] Where these experts part company relates to Mr. Farnsworth's conclusion that CB1 and Seymour's foundry operations are the most likely cause of all the contamination of the site. Mr. Berger states that it does not appear that the historical foundry operations resulted in contamination of the Property.

[126] The first point of contention is a quibble between the experts as to whether the fill material in the pits was properly described as "soil" and subject to soil testing standards. As Mr. Farnsworth points out, the definition of "soil" in s. 1 of the *CSR* includes "fill". Mr. Berger states that this material would have been regularly removed, not as remediation, but as production waste management. I agree with Mr. Farnsworth's opinion that, in the circumstances here, where some spent foundry sands were not removed but rather placed in two of the pits, the *CSR* standards properly applied to any disposal, management of treatment of this sand as "fill" and thus, "soil". Samples confirmed that contaminants in this "soil" exceeded the allowable contamination standards.

[127] The second issue deals with groundwater contamination and Keystone's assessment of the cause as set out in its September 2017 report. Mr. Berger refers to portions under section 4.5.2 of the report which state that the contaminants found in certain test areas north of the building do not appear to be associated with the foundry pits. The report further states that the source of the contaminants in the groundwater remains "undetermined".

[128] Keystone's Executive Summary states that the groundwater contamination could be associated with either on-site fill imported to the northwest portion of the Property (AEC3) or fill from an off-site facility. While Mr. Farnsworth states in his June 2018 opinion that the origin of this fill was not determined, he goes on to state that "the fill material in the northwest portion of the Site had a similar suite of elevated metals to that identified in the foundry pit contents (i.e. antimony, copper, lead, tin and zinc)".

[129] Given the "similar suite" of metals as between the fill material and the foundry pit contents, I concur with Mr. Farnsworth's reasonable conclusion that it is likely and

probable that the contamination in this area is attributable to the movement and handling of foundry soils to that portion of the Property. To suggest otherwise would be, as Mr. Farnsworth says, an "unlikely coincidence". It is a reasonable conclusion since the foundry operations, which produced this material or fill, was the only activity on the Property between 1971 and 1990.

[130] The third issue arises from Mr. Berger's statement that, since the pits were lined and sealed with concrete, they were isolated from groundwater. He opines that since the materials in the pits remained isolated from the environment by concrete, the contaminated sands in the pits do not appear to have contributed to the contamination of the Property.

[131] In my view, Mr. Farnsworth's second opinion dated June 13, 2018 is a complete answer to Mr. Berger's conclusions:

a) Concrete surrounding all three pits was removed to expose the soils next to (and under) the concrete pits to determine if contamination had migrated beyond the concrete;

b) Samples of scrapings from the walls and base of the pits, taken after the sands were removed and then the base of the pits were removed, confirmed the presence of arsenic and copper concentrations greater than the *CSR* commercial standard. Mr. Farnsworth opines that this resulted from contaminant loss from the pits, which I consider a reasonable and supportable conclusion;

c) Sampling of groundwater within the footprint of two former pits following the removal of the pits also indicated contaminated water. Following removal, the level of contaminants reduced. Again, Mr. Farnsworth comes to the reasonable conclusion that the contamination was consistent with foundry operations and leaching from the pits;

d) Samples of soil beneath the concrete line pits indicated copper and arsenic exceeding allowable limits. Again, Mr. Farnsworth comes to the reasonable conclusion that the foundry operations and loss from the porous concrete are the most likely source of this contamination;

e) The porous nature of the concrete encompassing the spent foundry sands in the pits was most likely the reason for contaminant loss below these pits; and

f) After removal of the foundry sand in the pits and the pits themselves, Keystone found that groundwater contamination of copper and zinc was stable or decreasing, representing a link between the materials

found in the pit and the contamination.

[132] As CB2 argues, there remains the possibility that at least some of the contamination arose from an off-site source. Keystone was unable to rule out such a possibility and there is no evidence to confirm or refute this possibility.

[133] I accept Mr. Farnsworth's opinions, as set out in his reports. There is also no evidence or explanation as to when, why or how off-site soil might have been deposited on the Property. I find that the likely and probable source of the present contamination was the foundry operations, the handling of contaminated fill from those operations and the filling of the concrete pits with that contaminated sand or fill in 1990. This led to the designation of the Property as a "contaminated site" in accordance with the *EMA*.

[134] It is, however, impossible to determine what level of contamination existed prior to June 1989 when the Joint Venture took over, including whether foundry sands or materials were placed elsewhere on the Property. In addition, it is impossible to conclude what level or contamination occurred from the foundry operations from June 1989 to the end of the foundry operations in 1990, including whether contaminated fill was moved again to other areas of the Property, including the north end, as before. The identification of contaminated soil at the north end of the Property which led to the 2003 remediation leads to the reasonable conclusion that this soil arose from foundry operations.

[135] I also find that the filling of two of the pits with contaminated foundry sands in 1990 was a major contributing factor to the contamination of the Property and/or ongoing contamination of the Property, when proper removal of those contaminated sands from the Property was possible in the circumstances.

(B) WHO ARE THE "RESPONSIBLE PERSONS"?

[136] The first issue is a pleading point. Rolin suggests that no apportionment of the cleanup costs may be granted against it as a "responsible person" since CB2 did not file any counterclaim or third party proceeding against Rolin. This argument is without merit.

[137] In paragraph 52 of its further amended response to civil claim, CB2 clearly advanced the allegation against both Rolin and Dakirs, as plaintiffs, and Fred, that they were all "responsible" for the remediation costs. The issue was clearly joined in Dakirs/Rolin's reply where they stated that, if they were "responsible persons", they were "minor contributors".

[138] CB2's counterclaim against Dakirs engages an entirely different issue based on allegations of liability arising from the lease between Vanguard and Dakirs. Similarly, CB2's third party proceeding against Fred refers to issues unrelated to liability under the *EMA*, but also includes allegations that Fred is a "responsible person" under the *EMA*, which I consider resulted in him being directly engaged on this issue as a party.

[139] In the above circumstances, I conclude that the issue as to who is a "responsible person" in these circumstances is clearly engaged at this trial with respect to all named parties, being Rolin, Dakirs, CB2 and Fred.

[140] There is no doubt that CB1/CB2 is a "responsible person". First, CB1 is a former "operator" of the Property: ss. 39(1) and 45(1)(b) of the *EMA*. Second, CB1 produced a substance and caused the substance to be disposed of, handled and treated in a manner that caused contamination of the site by producing, then placing the foundry sands in the pits: ss. 39(1) and 45(1)(c) of the *EMA*.

[141] CB1 became a "responsible person" by reason of the enactment of the *EMA* in July 2004, arising from its earlier foundry activities even before the Joint Venture's acquisition of its shares in June 1989 and afterward, while under the auspices of the Joint Venture until and including the decommissioning of the foundry operations in 1990.

[142] Rolin and Dakirs, as legal and beneficial "owners" of the Property since 1989, are also "responsible persons": ss. 39(1) and 45(1)(a) of the *EMA*.

[143] Whether Fred is a "responsible person" is more controversial.

[144] Firstly, Fred is an officer and director of Rolin/Dakirs. As such, he is a "responsible person" under the expanded definition of "owner": ss. 39(1) and 45(1)(a) of the *EMA*.

[145] Fred argues that CB2 has not demonstrated how he, as a director of Rolin/Dakirs as "owners", "authorized, permitted or acquiesced in the activity which gave rise to the cost of remediation" pursuant to s. 35(4) of the *CSR*.

[146] In my view, there is no merit to this argument.

[147] By Fred's own evidence, as a director of Rolin/Dakirs, he was well aware of CB1's activities on the Property since he was the person directing those activities. It is sophistry to suggest that he didn't authorize, acquiesce and permit the activities of CB1 with respect to its foundry operations after June 1989. Fred, while acting in both capacities (director of Rolin/Dakirs as owner; director/officer of CB1 as operator), was the person in charge of CB1's day-to-day activities in producing the contaminated foundry sands and also, the person in charge, on behalf of both CB1 and Rolin/Dakirs, in altering the Property by dismantling the foundry pits and moving the foundry sand into those pits. Again, Flory confirms that it was Fred as the "boss" who gave instructions to Flory's supervisor who in turn instructed Flory to arrange for the pits to be filled. Alteration of the Property in this fashion is inherently an activity which an "owner" would authorize, permit, or acquiesce in and Fred did just that *qua* director on behalf of Rolin/Dakirs as owner.

[148] It was the foundry sands found in two of the pits that Rolin, Dakirs and Fred now say was the source of the contamination found by Keystone in 2012.

[149] From June 1989 to 1990, Fred was also a director and officer of CB1 as the "operator" and the person who produced, disposed of, handled and treated the substances relating to the foundry operations. These actions were undertaken by CB1 with Fred's authority and direction.

[150] Fred argues that CB1 ceased to exist to be a "person" after its amalgamation into CB2 in 2013 and that therefore, he is no longer a director of CB1 as a "person" under s. 39(1) of the *EMA*.

[151] Fred attempts to draw an analogy to the result when a corporation is dissolved. Under s. 344(1) the *BCA*, a dissolved company "ceases to exist".

[152] In *Gehring v. Chevron Canada Limited*, 2006 BCSC 1639, Justice Gray considered whether a person could be a "responsible person" when he had been a director of a company that had owned contaminated property but where the company was later dissolved. At paras. 52-55, Gray J. held that, since the company was no longer a "person", the director was not within the expanded definition of "owner".

[153] Fred was unable to provide any support that this reasoning would equally apply in respect of a company that later amalgamated. I would also note that the *BCA* does not provide that upon amalgamation, the company is dissolved or ceases to exist; rather, s. 279 refers to the amalgamating company as "continuing". This is consistent with the statutory provisions as to the effect of the amalgamation in s. 282 of the *BCA* which expressly provide that the amalgamating company's rights, interests and obligations *continue* in the amalgamated company.

[154] I conclude that the amalgamation of CB1 into CB2 does not mean that CB1 ceased to exist as a "person" for the purposes of the *EMA*. In my view, it would be incongruous that the liability of CB1 as an amalgamated company continues to exist as a "person" under s. 282 of the *BCA* but that other "persons" within that definition, such as Fred, as a director, do not. Clearly, Fred continues to exist.

[155] In the alternative, I conclude that Fred became fixed with liability in 2004 upon the proclamation of the *EMA*. At that time, he had been a director of CB1 since 1989 and involved in its operations in the 1989/1990 timeframe when CB1 was also undoubtedly a "person" fixed with liability as "responsible person". There is nothing in the *EMA* to suggest that any later amalgamation of the company in 2013 was

intended to erase Fred's liability that arose at that earlier time. I also note that the facts in *Gehring* are distinguishable on that front. There, the company had been dissolved for decades before the *EMA* came into force such that, when liability was imposed in 2004, the company as a "person" no longer existed: para. 5.

[156] Indeed, the purpose of the "polluter pays" principle under the *EMA* is to hold persons responsible, even if their involvement is historical. That purpose is achieved by holding persons who are liable to account despite later changes in the corporate status of other persons or later changes relating to the control of that person. In part, that purpose is revealed by the reference in the *EMA* to not only present but past owners and operators of the site. For example, a person does not escape liability by simply resigning as a director of a company. To suggest that the director of a polluter could escape an existing liability under the *EMA* by simply later altering the status of the corporate polluter would, in my view, invite mischief toward defeating the purposes of the *EMA*.

[157] In summary, I find that Rolin, Dakirs, CB2 and Fred are all "responsible persons" under the *EMA*.

(C) ARE ROLIN, DAKIRS and FRED "MINOR CONTRIBUTORS"?

[158] Rolin/Dakirs and Fred argue that if they are found to be "responsible persons", they are "minor contributors". The distinction is significant since that designation means that a minor contributor is not jointly and severally liable for remediation costs; rather, a minor contributor is only responsible for remediation costs attributable to that person: ss. 47(1)-(2) and 50 of the *EMA*; *Gehring* at para. 89.

[159] Section 50 of the *EMA* provides:

> 50 (1) A director may determine that a responsible person is a minor contributor if the person demonstrates that
>
> (a) only a minor portion of the contamination present at the site can be attributed to the person,
>
> (b) either

> > > (i) no remediation would be required solely as a result of the contribution of the person to the contamination at the site, or
> > >
> > > (ii) the cost of remediation attributable to the person would be only a minor portion of the total cost of the remediation required at the site, and
> >
> > (c) in all circumstances the application of joint and separate liability to the person would be unduly harsh.
>
> (2) If a director makes a determination under subsection (1) that a responsible person is a minor contributor, the director must determine the amount or portion of remediation costs attributable to the responsible person.
>
> (3) A responsible person determined to be a minor contributor under subsection (1) is liable for remediation costs in an action or proceeding brought by another person or the government under section 47 *[general principles of liability for remediation]* only up to the amount or portion specified by the director in the determination under subsection (2).
>
> (4) If a director has determined that a responsible person is a minor contributor for a site, the site is considered to be a contaminated site at the time of that determination, despite the absence of a determination under section 44 (1) *[determination of contaminated sites]*.

[160] The analysis under s. 50 of the *EMA* is informed by the information that any person seeking "minor contributor" status must provide pursuant to s. 38 of the *CSR*:

> 38 A responsible person applying for minor contributor status under section 50 of the Act must provide information to a director, to the extent the information is reasonably ascertainable, respecting all of the following:
>
> > (a) the condition of the contaminated site at the time the applicant
> >
> > > (i) became an owner or operator at the site, and
> > >
> > > (ii) if applicable, ceased to be an owner or operator at the site;
> >
> > (b) any activities and land uses carried out by the applicant while located at the site;
> >
> > (c) the nature and quantity of contamination at the site attributable to the applicant;
> >
> > (d) all measures taken by the applicant to prevent or remediate contamination;
> >
> > (e) contamination on the site or released from the site which is attributable to

> (i) the applicant, and
>
> (ii) other persons at the site;
>
> (f) all measures taken by the applicant to exercise due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site, including any measures taken to prevent foreseeable acts of third parties which may have contributed to the contamination at the site.

[161] In the first instance, CB2 argues that this Court does not have jurisdiction to make such a "minor contributor" determination, since s. 50 refers only to the "director" doing so. Similarly, s. 38 of the *CSR* refers to a person providing information to the "director" in respect of that designation. The definition of "director" in s. 1(1) of the *EMA* refers to a "person employed by the government and designated in writing by the minister as a director of waste management or as an acting, deputy or assistant director of waste management".

[162] As Rolin, Dakirs and Fred note, there is authority for the proposition that this Court may also make such a determination: *Dolinsky* at paras. 110-130; *Gehring* at paras. 87-112.

[163] In any event, in terms of the information relevant to this determination, I draw on the evidence of both Sid and Fred and find as a fact that:

a) When the Joint Venture acquired the shares in CB1 and Seymour in 1989, neither Fred nor Sid were aware of any contamination of the Property arising from CB1's operations or otherwise, save for the foundry sands which Fred believed to be contaminated and which was later removed by the earlier owner. Sid was aware of these concerns also;

b) From the time of the acquisition by the Joint Venture in 1989, Fred was the president and on-site manager who exercised the day-to-day control of CB1 and Seymour's operations. Sid was located in Toronto and not involved in the day-to-day operations;

c) The decision to shut down the foundry operations was made by Fred, Sid and perhaps other persons involved in the Joint Venture at the time;

d) Fred was responsible for the actual shutting down of the foundry. He admitted being on-site every day when the equipment was removed and the pits were filled with foundry sand;

e) Consistent with his early assessment of the state of foundry sands on the Property at the time of the Joint Venture's acquisition, Fred also knew that sands or materials produced by the foundry operations was likely contaminated. In 1990, he was well aware of this when he authorized the placement of that contaminated materials in two of the pits as a representative of both CB1 and Rolin/Dakirs. This is the contaminated material later found in and around the pits by Keystone in 2012 that he alleges was the source of the Property's contamination;

f) Sid was not aware of the specifics of how the shutting down of the foundry operations was to be accomplished. He was not involved in and not present for those activities, including making the decision to fill two of the pits with foundry sands. He left the matter to Fred to deal with; and

g) Before, during and after the shutting down of the foundry, Sid was not specifically advised of any environmental issues relating to the Property, save for being told by Fred that likely contaminated materials were left on site by the previous owner and that they were later removed.

[164] Fred does not address in his evidence what options he considered or due diligence he performed in terms of disposing of the contaminated fill from the foundry floor that was later transferred into two of the pits. He does not address what measures, if any, he considered or took so as to prevent the contamination that he now contends arose as a result. In my view, other options, such as removing this material from the Property, could reasonably have been considered.

[165] Rolin, Dakirs and Fred's argument that they are “minor contributors” substantially rests on the contention that none of the contamination, or at least only a minor portion, can be attributed to them in their capacity as “owners” or as a director of “owners”. In other words, they contend that I should ignore Fred’s involvement with CB1 as the “operator”.

[166] I reject this argument. As above, I have found that Fred has responsibility as a director of an “operator”, CB1. He was the controlling mind behind CB1 particularly as to the filling of the pits in 1990, which is said to have caused the contamination.

[167] I also disagree that Rolin and Dakirs, as “owners”, and Fred, as a director of these “owners”, did not in that capacity contribute to any contamination. They were certainly imbued with knowledge concerning CB1’s operations on site and the filling of the foundry pits with contaminated soil or sands. I find that implicitly, these persons, as owners, would have agreed to these operations by allowing them to continue. They would also have implicitly or explicitly agreed in that capacity to allow CB1/Fred to alter their Property by the filling of the pits with contaminated foundry sands or fill from the foundry floor. In other words, the owner still had some ability to control the activities on the Property: see *Gehring* at para. 59. An owner in these circumstances cannot distance themselves from the activities that they know of and specifically approve of.

[168] In the above circumstances, Rolin, Dakirs and Fred have failed to satisfy me that they are “minor contributors” regarding the contamination in accordance with s. 50(1)(a) of the *EMA*. It is certainly possible, or even likely, that the foundry operations prior to June 1989 contributed to the contamination. However, after June 1989, Fred oversaw those operations and the disposal of contaminated materials arising from the foundry operations. In addition, he was the sole figure having decision making authority specifically with respect to the filling of the pits in 1990 with what he now says was contaminated materials.

[169] Rolin, Dakirs and Fred also fail to make out the other required grounds to be deemed “minor contributors” under ss. 50(1)(b) and (c) of the *EMA*. Satisfying

s. 50(1)(b)(i) that no remediation was required as a result of their contributions to the contamination is an impossible task in the above circumstances given their position at this trial that it was the filling of the foundry pits with contaminated soil from the floor that led to the contamination issue arising. These actions occurred on Fred's watch and indeed, were directed to be done by Fred. Nor have Rolin, Dakirs or Fred presented evidence that would allow a determination under s. 50(1)(b)(ii) that the cost of remediation attributable to them would only be a minor portion of the total cost of the remediation required at the Property.

[170] Lastly, in the above circumstances, I cannot conclude that the application of joint and several liability to Rolin, Dakirs and Fred would be unduly harsh: s. 50(1)(c). Indeed, given Fred's involvement in CB1's operations and his day-to-day involvement in the decommissioning of the foundry, and the filling of the pits with contaminated fill, in my view, it would be unduly harsh *not* to apply such liability to him, Rolin and Dakirs.

[171] In conclusion, I do not find Rolin, Dakirs or Fred to be "minor contributors".

(D) IS THE ACTION STATUE BARRED?

[172] The *EMA* does not provide for a limitation period with respect to cost recovery actions. Accordingly, the ordinary limitation period applies.

[173] A consideration of this issue is made more difficult by reason of the fact that the remediation costs were incurred over a long period of time, namely 14 years from 2003 to 2017.

[174] In *First National Properties Ltd. v. Northland Road Services Ltd*., 2008 BCSC 569, the Court discussed the nature of a cause of action under the *EMA*, finding that it was status based, not fault based:

> 55. Section 47 creates a new statutory cause of action that is status based, not fault based. The object of the legislation is to encourage prompt remediation of contaminated sites. It does not impose a statutory obligation to remediate a contaminated site but rather provides a right to recover reasonable remediation costs from a "responsible person", if ordered to do so by a government official or by the Court pursuant to s. 47(5). Under the *Act* it

> is not an offence to contaminate a site, only to fail to remediate if ordered to do so.

[175] The above comment was approved by the court in *J.I. Properties* at paras. 85-90, stating that the cause of action was not a claim for damages based on contract, tort or statutory duty. Rather, the cause of action is a "*sui generis* statutory cause of action to be reimbursed for costs" (para. 85) and a "form of reimbursement for reasonable costs of remediation which another party has incurred" (para. 89).

[176] The question then arising is when did the cause of action accrue?

[177] *First National Properties* at paras. 57-58 supports that the earliest possible time can only be when the cause of action came into existence, which in this case is the date of the *EMA*'s enactment: July 8, 2004. By 2004, work by D. Kelly and Sumas Remediation had been done, principally relating to the investigation of and removal of soil from the area around the building perimeter.

[178] The former and now repealed *Limitation Act*, R.S.B.C. 1996, c. 266, c. 3(5) provided for a six year limitation period after the date on which the right to sue arose: *J.I. Properties* at para. 84.

[179] The new legislation, being the *Limitation Act*, S.B.C. 2012, c. 13, became effective on June 1, 2013 well after many of the claimed costs were incurred. Section 6 provides for a basic limitation period of two years after the date upon which the claim is "discovered". Section 8 provides that a claim is "discovered" when a person knew or reasonably ought to have known that loss had occurred; that it was caused by or contributed to by an act or omission by a person against who the claim may be made; and that a court proceeding would be an appropriate remedy.

[180] CB2 argues that the plaintiffs' claim here was fully discoverable in 2003. It points to Fred's admission at his discovery that after he reviewed the D. Kelly report in 2003 he was "suspicious" about the possibility of further contamination inside the building. I have already found that Fred knew that contaminated materials had been placed in the two foundry pits as early as 1990. In that respect, I agree with CB2's position that this is the only reasonable conclusion, arising principally from the fact

that there was nothing "new" from 1990 to 2011 by which Fred's "suspicions" would coalesce into "knowledge" of the contamination in the building only immediately after Sid had exercised the shotgun sale purchase. D. Kelly and Sumas Restoration's work in 2003/2004 in the area outside of the building could only have served to reinforce Fred's earlier assessment that the foundry sands produced from the operations were contaminated.

[181] Accordingly, CB2 asserts that the plaintiffs' right to bring any action arose in 2003, such that the action should have been commenced no later than six years afterwards, or sometime in 2009.

[182] CB2's argument is not supported by the reasoning in *First National Properties* at para. 55, where again, the Court confirmed that the *EMA* does not compel a property owner to remediate a contaminated site; rather, the *EMA* only provides a right of recovery in respect of remediation costs. As such, whether an owner is or is not aware of the contamination does not answer the question as to when a cause of action accrues under the *EMA*.

[183] The Court in *First National Properties* found that an order for recovery of remediation costs, such as is sought here, can only be made once those costs are known and quantified: paras. 56-57.

[184] Accordingly, the plaintiffs argue that it was only in 2017, when the full remediation costs had been incurred, that it was able to bring this action. Here, the action was filed on July 14, 2016. By that time, the remediation was still underway and continued into 2017 leading to the issuance of the Certificate of Compliance in January 2018.

[185] The plaintiffs' position as to when the cause of action arose is further supported by the reasoning of this Court in *J.I. Properties Inc. v. PPG Architectural Coatings Canada Inc.*, 2014 BCSC 1619. Justice Kent followed the statements found in *First National Properties* and *Workshop Holdings Ltd. v. CAE Machinery Ltd.,* 2003 BCCA 56 and found that the cause of action only arose once all remediation costs were incurred. He also held that costs incurred even outside of the

limitation period could be sought. Justice Kent's analysis of this issue was not addressed by the Court of Appeal, who instead relied on his alternate finding on the limitation issue.

[186] Nevertheless, I consider Kent J.'s reasoning on this point persuasive and would adopt his analysis, as follows:

> 38. The cause of action under s. 47(5) of the *EMA* is bestowed upon any person "who incurs costs" (present tense) in carrying out remediation, and the recovery is in respect of all costs "reasonably incurred" whether on or off the contaminated site.
>
> 39. Potentially recoverable costs include the costs of initial site investigation, consultant costs, the cost of contractors and suppliers involved in the removal and disposal of the contaminants, as well as costs relating to containing, controlling and monitoring any substances which remain on-site. Remediation of a contaminated site can take many years and, particularly when a risk-based assessment approach is employed, may entail ongoing costs of containment and monitoring of contamination for decades.
>
> 40. So when, then, did JIP's cause of action arise in this case? Does the *EMA* create separate and multiple causes of action every time any particular remediation cost is incurred? Is aggregation permitted such that the cause of action does not arise (in the sense of being perfected) until all aspects of the remediation have been completed and all costs actually paid?
>
> 41. These fine distinctions are not just semantics. In the present case, if the *EMA* only permits recovery of costs incurred in the 2-year period before commencement of the action, almost all of the costs incurred by the plaintiff would be excluded from recovery. If, on the other hand, the recovery action is subject to a two-year limitation period but recovery is permitted for not just the costs incurred in the two years before the action was commenced but also for all costs incurred in the years before that date, then complete recovery can be effected.
>
> …
>
> 47. Any interpretation and application of the statutory liability imposed by the *EMA* "should advance not hobble the integrity" of that regime. The *EMA* expressly adopts as "general principles of liability for remediation" an exposure to liability that is both "absolute" and "retroactive" (s. 47(1)). Further, ss. 47(1), (3), and (5) combine to ensure liability is for all costs of remediation reasonably incurred, which by the very nature of the exercise can include costs incurred over many years.
>
> 48. In light of the above considerations, I do not think JIP's right to bring this cost recovery action arose until after March 12, 2007. JIP continued to incur remediation costs after that date, which is two years before it initiated its claim. I also hold that remediation all costs reasonably incurred before that date can be recoverable, regardless of the date they were actually incurred.

> 49. This holding will not, if applied in other *EMA* cost recovery cases, result in "indeterminate liability" on the part of "responsible persons" as suggested by ICI. Such persons can immunize themselves against liability for future remediation costs through the certificate of compliance regime contemplated by the *Act*. Exposure in the meantime for all reasonable remediation costs regardless of when they were incurred, is consonant with the "polluter pays" and retroactivity principles that are the primary drivers behind the cost recovery regime set out in the *Act*.
>
> [Emphasis added.]

[187] Applying the same reasoning here, since the plaintiffs commenced the action while remediation was still ongoing, the cause of action had not yet fully accrued by that time and no limitation issue arises. Accordingly, I find that the plaintiffs are able to claim all remediation costs reasonably incurred prior to that time, even if they were incurred before the commencement of the limitation period.

[188] CB2 argues that, at a minimum, the plaintiffs' remediation costs from 2003, 2004 and 2009 were "clearly crystalized" at the time and must be considered to be statute barred. All of these costs were outside of the six year limitation period applicable under the former *Limitation Act*.

[189] At first blush, there would appear to be some basis on which to characterize the 2003-2004 and 2009 costs in a different manner than the later costs. This distinction arises principally on a temporal basis and the fact that the professionals at that time considered that the contamination problem had been solved by the removal of materials from the north end of the Property.

[190] However, on reflection, I see little merit in applying different limitation periods to different aspects of the same overall remediation of the Property. The earlier reports make clear that the 2003-2004 work only related to the area around the building and it is beyond dispute, based on the later reports, that the contamination of the Property went well beyond that.

[191] Accordingly, I find that the cause of action accrued only once *all* remediation costs were known. It is only once all such costs are known and quantified that this evidence can be put before the Court in order to determine the issues arising under

the *EMA*, such as: the extent and cause of the contamination; who are the "responsible persons" liable for the remediation; whether the costs have been reasonably incurred; and, any apportionment or allocation of those costs.

[192] In light of my conclusion, none of the costs claimed by the plaintiffs are statute barred.

(E) ARE THE COSTS CLAIMED "REASONABLE"?

[193] In paragraph 73 above, I have outlined the costs claimed by the plaintiffs, totalling $508,618.12.

[194] There is no dispute that the *EMA* imposes liability only in respect of remediation costs reasonably incurred: s. 47(1). I accept that the plaintiffs bear the burden to prove that the costs were reasonably incurred.

[195] CB2 asserts that many of the claimed costs were not reasonably incurred. CB2's arguments concerning the direct remediation costs of $358,251.29 principally arise from Mr. Berger's opinion.

[196] Firstly, CB2 argues that costs were incurred that went beyond the remediation of the three pits. However, I would note that the pleadings and Fred's evidence at this summary trial outlined all of the remediation costs incurred, which referred to not only the pits, but also soil and groundwater investigation and assessment and soil removal. All of these costs were directly or indirectly as a result of the problem with the covered pits and the leaching identified there.

[197] With the exception of one aspect of the direct remediation costs, Fred's affidavit outlined all these costs and he provided documentary proof of invoices and amounts paid.

[198] CB2's principal argument as to the scope of the costs appears to be based on the contention that only two of the pits needed to be remediated, since the third one (the moulding pit) contained only uncontaminated river sand. Mr. Berger's opinion raises this issue, asserting that the pits needed to be removed for "building

renovation reasons" not related to the contamination. He also questioned that the concrete pits needed to be removed at all, presumably on the basis that the contaminated materials could have been simply removed and the pits left intact.

[199] These arguments are completely met by the reply statements and opinion of Mr. Farnsworth. He states that the concrete from the pits had to be removed to expose the soil underneath for testing, to evaluate the effectiveness of the concrete to prevent migration of contamination and to diminish the risk of residual hazardous material remaining on the site. I accept his explanation as justifying all of the expenses relating to the removal of all three pits, including the tendering costs of Keystone.

[200] I also accept Mr. Farnsworth's response and justification for the remainder of the costs that Mr. Berger challenges in his report:

a) The costs to obtain the Certificate of Compliance: I accept that since the Property was identified as a contaminated site by D. Kelly in 2003, it was necessary to obtain a Certificate of Compliance rather than a less expensive legal instrument such as a Determination;

b) The costs with Keystone under the "Background Determination": I accept that, since the foundry had operated on the site, an assessment was necessary to determine whether dissolved iron and manganese were background concentrations naturally occurring in groundwater. Without such an assessment, significant further fees would have been necessarily incurred;

c) The costs with Keystone under the "HHERA" scope and "AP Review (Risk)": I accept Keystone and Mr. Farnsworth's conclusions that the foundry operations likely contributed to the groundwater contamination and that a "human health and ecological risk assessment" and review by a risk based approved professional were reasonable steps in evaluating risks associated with the Property in anticipation of an application for the Certificate of Compliance; and

d) The costs with Keystone in respect of the "Detailed Site Investigation": I accept that the investigations conducted, which determined that the soil and groundwater contamination was associated with the foundry pits and the fill material, were reasonable costs incurred toward securing the Certificate of Compliance.

[201] In summary, I accept that the majority of the plaintiffs' direct remediation costs were reasonably incurred in respect of addressing the contamination issues associated with the Property and are "costs of remediation" within the meaning of s. 47(3) of the *EMA*.

[202] The only exception relates to amounts which Fred alleges he paid to D. Kelly, presumably in 2003, in the "approximate" amount of $18,000. Fred states that he no longer has a copy of these prior invoices. There is no indication that the plaintiffs sought this documentation from D. Kelly. In my view, this evidence does not meet the evidentiary standard of proving this aspect of the costs claimed on a balance of probabilities.

[203] The final remediation cost issue relates to Fred's evidence where he alleges that the plaintiffs lost rental income of $97,300 from the Property in 2016. He states in his affidavit:

> 59. Due to the remediation work being undertaken on the Property, the plaintiffs were unable to rent the property. The plaintiffs lost approximately $97,300 in rental income in 2016. This amount is calculated based upon the basic rent paid by the defendant in 2015 at $13,900 per month. The Property could not be rented for seven months during January, February, July, August, September, and November 2016 due to remediation work. Seven months of loss of rental income amounts to $97,300.

[204] I accept that the "costs of remediation" listed in s. 47(3) of the *EMA* was not intended to be exhaustive, but to illustrate what one might reasonably expect as the categories of such costs. In that respect, the types of potentially claimable costs is not closed. I accept that it is arguable that loss of rental income from a property could conceivably be considered a recoverable remediation cost under the *EMA*.

[205] However, I agree that Fred's evidence in support of this aspect of the claim does not satisfy the evidentiary standard of proving this loss of rental income claim on balance of probabilities. It is clearly only an estimation. Fred does not provide any evidence as to what activities were taking place over these months in 2016 that would have prevented the Property being leased. There is no evidence as to efforts being made to rent the Property or even assessments by realtors as to whether the Property could be rented. There is no explanation as to why there is no claim for lost rental income in the intervening months of March-June and October 2016. There is no evidence as to what happened in December 2016 as to the ability to rent the Property at that time. There is no evidence at all as to market rental rates over 2016.

[206] In the above circumstances, Fred's very basic statement as to this alleged loss raises more questions than answers. In my view, insufficient proof of such loss has been provided and this aspect of the claim is disallowed.

[207] In summary, I find that direct costs of remediation of $393,318.29 have been proven.

(F) HOW SHOULD THE CLEANUP COSTS BE ALLOCATED?

[208] I have already referenced the provisions of the *EMA* (s. 47(9)) and the *CSR* (s. 35) which govern the allocation process under the statutory scheme. The principles found in those sections govern the allocation exercise and the exercise of discretion in arriving at a "fair and just allocation": *J.I. Properties* (C.A.) at para. 64.

[209] The relative positions of the parties here is stark: the plaintiffs and Fred assert that CB2 should be allocated full responsibility for the remediation costs; CB2 asserts that the plaintiffs and Fred should be allocated full responsibility for the remediation costs.

[210] I will address the *CSR* s. 35(2) factors in turn toward allocating the reasonable remediation costs among the "responsible persons" under the *EMA*, who I have found to be Rolin, Dakirs, Fred and CB2.

a) the price paid for the property by the person seeking cost recovery

[211] As noted above, Rolin and Dakirs have been the owners of the Property since 1989. At that time, CB1's foundry operations had already taken place for almost two decades.

[212] Rolin and Dakirs implicitly recognized those operations when they purchased the Property. Needless to say, Fred and Sid expressly intended CB1 and Seymour's foundry operations to continue into 1990 when the foundry was decommissioned.

> *b) the relative due diligence of the responsible persons involved in the action*

[213] When Rolin and Dakirs purchased the Property and the Alagheband and Assefi families purchased the shares in CB1, no one on the purchasers' side was aware of any contamination issues, save that shortly after closing the purchase, Fred and Sid became aware of some contamination issues. The soil thought to be contaminated was removed and there was a reduction of the purchase price.

> *c) the amount of contaminating substances and the toxicity attributable to the persons involved in the action*

[214] I find as a fact that, by the time of the foundry decommissioning in 1990, it was no secret that the contaminated sand from the floor of the foundry was being placed in two of the pits. As I have stated earlier in these reasons, no explanation has been forthcoming from Fred as to why he made the decision to do this, when other options (such as removal) would appear to have been equally available. There is no evidence, for example, that Fred made any enquiries as to the (in)ability of the concrete pits to contain the contamination in that sand or fill. On the face of things, one can easily speculate that the filling in of the pits with this contaminated sand was an economical solution to the problem in disposing of these materials such as one could say "out of sight, out of mind".

[215] I have already discussed Fred's involvement in the placement of the contaminated materials in the pits, which was later found to be leaching from the pits into the surrounding soil and groundwater. I see no principled basis upon which to distinguish his involvement in this task – i.e., making the decision to do so and

supervising this work – on behalf of the operator (CB1) or the owner (Rolin/Dakirs): see *Gehring* at para. 59.

[216] It was this activity which the plaintiffs allege was a predominant contributor to the contamination of the Property, an allegation which I have accepted.

> *d) the relative degree of involvement, by each of the persons in the action, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated*

[217] There is no doubt that CB1 was the "generator" of the substances that caused the contamination and that CB1 was the person who "transported" and "treated" the substances.

[218] In addition, I have concluded that both CB1 and Rolin/Dakirs were both involved in the "storage and disposal" of the foundry sands by the placement of those contaminated sands into the two foundry pits before the floor of the building was covered with concrete. All three corporate entities, through Fred, were well aware of the contaminated foundry sands being placed in the pits.

[219] CB2 argues that it would be unjust to hold it liable as "currently constituted", citing that it is innocent of wrongdoing.

[220] I accept CB2's submissions that the Lowes, the shareholders of Monarch, who ultimately came to own the shares in CB1 after 2011, had no involvement in the generation of the contaminated substances. In addition, they had no personal involvement in the manner in which the contaminated foundry sands were placed on the Property and allowed to spread contamination across it.

[221] However, CB2 is attempting to conflate the share ownership of CB1 with CB1 itself, when the principle of corporate identity allows for no such thing, at least in these circumstances: *Salomon v. A. Salomon and Co.* (1896), [1897] A.C. 22 (Judicial Committee of the Privy Council).

[222] The fact remains that the Lowes/Monarch bought the shares in CB1 and therefore, inherited whatever liability flowed from that decision. The Lowes would no

doubt have known, or had the means to know, of the previous foundry operations. A quick review of environmental legislation even at that time would have highlighted risks with such operations. Indeed, their enquiries included questions related to environmental risk.

[223] It is beyond dispute that such a result could have been avoided by the purchase of CB1's assets, rather than a share purchase, an option that the Lowes now candidly admit was possible. It appears that the Lowes are experienced businessmen. In addition, Monarch made its decision as to how to complete the purchase after obtaining legal advice. Mr. Lowe's present statement that, had he known of the issues, Monarch would not have bought the shares without a financial adjustment or indemnity from the shareholders, is simply a regretful reflection made with the benefit of hindsight.

[224] As such, a "responsible person" under the *EMA*, such as CB2, can not now avoid liability simply by asserting the innocence of its shareholders. Simply put, the Lowes/Monarch bought a company (CB1) that had already, by that time, become liable for these remediation costs by reason of the *EMA*.

[225] In my view, the allocation exercise under the *EMA* was not intended to alleviate a polluter (CB1/CB2) in order to shield business persons who now own that polluter from bad or improvident business and legal decisions that they now regret.

> e) *any remediation measures implemented and paid for by each of the persons in the action*

[226] The evidence establishes that, since 2003, Rolin and Dakirs have undertaken all the remediation measures in relation to the Property and that they have paid all the costs associated with that remediation.

[227] CB1/CB2 have not paid any such costs.

> f) *other factors relevant to a fair and just allocation*

[228] With respect to this factor, CB2 argues that Fred can be criticized for his actions (or inactions) in relation to the contamination in the foundry pits.

[229] I accept that Fred had knowledge of the contamination when he authorized and supervised the placement of the contamination foundry sands in the pits in 1990.

[230] CB2 then argues that Fred's (in)actions later in relation to the shotgun share sale are relevant factors to be considered in the allocation exercise.

[231] I do not agree. While there may be a basis to criticize Fred's actions in relation to his lack of communication about the contamination in the foundry pits to Sid and perhaps others, I do not see that these (in)actions had any effect in increasing (or decreasing) his personal involvement in the contamination, which had occurred by reason of CB1's operations in 1989-1990 and which continued to cause contamination into the later years. The fact remains that the contamination happened in that time frame (and perhaps before) and that it continued. There is no evidence to suggest that there was an increase in the contamination arising from Fred's actions post 1990.

[232] In conclusion, I think a fair and just result, subject to consideration of the other issues discussed below, is that Rolin/Dakirs, Fred and CB2 each be allocated one third of the liability for the remediation costs. I make that determination in that respect in relation to Rolin and Dakirs by essentially treating them as one entity, since Dakirs is really only a nominal party holding the legal title to the Property on behalf of Rolin.

(G) IS THE RELEASE IN FAVOUR OF FRED EFFECTIVE?

[233] CB2's third party action against Fred refers to various causes of action, which can be summarized as follows:

a) That Fred, as an officer and director of CB1, was negligent in allowing the contamination to occur and not remediating it, thereby exposing CB1 to liability for remediation;

b) That Fred made various express fraudulent misrepresentations and that his silence and concealment of the contamination is also a misrepresentation; and

c) That Fred breached his duty of good faith in respect of the shotgun transaction leading to the sale of his shares to Sid in 2011.

[234] The major stumbling block to CB2's allegations, as above, is the release dated July 27, 2011 that CB1 signed in favour of Fred arising from the shotgun share transaction in 2011. That release executed by CB1 was in respect of:

> … any and all actions, causes of action, claims, demands and damages howsoever arising which [CB1, Seymour and others] now have or may hereafter have against [Fred] by reason of any cause, act, deed, matter, thing or omission existing up to the execution of these presents and in particular but without limiting the generality of the foregoing, [CB1, Seymour and others] hereby release [Fred] from any and all actions, causes of action, claims, debts, demands and damages howsoever arising out of any obligations arising from the affiliation or relationship of [CB1, Seymour and others] with [Fred] …

[235] It is evident enough that this release is a general and very broad release and would encompass any basis for liability that Fred may have had to CB1 at the time.

[236] CB2 seeks an order that the release is void and of no effect, asserting that it was obtained by fraud.

[237] A case cited by CB2, being *Fotini's Restaurant Corp. v. White Spot Ltd.* [1998], 38 B.L.R. (2d) 251 (S.C.), was a case where the plaintiff had executed a general release in favour of the defendant in respect of the purchase of a restaurant business. The plaintiffs sought to avoid the consequences of the release, alleging that they were induced into signing the release based on negligent or fraudulent misrepresentations. At paras. 6-10, the Court discusses that a release is subject to ordinary interpretation principles and will be interpreted based on the wording of the release and what was "in the contemplation of the parties at the time the release was given".

[238] I agree with the plaintiffs that the release was a general release intending to completely sever all potential sources of liability between CB1 and Fred, including any liability that may have been fixed on Fred in his capacity as a director and officer of CB1 (i.e., based on his "affiliation" or "relationship" with CB1).

[239] In addition, I find that when Sid caused CB1 to execute the release in 2011, Sid/CB1 would have been well aware of potential environmental issues relating to the Property:

a) Sid knew about the foundry operations and either knew or should have known of potential environmental concerns arising. By Sid's own evidence, Fred raised concerns about possible contamination from foundry sands immediately after acquiring the business in 1989;

b) Sid was expressly aware of the remediation work done on the Property by D. Kelly and Sumas Restoration in 2003/2004 which identified contaminants, being constituent elements of a foundry operation. He was aware that this remediation was only in the areas outside the building, not inside. He was also aware of PGL's work on the Property in relation to environmental remediation in 2009;

c) Sid states that arising from Sumas Restoration's work, he "believed" that the Property was free of contamination. There is no basis asserted for that belief, beyond the fact that Fred didn't indicate to him otherwise. There is no indication that he asked Fred about the foundry operations and, for example, how the foundry sands had been disposed of – either generally or upon the decommissioning – and where they had been placed;

d) Sid participated on behalf of Dakirs, CB1 and/or Seymour in making representations to various financial institutions relating to environmental matters in 2005, 2009 and 2010 i.e., that there were no such issues in respect of the Property. Again, there is no indication that he made any

independent effort to confirm those representations, beyond his "belief" that the Property had been remediated in 2003/2004; and

e) In April 2011, Sid knew that CB1 was releasing Fred from all claims at precisely the time when CB1 knew that a potential purchaser of CB1's shares (Monarch) wanted to do diligence on "known environmental risks relating to the business".

[240] In my view, in the above circumstances, potential environmental issues were in the contemplation of both CB1 and Sid when Sid executed that release on behalf CB1. Accordingly, the claims now advanced by CB2 in its third party proceeding were included in the release and cannot now be advanced.

[241] Further, CB2 argues that Fred "procured" the release by knowingly misrepresenting the contamination to Sid and the Lowes, citing *Fotini's Restaurant* at para. 18.

[242] This argument suffers from a number of deficiencies:

a) CB1's release was only provided in the context of the exercise of the reverse shotgun provision by Sid in response to Fred's own offer to purchase under the Shareholders Agreement;

b) Fred's intention was to buy all of Sid's shares in CB1, although he was unsuccessful. Indeed, by his offer of April 28, 2011, Fred's offer included that Sid would similarly be released by CB1 under the terms of his offer. It is incorrect to characterize Fred as trying to benefit from his silence by hoodwinking Sid into buying his shares;

c) There is no evidence that Sid relied on Fred's previous silence concerning any environmental matters or issues relating to CB1 in coming to his decision as to how to respond to Fred's shotgun offer. Sid could have accepted the offer or invoked the shotgun provision himself;

d) In invoking the reverse shotgun provision, Sid was compelled, by section 4.4 of the Shareholders Agreement, to offer that same term and condition

(i.e., the release) to Fred. Accordingly, I give no weight to Sid's present evidence that "had I known that Fred would be making a claim to recover damages or costs relating to the remediation of the contamination on the Property, I never would have signed the release". In fact, having invoked the shotgun, he had no option but to do so;

e) There is no basis upon which one could discern an intention to dupe Sid into causing CB1 to release Fred. In fact, if Fred had been successful in acquiring Sid's shares, Fred would have been the person left "holding the bag" with CB1 exposed to liability under the *EMA* and Sid being released. It is pure speculation that Fred would similarly have proceeded to sale to Monarch and if so, on what terms. Even if Fred would have proceeded to close a sale of CB1's shares to Monarch himself, Fred would likely not have been in a position to seek or obtain a release from CB1. As part of those transactions, he may also have been required to give certain representations to Monarch as to environmental risk issues;

f) The release was not given by Sid, but by CB1. CB1 has no basis upon which to assert or complain that Fred made misrepresentations to another party or that that party suffered loss as a result. Sid was not the person who is alleged to have signed any release by reason of any fraud. Sid is not a party to this action; and

g) There is no evidence that Fred made any misrepresentations to the Lowes in relation to later transactions between Monarch and Sid. Fred was not a part of any negotiations of those agreements and he made no express or implied representations to the Lowes/Monarch in that respect. The Lowes/Monarch were specifically aware or should have been aware of the provisions of the shotgun offers and that a release would be provided by CB1 to Fred. The Lowes and Monarch are not parties to this action and do not allege any loss arising from Fred's actions.

[243] Similarly, I see no basis upon which CB2 can advance the argument that CB1's previous representations and agreements to various financial institutions

regarding the absence of contamination on the Property can be laid at the feet of Fred. These agreements and representations were made by CB1, not Fred. In addition, either Fred or Fred and Sid signed these documents as officers and directors of CB1.

[244] In summary, there is no evidence that Fred procured the release from CB1 by fraud.

[245] I will also briefly address CB2's argument that Fred breached his duty of good faith in respect of the shotgun transaction and the sale of his shares to Sid in 2011.

[246] This argument is based on the discussion found in *Bhasin v. Hrynew*, 2014 SCC 71. In that case, the Supreme Court of Canada established the principle that "parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily" (para. 63). CB2 argues that Fred was required to be honest with the other contracting parties in relation to the performance of their contractual obligations, citing Cromwell J.:

> 60. Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce. The growth of longer term, relational contracts that depend on an element of trust and cooperation clearly call for a basic element of honesty in performance, but, even in transactional exchanges, misleading or deceitful conduct will fly in the face of the expectations of the parties: see Swan and Adamski, at s.1.24.

[247] CB2 alleges that Fred was dishonest by concealing the contamination. CB2 also alleges that Fred was dishonest by failing to disclose his intention to claim the remediation costs, i.e. to bring this lawsuit.

[248] However, if such concealment occurred, resulting in a breach of the duty, it was done to Sid and he does not allege any loss arising from any breach. Further, the Court in *Bhasin* makes clear that the good faith principle does not impose a duty of disclosure: para. 73. Rather, the duty lies in the *performance* of the contract.

[249] Here, Sid offered to buy Fred's shares for a certain price and on certain terms. That is exactly what Fred did. He sold his shares to Sid in consideration of receiving the purchase price. No terms were associated with that offer beyond what was already in Fred's earlier offer. Sid did not require Fred to make any representations to him concerning environmental matters prior to Sid making that offer.

[250] Simply put, there is no evidence that Fred "lied" to or "misled" Sid in respect of his performance of the shotgun transaction by which Sid purchased Fred's shares in CB1. Nor was Fred involved in any contract, or the performance of any contract, with Monarch in relation to its purchase of Sid's shares in CB1. After Sid purchased his shares in CB1, Fred severed all tied to the operating companies. He also had nothing further to do with Monarch in respect of those transactions. CB2 other allegations, as above, concerning the actions of Fred after the closing of the shotgun transaction, are simply irrelevant.

[251] I conclude that the release is a complete answer to the allegations against Fred advanced in the third party notice. The release, as an agreement between CB1 (now CB2) and Fred, is also effective as a relevant factor to disallow CB2 from seeking a determination of Fred as a "responsible person" under the *EMA*: *EMA*, ss. 47(9)(d) and 48(4)(a); *CSR*, ss. 35(1) and 35(2)(f).

[252] Needless to say, the release does not affect any liability of Rolin and Dakirs, including allocating some measure of the remediation costs to them.

(H) IS DAKIRS LIABLE TO CB2 UNDER THE LEASE?

[253] CB2's counterclaim against Dakirs relates to a lease between Dakirs and Vanguard. Vanguard was another of the companies operated by the Joint Venture.

[254] By early 2011, Fred and Sid were continuing their discussions and negotiations with the Lowes/Monarch. In anticipation of the sale of their shares in CB1 to Monarch, Fred arranged for a lease on the Property to be drafted. This was

because Sid and Fred did not expect that the sale to Monarch would include the Property.

[255] The lease was dated January 1, 2011 but signed sometime in the spring of 2011 (the “Lease”). It named Dakirs as landlord and Vanguard as tenant. The term is from January 1, 2011 to December 31, 2015. Fred and Sid, who were officers and directors of both landlord and proposed tenant, signed the lease for both companies.

[256] The relevant terms of the Lease are:

> **1.1 Defined Terms**
>
> (k) "Hazardous Substance" or “Hazardous Substances" means any pollutants, contaminants, deleterious substances, underground or above-ground tanks, asbestos materials, hazardous, corrosive, or toxic substances, special waste or waste of any kind, or any other substance which is now or hereafter prohibited, controlled or regulated under Environmental Laws:
>
> …
>
> **15.4 Material Compliance**
>
> Except as previously disclosed in writing to the Tenant, the Landlord represents and warrants to the Tenant that the Lands and Premises are in material compliance with all Environmental Laws and that the Landlord has not received any notice of non-compliance, and does not know of, nor have reasonable grounds to know of, any facts which could give rise to a notice of non-compliance with any Environmental Laws.
>
> **15.5 Environmental Laws**
>
> In performing or causing to be performed its obligations pursuant to this Lease, the Landlord shall comply with all Environmental Laws in resepct of Hazardous Substances existing on, in, or under the Lands and Premises, save and except in respect of Hazardous Substances whose existence is attributable, wholly or in part, to the Tenant's Fixtures and activities located or carried on in, on or adjacent to the Lands and Premises by the Tenant or to any act or omission of the Tenant or those for whom it is in law responsible during the period of the Tenant's use or occupation of the Lands and Premises.
>
> **15.6 Claims**
>
> The Landlord shall indemnify and save harmless the Tenant and its officers, directors, employees, and others for whom the Tenant is in law responsible, from and against all claims which may be made or brought against and/or which the Tenant may suffer or incur as a result of the existence of Hazardous Substances attributable to an act or omission of the Landlord …
>
> [Emphasis added.]

[257] CB2 asserts that the Lease contains misrepresentations as to the environmental state of the property. CB2 cites *Boyd v. Cook*, 2016 BCCA 424 at paras. 24-25 as setting out the elements of fraudulent misrepresentation: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.

[258] I conclude, however, that CB2 has not established any of the above elements of fraudulent misrepresentation against Fred or Dakirs in respect of the Lease:

a) Dakirs' representations in the Lease were not false, knowingly or otherwise. The Property was in material compliance with all Environmental Laws referred to in section 15.4. As the plaintiffs and Fred note (and as acknowledged by CB2 in its amended response to civil claim), it is not an offence under the *EMA* to contaminate a site, only to fail to remediate if ordered to do so: *First National Properties* at para. 55;

b) Dakirs had not received any notice of non-compliance under any "Environmental Laws" referred to in section 15.4. In addition, there is no evidence that establishes that Sid, Vanguard or CB1 received written notice of non compliance under any applicable "Environmental Law";

c) Vanguard/CB1 did not act or rely on any representations in the Lease. The Lease contained representations made by Dakirs to Vanguard only. At the time the representations were made, CB1's directors were also the directors of Dakirs. As such, any information known by Dakirs was also equally known by CB1/Vanguard. I accept the plaintiffs' submissions that this knowledge is held by the companies (CB1/Vanguard) even if that information was not known to some of the directors of the company, such as Sid; and

d) There is no evidence that Dakirs' representations in the Lease concerning environmental matters caused any loss to Vanguard giving rise to a cause of action.

[259] The more relevant (and the only pleaded) allegation is CB2's contention that, pursuant to s. 15.6 of the Lease, it is entitled to be indemnified by Dakirs in respect of any liability imposed on CB2 under the *EMA* in respect of the Property. CB2 asserts that one of the amalgamating companies included Vanguard and that therefore, it is entitled to assert all rights granted to Vanguard: s. 282(1)(g) of the *BCA*.

[260] This argument is equally doomed to failure.

[261] By 2011, when the Lease was signed, CB1 was already imbued with liability under the *EMA* by reason of having been an "operator" on the Property – or "responsible person" who had caused contamination up to 1990. Vanguard did not attract liability under the *EMA* as a tenant under the Lease from January 2011 to December 2015 by reason of any breaking of "Environmental Laws" attributable to acts or omissions of Dakirs as the landlord, or for which Vanguard/CB2 might have sought indemnification from Dakirs as the landlord.

[262] In short, the indemnity under the Lease was not meant to relieve another party (CB1) of liability it already had as a responsible person under the *EMA* prior to Lease being executed.

[263] In the above circumstances, CB2's counterclaim against Dakirs is dismissed.

(I) ARE ROLIN/DAKIRS AND FRED OTHERWISE LIABLE TO CB2?

[264] CB2 alleges that Rolin, Dakirs and Fred are liable to it by reason of what is said to be Fred's tortious conduct.

[265] I have already concluded that the release executed by CB1 in favour of Fred is a complete answer to the allegations advanced against Fred in the third party notice. This would include allegations of negligence, fraudulent misrepresentations

and allegations of a breach of the duty of good faith in relation to the performance of any contract.

[266] Many of these same allegations are also advanced against Rolin and Dakirs in CB2's amended response to civil claim and further amended response to civil claim, again arising from allegations about Fred's action or inactions while he was acting as an officer and director of Rolin/Dakirs.

(i) Negligence

[267] CB2 argues that, as a director, officer and senior manager of Rolin/Dakirs, Fred owed a duty of care to ensure that the Property did not become contaminated. CB2 argues that Rolin/Dakirs, through Fred, were obliged to ensure that steps taken to fill the foundry pits did not contaminate the Property and also, that they had a duty of care to remediate the Property.

[268] CB2 does not, in its pleadings, allege to whom this duty is owed. However, in its argument, it is said to have been owed to CB1 arising from the "proximity" of the landlord/tenant relationship, citing *Cooper v. Hobart*, 2001 SCC 79, and *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19 at paras. 16-19. By this, I take it to mean that there was informal occupation of the Property by CB1 since no formal lease was in evidence.

[269] CB2 cites *Enviro West Inc. v. Copper Mountain Mining Corp.*, 2012 BCCA 23 at para. 16 in support of the argument that Rolin/Dakirs are negligent because they knew or ought to have known of the contamination, they allowed the contamination to happen, and they did not remediate.

[270] A reading of *Enviro West* does not support CB2's arguments. The case does not stand for the proposition that an owner (Rolin/Dakirs), or a director of an owner (Fred), has any duty of care to remediate contaminated property that might be occupied by that other person. In *Enviro West*, the court acknowledged the trial judge's findings that the owners and operators of electrical transformers which were leaking oil contaminated with high levels of polychlorinated biphenyls (PCBs) owed a

duty to disclose to the party hired to remove and transport the oil that it was contaminated. Those facts are completely distinguishable from those here.

[271] Here, it is not apparent that any duty of care existed. I will repeat again that it is not an offence under the *EMA* to contaminate property. Further, and generally speaking, a landlord will expect a tenant's operations to be in compliance with applicable laws and the landlord, by the terms of the tenancy, may restrict the activities conducted on the premises. No laws were broken by the landlords and there is no evidence that Rolin/Dakirs restricted CB1's operations. As is quite clear, Rolin/Dakirs were well aware of CB1's operations and the nature of those operations.

[272] In these unique circumstances, I fail to see how CB1, as tenant, can complain that its landlord did not prevent the very contamination that was done by that tenant.

[273] The same goes for the allegation that Rolin/Dakirs should have remediated the Property. No such obligation exists at law. In fact, CB1 bore at least some of the responsibility to remediate the Property itself. Even if Rolin/Dakirs had earlier undertaken remediation work at the Property, CB1 would still have faced liability as a "responsible person" under the *EMA* which imposed liability on CB1 for remediation costs. This is another way of saying that, even if this duty of care existed, CB1 has not established causation. CB2 has not shown how "but for" Rolin/Dakirs' purported breach of their standard of care to CB1 that it suffered loss.

[274] In sum, I see no basis upon which Rolin/Dakirs can be said to have been negligent in respect of their relationship with CB1 to support any claim for contribution and indemnity under the *Negligence Act*, R.S.B.C. 1996, c. 333.

(ii) Fraudulent Misrepresentation

[275] Under the section of these reasons addressing CB1's release in favour of Fred, I have set out the requisite elements of the tort of fraudulent misrepresentation.

[276] In addition, I have rejected any such claim against Fred and Dakirs relating to the Lease and against Fred relating to agreements with and representations to various financial institutions for the reasons expressed above.

[277] Similarly, none of the other arguments advanced by CB2 relating to Rolin/Dakirs have any merit. The fact of the matter is that Rolin/Dakirs didn't make any false representations to CB1 about the contamination, principally because CB1 was the party who had done it in the first place. In that respect, I agree with the plaintiffs and Fred that CB1 cannot claim that it did not know of the contamination.

[278] CB2 cites many cases dealing with negligent or fraudulent representations by vendors of property concerning the environmental state of property as sufficient to impose liability on those vendors for later remediation. However, Rolin/Dakirs were not the vendors of the Property when the later transactions were completed in 2011. In fact, the Property was not sold at all.

[279] The gravamen of CB2's arguments concerning reliance as also grounded in the allegation of Sid and the Lowes that they relied on certain representations which led to the reverse shotgun transaction and the later purchase of Sid's shares in CB1 by Monarch/the Lowes.

[280] I have already addressed, and rejected, the allegations levelled at Fred arising from these later transactions. Further, there is nothing to suggest that Rolin/Dakirs was involved in any way in those later transactions such that Fred's actions can be attributed back to those plaintiffs.

[281] In summary, there is no independent basis upon which to find that Rolin/Dakirs or Fred committed any torts in respect of this matter in relation to CB1 (now CB2) so as to impose liability upon them for the costs of remediation.

CONCLUSION

[282] Having made the above findings, the final matter relates to the allocation between the "responsible persons" of the remediation costs, in the context of Fred having been released by CB1 of any liability in that regard.

[283] In all of the above circumstances, I conclude that a fair and just allocation would be an equal sharing between Rolin/Dakirs and CB2.

[284] Accordingly, I grant the following orders:

a) Judgment in favour of the plaintiffs against CB2 in the amount of $196,659.14, representing one half of the reasonably incurred remediation costs;

b) CB2's counterclaim against Dakirs under the Lease is dismissed; and

c) CB2's third party notice against Fred is dismissed.

[285] Both counsel requested that the matter of costs be left for further submissions once these reasons were released and the parties could consider what issues may arise in that respect. Accordingly, failing agreement between the parties, if any party wishes to seek a costs award, they must file an application to determine those costs within 30 days of the release of these reasons and thereafter, take steps to set the matter down before me within a reasonable period of time.

"Fitzpatrick J."

TAB 2

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walter Energy Canada Holdings, Inc. (Re),* 2017 BCSC 709

Date: 20170501
Docket: S1510120
Registry: Vancouver

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

And

In the Matter of the *Business Corporations Act*,
S.B.C. 2002, c. 57, as Amended

And

In the Matter of a Plan of Compromise or Arrangement of Walter Energy Canada Holdings, Inc. and the Other Petitioners Listed on Schedule "A"

The text of the judgment was corrected on page 2 and in paragraph 5 on May 5, 2017.

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

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Counsel for KPMG Inc., Monitor:	P.J. Reardon
Place and Date of Hearing:	Vancouver, B.C. January 9-13, 16, 18-20, 2017
Place and Date of Written Reasons:	Vancouver, B.C. May 1, 2017

I INTRODUCTION

[1] These are proceedings brought by the petitioners pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). The petitioner companies are part of what I will describe as the "Walter Canada Group" which includes other entities, as I will discuss below.

[2] This application is brought by the Walter Canada Group to determine the validity of a claim filed in these proceedings by the UMWA 1974 Pension Plan and Trust (the "1974 Plan").

[3] The 1974 Plan's claim is asserted as a liability of the Walter Canada Group based on the provisions of U.S. legislation, namely the *Employee Retirement and Income Security Act of 1974*, 29 U.S.C. § 1001, as amended ("*ERISA*"). The amount of the claim arises from certain unfunded pension liabilities owed to former

employees of a U.S. entity within the larger international Walter Energy Group. For context, the Walter Canada Group is the Canadian part of the international "Walter Energy Group". *ERISA* is sometimes referred to as "long arm" legislation in that the 1974 Plan asserts that this U.S. legislation applies to the Walter Canada Group even though they were all Canadian corporations or entities conducting their mining businesses only in Canada and not in the U.S.

[4] As far as I'm aware, and all counsel agree on this point, this is the first time that a Canadian court will have considered whether *ERISA* applies in Canada and in these circumstances. It also appears to be the case that no U.S. court has yet considered whether *ERISA* applies to entities outside of the U.S.

[5] The 1974 Plan's claim is extremely large - approximately $1.25 billion. If the 1974 Plan's claim is valid, it will swamp all other valid claims that have been filed in the estate against the Walter Canada Group. The result would be that the vast majority of the realizations from the estate assets - estimated by mid-2017 to be approximately $63 million - would be paid to the 1974 Plan and not in respect of the claims of other creditors. These other creditors include the Walter Canada Group's former employees, which in turn include union members represented by the United Steelworkers, Local 1-424 (the "Union"), to whom substantial amounts are owed.

II PROCEDURAL BACKGROUND

[6] The Claims Process Order that was granted on August 16, 2016 (see *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 1746 at paras. 86-87) put in place a specific claims process designed to address the 1974 Plan's claim. Pursuant to the Claims Process Order, and with the objective of clarifying the issues as between the parties, the 1974 Plan filed a notice of civil claim on August 26, 2016 in this action. Responsive pleadings were filed by the Walter Canada Group and the Union shortly thereafter.

[7] Paragraph 30 of the Claims Process Order provided that, upon the filing of the pleadings, the 1974 Plan's claim was to be adjudicated by the Court "under a procedure to be determined more fully by subsequent Order of this Court".

[8] There were various disagreements between the Walter Canada Group, the Union and the 1974 Plan as to whether pre-hearing discovery procedures were required or necessary prior to a determination of certain preliminary issues raised by the Walter Canada Group. Since at least the fall of 2016, the 1974 Plan has taken the position that it is inappropriate to determine these preliminary issues on a summary basis without allowing it to conduct discovery of the Walter Canada Group.

[9] This disagreement led the Monitor to apply for directions on the procedure to adjudicate the 1974 Plan's claim, as was expressly directed under paragraph 31 of the Claims Process Order. I denied the oral and document discovery sought by the 1974 Plan arising from two hearings: firstly, on October 26, 2016 (*Walter Energy Canada Holdings, Inc. (Re)* (Unreported; October 26, 2016) and secondly, on November 28/December 2, 2016 (*Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 2470). Those decisions were made in light of the Walter Canada Group's position that the preliminary issues could be resolved on a summary basis, consistent with the legislative objective under the *CCAA* to determine claims in that manner.

[10] After the October 26, 2016 hearing, the parties agreed to a Case Plan Order which set out various deadlines for the delivery of the applications and responses, evidence and written arguments, all in advance of the January 2017 hearing.

[11] In November 2016, the Walter Canada Group filed their application for a summary hearing to decide these issues. Although described as a "summary hearing", the nature of the hearing can be described as a hybrid one. In addition to the pleadings, applications and responses, the evidence before the Court consisted of various affidavits, the Walter Canada Group's notice to admit and the 1974 Plan's response to the notice to admit. In addition, as the answer to one of the issues - namely, whether *ERISA* applies exterritorialy to the Walter Canada Group - is a matter of U.S. law, the Walter Canada Group and the 1974 Plan both filed expert reports from U.S. attorneys. All three of these experts were cross examined on their reports at this hearing.

III ISSUES

[12] The Walter Canada Group seeks the following declaratory relief:

a) under Canadian conflict of laws rules, the 1974 Plan's claim as against the Walter Canada Group is governed by Canadian substantive law and not U.S. substantive law (including *ERISA*);

b) in the alternative, if the 1974 Plan's claim against the Walter Canada Group is governed by U.S. substantive law (including *ERISA*), then as a matter of U.S. law, "controlled group" liability for withdrawal liability related to a multiemployer pension plan under *ERISA* does not extend extraterritorially; and

c) in the further alternative, if the 1974 Plan's claim against the Walter Canada Group is governed by U.S. substantive law (including *ERISA*), and *ERISA* applies extraterritorially, that law is unenforceable in Canada because it conflicts with Canadian public policy.

[13] It is common ground that if the Walter Canada Group succeeds on any one of the above arguments, the 1974 Plan's claim is not a valid claim against the estate. While I have referred to the arguments below as that of the Walter Canada Group, I have considered the similar arguments advanced by the Union even if they are not specifically referenced as such.

IV IS A SUMMARY HEARING APPROPRIATE?

[14] The 1974 Plan argues that the hearing should not proceed summarily and has brought a cross application to dismiss the Walter Canada Group's application. Consistent with Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (the "*Rules*") regarding summary trials, the 1974 Plan argues:

a) the matter is not suitable for a summary hearing: Rule 9-7(11)(b)(i);

b) a summary hearing on the preliminary issues will not assist in the efficient resolution of the validity of its claim: Rule 9-7(11)(b)(ii);

c) the Court will be unable to find the necessary facts to determine the issues: Rule 9-7(15)(a)(i);

d) the Court should find it unjust to determine the preliminary issues in the circumstances: Rule 9-7(15)(a)(ii); and

e) the Walter Canada Group is "litigating in slices" by attempting to obtain a decision on only some of the issues.

[15] The *CCAA* mandates that any dispute about claims will be determined, if possible, in a summary manner. Specifically, the *CCAA* provides for a summary determination of the validity of a disputed unsecured claim, such as that asserted here by the 1974 Plan:

> **Determination of amount of claims**
>
> 20 (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:
>
> (a) the amount of an unsecured claim is the amount
>
> …
>
> (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor;
>
> [Emphasis added]

[16] The requirement for a summary determination of claims in a *CCAA* proceeding is similar to that found in the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3: see *San Juan Resources Inc. (Re)*, 2009 ABQB 55 at para. 30. Both recognize the need to determine claims as quickly as possible to allow for a timely distribution to creditors, as creditors will suffer more prejudice if there is delay in receipt of whatever recovery they can expect from an insolvent estate. In addition, proceeding by summary application respects the need to resolve claims without undue cost, which would exacerbate the already insolvent circumstances and lessen the recovery of the parties.

[17] Other than directing a "summary" determination of the issue, the *CCAA* provides no further guidance as to how a claim is to be determined. In this legislative vacuum, courts across Canada have drawn upon their statutory jurisdiction under the *CCAA* to fashion a process to do just that. This typically takes the form of a claims process order, as was granted in this proceeding on August 16, 2016.

[18] There was agreement that the process typically found in a claims process order, allowing for review by the monitor and a revision/disallowance process, was not appropriate in these circumstances. The 1974 Plan's claim raised unique issues and it was recognized early in these proceedings that a resolution of that claim would likely require a more complex procedure.

[19] There are examples where the courts in *CCAA* proceedings have fashioned a process that was "summary" in the sense of not requiring full pre-trial and trial procedures, but still allowed for certain appropriate pre-hearing steps.

[20] A similar issue was before the Court in the *CCAA* proceedings in *Pine Valley Mining Corporation (Re)*, 2008 BCSC 356. A substantial claim had been advanced and the Court addressed how the claim should be resolved and the format of the summary trial. Justice Garson (as she then was) said:

> [16] The second issue I have been asked to determine is the question of the format of this trial. Section 12 of the *CCAA* [now s. 20] requires a summary trial. I recognize that in some cases, courts have held that that does not preclude a conventional trial. (See *Algoma Steel Corporation v. Royal Bank of Canada* (1992), 8 O.R. (3d) 449 (C.A.). I do not understand Mr. McLean to object in principle to an order that this matter be determined in a summary way but, rather, I think he reserves his right to object to the suitability of such a procedure depending on how the evidence unfolds. It is my view that s.12 [now s. 20] of the *CCAA* informs any decision the court must make as to the format of a trial and that trial must surely be as the section dictates, a summary trial, unless to do otherwise would be unjust, or there is some other compelling reason against a summary trial. I am not persuaded that this claim cannot be tried summarily on the date reserved in May of this year. The parties have one week to work out an agreement as to a time line for the necessary steps to prepare for that trial, including the exchange of pleadings, disclosure of documents as requested by Tercon, agreed facts, delivery of affidavits, expert reports (including notice of reliance on all or part of the Monitor's reports), delivery and responses to notices to admit, examination for discovery if consented to, and delivery of written arguments. I acknowledge that many of these steps are underway.

> [17] … Either party has leave to apply to cross-examine the deponent of an affidavit out of court or in court. Either party has leave to apply to convert this summary trial to a conventional trial but I expect the parties to make their best efforts to manage this generally as a summary trial.
>
> [Emphasis added]

[21] Similarly, in *Jameson House Properties Ltd. (Re)*, 2011 BCSC 965 at paras. 13-14, Justice Adair departed from the strict terms of a claims process order and ordered the filing of pleadings and oral discovery after the filing of affidavits. An agreed statement of facts was also later filed although some facts remained in dispute. At para. 15, the Court stated that it was approaching the summary hearing as in a conventional trial; in other words, if the party bearing the onus of proof failed to establish the necessary facts, that party's case would fail.

[22] In *Coast Capital Savings Credit Union v. The Symphony Development Corp.*, 2011 BCSC 333 at paras. 23-27, the Court referred to a "principled" approach to the determination of claims, albeit in a receivership context, which respected the summary claims process while also ensuring that the claim was adjudicated in a just manner.

[23] Accordingly, although the *CCAA* requires that, presumptively, claims be determined on a summary basis, the court has the discretion to order another procedure where it is appropriate. That other procedure may, but will not usually, involve a full trial procedure. One possible approach is to conduct a hybrid hearing, such as occurred here.

[24] Needless to say, the exercise of the court's discretion will be guided by the statutory objectives of the *CCAA* toward a timely and inexpensive resolution of claims and distribution to creditors, while also ensuring that the determination of claims is made in a manner that is just and fair to all the stakeholders, including the debtor company, the claimant and other creditors: *0487826 B.C. Ltd. (Re)*, 2012 BCSC 1501 at para. 38. These objectives are consistent with Rule 1-3(1) which states that the object of the *Rules* is to secure the "just, speedy and inexpensive determination of every proceeding on its merits". These objectives are also

consistent with the Supreme Court of Canada's recent exhortation to the legal profession and the courts to embrace more summary forms of adjudication where appropriate, as found in *Hryniak v. Mauldin*, 2014 SCC 7.

[25] In exercising the court's discretion to move beyond a pure summary determination in accordance with s. 20 of the *CCAA*, factors to be considered by the court will vary from case to case depending on the circumstances, but may include: the nature and complexity of the claim or issues arising; the amount in issue; the nature of the evidence (including whether credibility is in issue); the importance of the claim to the creditor and the estate; the cost and delay of further procedures; and what prejudice, if any, may arise from a summary hearing.

[26] There is no "one size fits all" solution as to how any claim can be determined; ideally, the answer will no doubt be driven by the willingness of the parties to streamline the process and the creativity of the parties, and their counsel, in fashioning an efficient and expeditious means of obtaining the necessary evidence to put before the court. If agreement can't be reached, then it will fall to the court to consider the issue.

[27] Procedural issues that may be considered include:

a) whether pre-trial oral or document discovery is truly necessary and if so, whether limits can be put on such discovery;

b) whether affidavits should be filed as opposed to *viva voce* evidence at a full trial;

c) whether cross-examinations on affidavits or expert reports are necessary and whether that can be done ahead of the hearing or at the hearing itself;

d) whether timelines for delivery of materials, such as affidavits, or any pre-hearing procedures, can be fixed so to expedite the determination of the issues;

e) whether other means of establishing the evidentiary record can be ordered, such as through notices to admit, agreed statement of facts and common documents so as to minimize or eliminate any conflict as to the facts; and

f) whether written arguments can be exchanged in advance of the hearing.

[28] The 1974 Plan continues to take the position that the issues raised in the Walter Canada Group's application cannot and should not be determined at this hearing without providing it the opportunity to undertake the discovery that it earlier sought. It specifically seeks to examine William G. Harvey, the former executive vice-president and chief financial officer of the Canadian holding company within the Walter Canada Group, who was also the person who gave evidence in support of the initial *CCAA* filing. That evidence was accepted by this Court and various orders were made based on that evidence.

[29] In substance, the 1974 Plan advocated for a reversal of what I consider to be the proper approach (and onus) here, as discussed above. The 1974 Plan submits that a full trial is required, unless the Walter Canada Group can successfully argue in favour of abbreviated procedures. Consistent with its goal of embarking upon a full scale litigation process, the 1974 Plan prepared its list of documents dated December 23, 2016. The Walter Canada Group has not yet provided any discovery, either oral or documentary.

[30] I intend to address the 1974 Plan's objection to the lack of discovery from the Walter Canada Group in the context of the individual issues discussed below. It will suffice at this point to note that I reject the approach advocated by the 1974 Plan, although I will consider its arguments in the context of the relevant and material evidence needed to decide the issues raised on this application.

V BACKGROUND FACTS

[31] In support of its overall position that this summary hearing is inappropriate, the 1974 Plan has steadfastly refused to admit to most facts as proposed by the

Walter Canada Group. It insists on what it calls "trial quality" evidence on all issues and says that there remain "disputed facts" which are relevant to the determination of these issues, principally relating to the degree of integration between the Walter Canada Group and the entities within the U.S. arm of the Walter Energy Group.

[32] The stridency of this position is particularly puzzling given the 1974 Plan's refusal to acknowledge even its own "facts" and documents, as found in its evidence filed in the course of this proceeding.

[33] The 1974 Plan has shown absolutely no willingness to consider and co-operate in the development of a streamlined process which would have allowed the Walter Canada Group to put what I consider uncontroversial facts before the court. The more extreme examples of this obdurate position are found in the 1974 Plan's refusal to admit that: the Canadian mine operations and assets in this jurisdiction were governed by Canadian and British Columbian environment and mining legislation; and, that the Walter Canada Group's relationship with its Canadian employees (both unionized and non-unionized) were governed by Canadian and British Columbian labour and employment laws. To suggest otherwise is a confounding proposition and needless to say, the 1974 Plan never did explain how it could not be so. The 1974 Plan would only admit that the mines were located in British Columbia and that the Walter Canada Group employed persons working in British Columbia, matters that were in evidence at the beginning of this proceeding and as I said, uncontroversial.

[34] The 1974 Plan has raised virtually every possible objection toward blocking a summary or even hybrid hearing on these preliminary issues, presumably toward the end game of avoiding this hearing and engaging in an extensive and expensive full-scale litigation process with corresponding discovery. In my view, the objections of the 1974 Plan can more accurately be described as angling for a "fishing expedition" so as to search for facts that may conceivably provide some basis for their claim.

[35] I would also note that the 1974 Plan appears to have made no effort to obtain what it describes as relevant evidence from various U.S. sources, including speaking

to Mr. Harvey and also obtaining documentation in the hands of the U.S. debtors within the Walter Energy Group: see *Tassone v. Cardinal*, 2014 BCCA 149 at paras. 38-39. As such, the 1974 Plan has not provided any foundation upon which to argue that further relevant facts may exist in order to prove its claim.

[36] I have concluded that the approach advocated by the 1974 Plan is neither warranted nor appropriate in the circumstances and I am exercising my discretion to proceed otherwise.

[37] Accordingly, I have taken the facts from various sources: the facts asserted by the 1974 Plan which are admitted or which are not contested by the Walter Canada Group or the Union for the purpose of this application; evidence filed by the 1974 Plan in these proceedings generally or in direct response to this application; and, what I consider to be the uncontroverted facts introduced by the Walter Canada Group in its evidence in this proceeding which have been the foundation for numerous orders granted by me. I also rely on the findings in my earlier reasons for judgment in these proceedings (including *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107; 2016 BCSC 1413; 2016 BCSC 1746); and, evidence introduced in other proceedings before this court and filed in this action. See *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367 at paras. 36-37; *British Columbia (Attorney General) v. Malik*, 2011 SCC 18 at paras. 46-48.

[38] In my view, there is little, if any, controversy about the following facts which are more accurately described as simply background facts.

[39] Below are my findings of fact. It will become clear from the analysis below that most of the following background facts only provide context for the specific determination of the issues raised by the Walter Canada Group. I will also address any further facts relevant to the analysis in the separate discussion of the issues.

(1) The Walter Energy Group and U.S. Operations

[40] The Walter Energy Group operated its international coal production and export business in two distinct segments: (a) the U.S. operations, and (b) the Canadian and United Kingdom (U.K.) operations.

[41] The parent corporation of all of entities within the Walter Energy Group is Walter Energy, Inc. ("Walter Energy U.S."), which is a public company incorporated under the laws of Delaware and headquartered in Birmingham, Alabama. The U.S. coal mining operations of the Walter Energy Group were conducted in Alabama and West Virginia through a variety of U.S. corporations.

[42] The Walter Energy Group's U.S. entities included a wholly owned subsidiary of Walter Energy U.S., Jim Walter Resources, Inc. ("Walter Resources"). Walter Resources was incorporated in Alabama and conducted its coal production business in Alabama.

(2) Acquisition leading to Creation of Walter Canada Group

[43] Before 2011, Walter Energy U.S. did not have any operations or subsidiaries in Canada or the U.K.

[44] In October 2010, Walter Energy U.S. and Western Coal Corp. ("Western") began negotiating the acquisition of Western's coal mining operations in British Columbia, the U.K. and the U.S. (the "Western Acquisition").

[45] Walter Energy U.S. publicly announced the Western Acquisition in November 2010, when Walter Energy U.S. issued a press release and filed both the press release and a Form 8-K with the SEC on its publicly available EDGAR system. The press release referred to Walter Energy U.S.'s intention to complete a "business combination" with Western.

[46] In December 2010, Walter Energy U.S. announced that (admitted for the purpose of these statements having only been made, and not for the truth of the contents):

a) it had entered into an arrangement agreement with Western whereby Walter Energy U.S. would acquire all of the outstanding common shares of Western;

b) the "transaction will be implemented by way of a court-approved plan of arrangement under British Columbia law"; and

c) in connection with the arrangement, Walter Energy U.S. intended to borrow $2.725 million of senior secured credit facilities, "the proceeds of which will be used (i) to fund the cash consideration for the transaction, (ii) to pay certain fees and expenses in connection with the transaction, (iii) to refinance all existing indebtedness of the Company and Western Coal and their respective subsidiaries and (iv) to provide for the ongoing working capital of [Walter Energy U.S.] and its subsidiaries".

[47] On March 9, 2011, Walter Energy U.S. incorporated Walter Energy Canada Holdings, Inc. ("Canada Holdings") and became its sole shareholder. Canada Holdings was incorporated specifically to hold the shares of Western and therefore, indirectly, its subsidiaries.

[48] On March 10, 2011, Justice McEwan of this Court approved the proposed plan of arrangement through which the Western Acquisition was accomplished.

[49] On April 1, 2011, Canada Holdings acquired all outstanding common shares of Western for an estimated total consideration of approximately US$3.7 billion.

[50] After completing the Western Acquisition, the Walter Energy Group engaged in a series of internal restructurings to rationalize operations and organize the Walter Energy Group into geographical business segments: the Walter U.S. group, the Walter Canada Group and the Walter U.K. Group. As a result, the U.S. assets previously held by Western were transferred from Canada Holdings to Walter Energy U.S. and no longer formed part of the Canadian assets.

(3) Walter Resources and the 1974 Plan

[51] The 1974 Plan is a pension plan and irrevocable trust established in 1974 in accordance with section 302(c)(5) of the *Labour Management Relations Act of 1947*, 29 U.S.C. § 186(c)(5). It is a multiemployer, defined benefit pension plan under section 3(2), (3), (35), (37)(A) of *ERISA*.

[52] The 1974 Plan is resident in Washington, D.C. and administered there. The trustees are resident in the U.S. and all participating employers in the 1974 Plan are resident in the U.S.

[53] The 1974 Plan was established pursuant to a collectively bargained National Bituminous Coal Wage Agreement of 1974 negotiated between the United Mine Workers of America and the Bituminous Coal Operators' Association, Inc., a multiemployer bargaining association. This agreement has been amended from time to time since 1974.

[54] *ERISA* requires that the 1974 Plan be administered in accordance with the most recently negotiated collective bargained agreement and other related documentation, such as the pension plan document and pension trust document. These documents set out, among other things, the contribution obligations of contributing employers to the 1974 Plan, which include:

a) monthly pension contributions for as long as there were operations covered by the 1974 Plan; and

b) a "withdrawal liability" accruing upon a partial or complete withdrawal from participation in the 1974 Plan.

[55] The participants and beneficiaries in the 1974 Plan are retired or disabled former hourly coal production employees and their eligible surviving spouses. There are approximately 88,000 such participants and beneficiaries.

[56] All signatories to the collective bargaining agreements are "participating employers". All such "participating employers" are resident in the U.S.

[57] Only one of the U.S. entities, namely Walter Resources (or a predecessor entity), was a signatory to various National Bituminous Coal Wage Agreements from 1978 forward and was therefore, a "participating employer" in the 1974 Plan. The last of such agreements signed by Walter Resources was the one negotiated in 2011 (the "2011 CBA").

[58] No member of the Walter Canada Group is or ever was a signatory to any National Bituminous Coal Wage Agreement, including the 2011 CBA. The 1974 Plan does not suggest that the Walter Canada Group ever contributed to the 1974 Plan; nor does the 1974 Plan suggest that the Walter Canada Group entities had any obligation to contribute to the 1974 Plan.

[59] At the time of the Western Acquisition in 2011, the 1974 Plan had an unfunded liability of more than US$4 billion. Its status at that time was said to be "Seriously Endangered Status", meaning that the 1974 Plan's funded percentage was less than 80%. If Walter Resources had withdrawn from the 1974 Plan around that time, the estimated withdrawal liability was approximately US$426 million. There is no indication that the 1974 Plan took any position in this court in respect of the Western Acquisition.

[60] Walter Resources and the 1974 Plan entered into the 2011 CBA after the Walter Acquisition was completed.

[61] As with many pension plans, the fortunes of the 1974 Plan (and hence its beneficiaries) have not escaped the brunt of global market forces over the last decade or so. The global financial crisis in 2008/2009 resulted in declining assets held by such plans. In addition, the demographics of an aging population combined with declining coal mining operations (and hence fewer participating employers) have resulted in added financial pressures on less resources. As of September 2015, the 1974 Plan was certified as being in "Critical and Declining Status", meaning that it is expected to become insolvent by 2025/2026. The 1974 Plan now asserts that the insolvency is expected to occur in six to seven years.

[62] Beyond benefits available to the beneficiaries of the 1974 Plan under these private contractual arrangements, there is some governmental support. A U.S. government sponsored entity, the Pension Benefits Guaranty Corporation, guarantees payment of a portion of the 1974 Plan's benefits, but at a reduced level.

(4) Walter Canada Group Corporate Structure

[63] All of the Walter Canada Group entities are organized in Canada and for the most part, in British Columbia. The Canadian business operations principally consisted of the operation of three coal mines in British Columbia, being the Brule, Willow Creek and Wolverine mines. These mining properties have since been sold to a purchaser, as approved in these proceedings last year: *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 1746 at para. 80.

[64] In particular, the petitioner companies, being Walter Canadian Coal ULC and Canada Holdings, with the latter's wholly owned subsidiary corporations, being Wolverine Coal ULC, Brule Coal ULC, Willow Creek Coal ULC, Cambrian Energybuild Holdings ULC (which in turn owns the Walter Energy Group's U.K. assets) and 0541237 BC Ltd., are all incorporated under the laws of British Columbia. The lone exception is Pine Valley Coal Ltd., a company incorporated under the laws of Alberta.

[65] Similarly, the partnerships in the Walter Canada Group, which are wholly owned by Canada Holdings, being Walter Canadian Coal Partnership, Wolverine Coal Partnership, Brule Coal Partnership, and Willow Creek Coal Partnership, are all organized under the laws of British Columbia.

[66] As I earlier noted in my reasons (*Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107 at para. 4), "[t]he timing of the Canadian acquisition could not have been worse". In 2011, the market for metallurgical coal fell dramatically, affecting operations of the entire Walter Energy Group in the U.S., Canada and the U.K. One can only assume that other coal producers in those jurisdictions, including signatories to the 1974 Plan in the U.S., similarly suffered the same fate and are struggling or have struggled with this economic downturn in the coal industry.

(5) The U.S. Chapter 11 Proceedings

[67] On July 15, 2015, Walter Energy U.S. and some or all of its U.S. subsidiaries, including Walter Resources, commenced proceedings under Chapter 11 of Title 11 of the U.S. *Bankruptcy Code* in the U.S. Bankruptcy Court for the Northern District of Alabama (the "Chapter 11 Proceedings").

[68] On October 8, 2015, the 1974 Plan filed proofs of claim in the Chapter 11 Proceedings against all of the U.S. debtors, including Walter Resources and Walter Energy U.S., claiming what was anticipated to be the withdrawal liability of Walter Resources if it withdrew from the 1974 Plan. It appears to be the case that everyone anticipated that Walter Resources would seek to withdraw from the 1974 Plan through the Chapter 11 Proceedings. The unsecured claim was for not less than approximately US$904 million.

[69] The Proofs of Claim filed by the 1974 Plan do not refer to any entity within the Walter Canada Group as having any potential liability for this claim.

[70] The U.S. insolvency filing in turn sparked the need for the corporations within the Walter Canada Group to seek creditor protection in Canada.

[71] On December 7, 2015, this Court granted an Initial Order in this proceeding in favour of the petitioners. Protection was also granted in favour of the partnerships (see *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107 at para. 3). The Walter Canada Group did not seek recognition of the *CCAA* Proceedings in the U.S.; similarly, the Walter Energy Group's U.S. debtors did not seek recognition of the Chapter 11 Proceedings in Canada.

[72] At the time of the Canadian *CCAA* filing, Mr. Harvey indicated that efforts were underway in the Chapter 11 Proceedings to implement a sales process to sell all of Walter Energy U.S.'s Alabama assets. A stalking horse agreement was part of that sales process, as is typical in those proceedings.

[73] It quickly became apparent to the U.S. stakeholders that the stalking horse purchaser in the Chapter 11 Proceedings had no interest in assuming what the U.S. Bankruptcy Court would later describe as Walter Resources' "legacy and current labour costs", including that owing under the 2011 CBA. The asset purchase agreement later signed by the U.S. debtors and the purchaser expressly provided that the sale was subject to the U.S. Bankruptcy Court issuing an order allowing the U.S. debtors to reject the 2011 CBA, in accordance with the U.S. *Bankruptcy Code* provisions. It is common ground that upon such rejection, the withdrawal liability under the 1974 Plan would arise.

[74] Arising from opposition to the stalking horse process from some factions, including the unsecured creditors committee (the "UCC"), a settlement was reached. On December 22, 2015, the U.S. Bankruptcy Court entered an order approving a Settlement Term Sheet between the Walter Energy group's U.S. debtors, a steering committee, the stalking horse purchaser and the UCC. The Settlement Term Sheet entitles unsecured creditors, which includes the 1974 Plan, to receive 1% of the common equity issued in the stalking horse purchaser on closing, as well as the right to participate in any exit financing. Later documentation filed in March 2016 by the Walter Energy Group's U.S. debtors and the UCC in the Chapter 11 Proceedings confirms that this settlement was intended to establish the extent of any recovery by unsecured creditors, such as the 1974 Plan, from the Chapter 11 estates.

[75] The Walter Canada Group entities were not involved in the Chapter 11 Proceedings and were not parties to the Settlement Term Sheet.

[76] On December 28, 2015, the U.S. Bankruptcy Court granted an order allowing Walter Resources to reject the 2011 CBA, over the objections of labour related stakeholders, including the 1974 Plan. The order (the "1113/1114 Order") authorized Walter Energy U.S. and its U.S. affiliates to reject the 2011 CBA and declared that any sale to the stalking horse purchaser was free and clear or any encumbrance or liabilities under the 2011 CBA. The U.S. Bankruptcy Court also declared that upon

such sale, Walter Resources had no further contribution obligations under the 2011 CBA.

[77] The Walter Canada Group did not participate in the hearing which gave rise to the 1113/1114 Order. The reasons of the U.S. Bankruptcy Court which led to the granting of the 1113/1114 Order do not refer at all to the Walter Canada Group entities or any assets or operations in Canada held by those entities.

[78] The 1974 Plan appealed the 1113/1114 Order, although that appeal was later withdrawn in February 2016. At that time, the 1113/1114 Order became final.

[79] By early January 2016, the 1974 Plan clearly anticipated that Walter Resources' withdrawal from the 2011 CBA was imminent. Around that time, the 1974 Plan began filing materials in these *CCAA* proceedings asserting that the Walter Canada Group entities were jointly and severally liable for the withdrawal liability under the 1974 Plan.

[80] The sale of the U.S. assets, as approved by the U.S. Bankruptcy Court, closed on April 1, 2016. Accordingly, immediately before that date, all contributions by Walter Resources to the 1974 Plan ceased and the withdrawal liability arose. The 1974 Plan now estimates that the withdrawal liability is in excess of US$933 million.

[81] The 1974 Plan introduced the evidence of Dale Stover, the Director of Finance and General Services employed with the 1974 Plan. He indicates that by reason of Walter Resources' withdrawal, the status of the 1974 Plan has been further jeopardized even beyond that recognized in September 2015. He indicates that the other employers in the 1974 Plan will be further burdened by this loss.

[82] Despite the extensive proceedings before the U.S. Bankruptcy Court, at no time has that Court expressed any opinion on the validity of the 1974 Plan's claim as asserted in the Chapter 11 Proceedings. In addition, at no time did the U.S. Bankruptcy Court address the ability of the 1974 Plan to assert joint and several liability for the withdrawal liability against the other U.S. debtors. Certainly, that court did not address the core (and second) issue before me on this application; namely,

whether the entities within the Walter Canada Group are liable under *ERISA's* provisions.

(6) Estimated Recoveries

[83] In my view, the evidence and submissions on this point are substantially irrelevant, and completely irrelevant to the determination of some issues. I understand that the parties all agree as to this irrelevancy although they also all saw fit to ensure that I knew the consequences of a win/loss to each side. Accordingly, to round out the narrative, the consequences arising from this application are as follows.

[84] If the 1974 Plan's claim is found to be invalid as against the Walter Canada Group entities, it is anticipated that all other unsecured claims filed against the Canadian estates will be paid in full, including in relation to substantial amounts (approximately $12.8 million) owed to the Canadian unionized employees who worked in the British Columbia coal mines. In that event, it is also expected that the remaining funds will likely flow to Walter Energy U.S. arising from intercompany claims that have been filed.

[85] I am advised by the 1974 Plan that, if this happens, no funds will be paid to it in respect of its unsecured claim. This appears to arise from the Settlement Term Sheet, discussed above, and which appears to limit recovery for the U.S. unsecured creditors (including the 1974 Plan) to equity in the stalking horse purchaser and participation in exit financing, which I gather provided little or no recovery in the U.S. Accordingly, the 1974 Plan asserts that without recovery from the Walter Canada Group's assets, it will fail to have achieved any recovery, either here in Canada or in the U.S.

VI ***ERISA's* PROVISIONS**

[86] A review of the legislative provisions found in *ERISA* is helpful at this point. It is certainly required in order to consider and decide the second question, namely whether the Walter Canada Group is liable under *ERISA* as a matter of U.S. law.

However, an understanding of those provisions is also necessary in order to answer the first question, namely being whether U.S. law (i.e. *ERISA*) even applies here.

[87] The following, which I have largely adopted from the expert report of one of the Walter Canada Group's expert on U.S. law, Marc Abrams, summarizes the relevant legislative provisions under *ERISA* (or Title 29). Some of these provisions have already been generally described above:

a) a "multiemployer plan" is a collectively bargained pension plan maintained and funded by more than one unrelated employer, typically within the same or related industries: 29 U.S.C. § 1301(a)(3). As stated above, the 1974 Plan is a multiemployer defined benefit pension plan: see 29 U.S.C. § 1002(2), (3), (35) and (37)(A);

b) if one of the contributing employers withdraws from a multiemployer plan, either partially or completely, *ERISA* requires the "employer" to pay to the plan its share of any unfunded vested benefits, generally determined as of the end of the plan year preceding the plan year in which the withdrawal occurs: 29 U.S.C. § 1386 and § 1391. The withdrawing employer's liability is referred to as the "withdrawal liability": 29 U.S.C. § 1381; and

c) the plan sponsor has a statutory duty to calculate and collect the withdrawal liability from the withdrawing employer: 29 U.S.C. § 1382. *ERISA* appears to contemplate that payments may be made over time in accordance with a schedule; however, if the withdrawing employer defaults in paying the withdrawal liability, the entire amount of the withdrawal liability becomes subject to collection: 29 U.S.C. § 1399(c)(5).

[88] The key *ERISA* provisions which are said by the 1974 Plan to give rise to its claim against the Walter Canada Group entities are:

a) withdrawal liability is the joint and several obligation of not only the withdrawing "employer" (as a contributing employer) but also each member of the employer's "controlled group": 29 U.S.C. § 1301(a)(2)(B);

b) a contributing sponsor's "controlled group" consists of the contributing employer and others who are under "common control" (29 U.S.C. § 1301(a)(14)(A) and 29 U.S.C. § 1002(40)(B));

c) for a determination as to whether two persons are under "common control" where there is a single-employer plan, *ERISA* then refers to regulations "consistent and coextensive" with regulations under section 414 of Title 26 (also known as the *Internal Revenue Code*): 29 U.S.C. § 1301(a)(14)(B);

d) with respect to multiemployer plans, two or more trades or businesses are deemed to be a single employer if they are within the same "control group" and "control group" means a group of trades or businesses under "common control" with the employer: 29 U.S.C. § 1002(40)(B); and

e) for the purposes of *ERISA*, the three principal types of "controlled groups" are found in *Internal Revenue Code* regulations: (i) parent-subsidiary controlled groups; (ii) brother-sister controlled groups; and (iii) combined groups: 26 C.F.R. § 1.1563-1(a)(1)(i).

[89] The 1974 Plan asserts that the corporations within the Walter Canada Group are part of Walter Resources' parent-subsidiary "controlled group". Under *ERISA*, a parent-subsidiary "controlled group" is a group consisting of entities connected through a controlling interest with a common parent where stock ownership of at least 80% of the voting power or value (other than the parent) is owned by one or more corporations and the common parent corporation owns stock with at least 80% of the voting power of at least one of the corporations: 29 U.S.C. § 1301(b)(1); 26 U.S.C. § 414(b); 26 U.S.C. § 1563(a)(1); 26 C.F.R. § 1.1414(c).

[90] The 1974 Plan also relies on other provisions of the *Internal Revenue Code* and its regulations which refers to treating partnerships which are under common control as a single employer: 26 U.S.C. § 414(c); 29 U.S.C. § 1301(b)(1); 26 U.S.C. § 1563(a)(1); 26 C.F.R. § 1.1414(c)-2.

[91] For purposes of this application, the Walter Canada Group and the Union agree that it can be assumed that under the above provisions, the Walter Canada Group entities were under common control and within the "controlled group" of the Walter Energy Group given the level of stock ownership held by Walter Energy U.S. in Canada Holdings and Walter Canadian Coal ULC. Further, as stated above, 100% ownership of all of the Canadian operating entities is held through Canada Holdings. All of the expert witnesses were similarly asked to make this assumption.

[92] Accordingly, *prima facie*, *ERISA* purports to impose joint and several absolute liability on the entities within the Walter Canada Group based on the 1974 Plan having met the numerical (80%) test for stock ownership or voting control with respect to a "controlled group" under *ERISA*. In addition, no issue arises given that some of the entities are partnerships.

VII THE CHOICE OF LAW QUESTION

[93] The first issue posed by the Walter Canada Group is:

> Under Canadian conflict of laws rules, is the 1974 Plan's claim as against the Walter Canada Group governed by Canadian substantive law or U.S. substantive law (including *ERISA*)?

[94] Accordingly, the question for this Court to consider is what choice of law - Canada or the U.S. (ie. *ERISA*) - governs the 1974 Plan's claim. Since the 1974 Plan has chosen to assert its claim in these Canadian proceedings, it is common ground that Canadian choice of law principles govern the analysis of what law applies to the 1974 Plan's claim: Janet Walker, *Castel & Walker Canadian Conflicts of Laws*, (Toronto, LexisNexis, 2005) (loose-leaf, 6th ed.) ch. 1 at 1-2.

[95] The overall aim or purpose of the choice of law exercise is to identify the most appropriate law to govern a particular issue: A.V. Dicey, J.H.C. Morris & Lawrence Collins, *The Conflict of Laws,* vol. 1, 15th ed. (London, Sweet & Maxwell, 2012) at 51.

[96] The authorities are clear that determining choice of law is a two-step process: firstly, the Court characterizes the claim to determine which choice of law rule

applies; and secondly, the Court applies the proper choice of law rule to the claim. This process was described in *Castel & Walker* at 3-1 as follows:

> In an action involving legally relevant foreign elements, a court may be asked to apply foreign law. To decide whether to do so, the court must ascertain the legal nature of the questions or issues that require adjudication and then apply its appropriate conflict of laws rules to them. For instance, do the facts raise a question of succession or of matrimonial property, or a question of capacity or of form? This analytical process is called the characterization or classification. Its purpose is to enable the court to find legal categories with which the forum is familiar. In other words, the court must allocate each question or issue to the appropriate legal category. The application of the forum's conflict of laws rule to each legal question or issue will indicate which legal system governs that question or issue. That legal system is called the *lex causae*.
>
> Once the court has characterized the issue, it will consider the connecting factor – a fact or element connecting a legal question or issue with a particular legal system. Finally, the court will apply the law identified as the governing law. In doing so it must separate the rules of substance from the rules of procedure of the legal systems involved, because questions of procedure are governed by the *lex fori*.

[97] The first step therefore requires that the court ascertain or characterize the "legal nature of the questions or issues". Typical legal categories used for characterization include: property law, the law of obligations, family law, the law of corporations and insolvency. Other categories, or sub-categories, include the law of contract (an "obligation"), tort and equitable remedies, such as unjust enrichment.

[98] In Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws*, 2nd ed. (Toronto: Irwin Law Inc., 2016) at 223-226, the authors discuss the somewhat perplexing question as to just what is to be characterized. They conclude that facts are not to be characterized, but the courts have variously referred to both "issues" and "causes of action" as being characterized. At 224, the authors highlight, citing *Macmillan Inc. v. Bishopsgate Investment Trust and Others (No. 3)*, [1996] 1 W.L.R. 387 (C.A.), the possible differences that may arise in that respect and that claimants may attempt to characterize their claims to support their choice of law.

[99] In this case, I see no material difference whether one characterizes the 1974 Plan's claim in terms of a "cause of action" or "issue". Fundamentally, the claim arises from the express legislative provisions of *ERISA*. As noted by the Walter

Canada Group, there is no equivalent provision of *ERISA* here in Canada or British Columbia. In that event, the claim is to be characterized "as its closest functional equivalent under that [forum's] law", namely Canada and British Columbia: Pitel and Rafferty at 227.

[100] The Walter Canada Group and the Union, on one hand, and the 1974 Plan, on the other, present starkly different approaches to the characterization of the 1974 Plan's claim. As I will describe below, the answer to this first step or question in turn leads to a distinct path or set of considerations as to the choice of law issue. The answers to each of the analytical steps also lead to different considerations in relation to most, if not all, of the evidentiary issues and objections raised by the 1974 Plan.

[101] Accordingly, the statement found in Pitel and Rafferty at 222 that the characterization of the issue is "central to the choice of law process" is particularly apt here.

[102] This two-step process is illustrated by this Court's decision in *Minera Aquiline Argentina SA v. IMA Exploration Inc.*, 2006 BCSC 1102, aff'd 2007 BCCA 319, upon which both parties rely. At paras. 160-181, this Court addressed the characterization issue, which arose from the competing positions of the parties. The defendant asserted that the claim related to a foreign immovable (in which case Argentina law applied) and the plaintiff asserted that the claim was an *in personam* claim for appropriation through a breach of confidence (in which case British Columbia law applied).

[103] This Court in *Minera* determined that the claim was more appropriately characterized as an equitable claim for unjust enrichment arising from a breach of confidence, with the consequence that the relevant choice of law rule was the "proper law of the obligation" (see paras. 181-184).

(1) What is the Characterization of the 1974 Plan's Claim?

[104] Turning to the first step, there is no disagreement that the 1974 Plan's claim does not arise as a result of the Walter Canada Group's conduct. The Walter

Canada Group entities did not employ any beneficiaries of the 1974 Plan or have any direct relationship, contractual or otherwise, with the 1974 Plan. Nor did the Walter Canada Group contribute to or have any obligation to contribute to the 1974 Plan. No other conduct that may be relevant to the Walter Canada Group's liability in that regard has been raised. Simply put, the Walter Canada Group had nothing to do with either the 1974 Plan or Walter Resources' participation in it.

[105] The Walter Canada Group contends that the 1974 Plan's claim is properly characterized as an issue under the law of corporations or as an issue of legal corporate or partnership status or personality. They say that the basis for the claim simply arises under *ERISA* and as a result of Walter Resources' withdrawal from the 1974 Plan. Further, they say that the *only* basis for the claim against the Walter Canada Group arises from *ERISA*'s "common control" provisions, discussed above, and are said to apply solely from the fact that the Walter Canada Group entities and Walter Resources are both owned directly or indirectly by Walter Energy U.S.

[106] It is clear that Walter Resources was the only signatory to the 2011 CBA and that Walter Resources' corporate relationship, *albeit* indirectly, to the Walter Canada Group, is the sole basis upon which the 1974 Plan seeks to apply the "controlled group" concept under *ERISA*.

[107] The 1974 Plan contends that its claim concerns the law of obligations and in particular, contract, such that U.S. law is the "proper law of the obligation". The 1974 Plan asserts that its claim is one based not only on *ERISA*, but also the documents by which the 1974 Plan administers itself: namely, the pension plan document, the pension trust document and the 2011 CBA.

[108] I will first address the arguments of the 1974 Plan.

[109] The arguments of the 1974 Plan rest on the central proposition that where a statute confers a right of action in favour of an entity which is not a party to a contract to which the claim relates, the "essential nature" of the claim is to enforce the terms of that contract, such that the claim is properly characterized as one in

contract. The 1974 Plan describes its claim as seeking to enforce the contractual obligations of Walter Resources against the Walter Canada Group. Three English insurance cases are cited in support.

[110] The court in *Youell v. Kara Mara Shipping Company Ltd.,* [2000] EWHC 220 was addressing the consequences of a collision at sea between two ships. The owners of the "innocent" vessel commenced proceedings in Louisiana. In that jurisdiction, such a party was allowed, by statute, to claim directly against the "at fault" vessel owner's insurers. The insurers ultimately applied in England to restrain these proceedings on the basis that the "direct action" statutory claim was pursuant to insurance policies which required any litigation to be brought in England. The English court agreed, stating:

> 58. The position in the present case is that World Tanker has asserted a claim on the H&M Policies by virtue of the *Direct Action Statute* in the Direct Action Claim. It is true that World Tanker have not become a party to the policies by a mechanism of statutory novation or of statutory assignment. But in my view, the nature of the rights that the *Direct Action Statute* confers to World Tanker is contractual; it confers a statutory right to make a claim on a contract to which World Tanker was not originally a party. … the rights are confined to the "*terms and limits of the policy*".
>
> …
>
> 61. Therefore, I conclude that the nature of the claim by World Tanker against YM Insurers in the Direct Action Claim is contractual and the terms of that contract would include the English proper law clause and the [exclusive jurisdiction clause].

[111] In *Through Transport Mutual Assurance Association (Eurasia) Limited v. New India Assurance Association Company Limited*, [2004] EWCA Civ 1598, the court was considering Finnish legislation that gave a person a direct right to sue the defendants' insurer for losses caused by the defendant. At para. 56, the court agreed with the trial judge's approach to consider the "substance" of the claim being advanced. At para. 57, the court adopted the trial judge's comments on the characterization issue for choice of law purposes:

> … If in substance the claim is independent of the contract of insurance and arises under the Finnish legislation simply as a result of its having a right of action against an insolvent insured, the issue would have to be characterized as one of statutory entitlement to which there may be no direct equivalent in

> English law. In that case the issue would in my view have to be determined in accordance with Finnish law. If, on the other hand, the claim is in substance one to enforce against the insurer the contract made by the insolvent insured, the issue is to be characterized as one of obligation. In that case the court will resolve it by applying English law because the proper law of the contract creating the obligation is English law.

[112] The Court of Appeal in *Through Transport* agreed with the lower court's conclusions that the claim was, in substance, to enforce the insurance contract between the responsible party and its insurer:

> 58. … In short, the title to section 67 [of the Finnish Act] is the "*insured person's entitlement to compensation under general liability insurance*" and the right is defined as a right "to claim compensation in accordance with the insurance contract direct from the insurer" in certain defined circumstances. The claim under the Act is not therefore in any sense independent of the contract of insurance but under or in accordance with it. In these circumstances it seems to us that the judge was correct to hold that the issue under the Act is one of obligation under the contract. The judge noted in passing … that the Finnish court itself described the Act as giving the injured party the right to claim compensation "according to the insurance policy".
>
> [Emphasis added]

The Court of Appeal also noted at para. 59 that, although the Finnish Act gave the claimant a right of action directly against the insurer without the need of a formal assignment, what he obtained was "essentially a right to enforce the contract in accordance with its terms". Therefore, pursuant to the terms of the insurance contract, that stated English law applied, English law was the proper law of the claim.

[113] The third and final case cited by the 1974 Plan is *The London Steam-Ship Owners' Mutual Insurance Association Ltd. v. The Kingdom of Spain, The French State*, [2013] EWHC 3188 (Comm). There, the court followed the analysis in both *Youell* and *Through Transport,* stating that in deciding whether or not a direct action right under a statute is "in substance" a claim to enforce the contract or a claim to enforce an independent right of recovery, what matters most is the content of the right, rather than the derivation of its content (paras. 82-88). The Court held that the essential content of the right was provided by the insurance contract, despite the Spanish law which also created further liability for an event that would not normally

be insurable. The direct action right conferred by Spanish law against the liability insurers was found to be, in substance, a right to enforce the contract rather than an independent right of recovery.

[114] The 1974 Plan argues that, for choice of law purposes, its claim arises under the law of obligations - namely it is one of contract. It argues that the three English cases above all involve: (a) a plaintiff advancing a claim against another party for a liability arising under a contract where there was no privity of contract; (b) a plaintiff claiming that the defendant's liability arose under a statute from a law other than the *lex fori*; and (c) a court characterizing the claim as a right to enforce a contract which only existed by reference to that contract.

[115] The 1974 Plan contends that its claim is the same because, although Walter Resources was the only signatory to the 2011 CBA, *ERISA* (namely the foreign law) provides that the Walter Canada Group is liable in relation to Walter Resources' rejection of 2011 CBA and the withdrawal liability that arose under that contract.

[116] Despite the 1974 Plan's fervent submissions on this issue, I am not convinced that the three English cases are analogous to the situation here. In my view, they are distinguishable.

[117] Firstly, the foreign statutes in the English cases simply authorized a direct action against a *party* to the contract in question, being the insurance policy. In essence, the plaintiffs were made parties to the insurance contract between the insurer and the insured. In contrast here, *ERISA* does not authorize the 1974 Plan to sue the Walter Canada Group as a party to the 2011 CBA, the pension plan and trust documents. The 1974 Plan relies solely on the provisions in *ERISA* which only references the contractual liability as the basis upon which to monetarily determine the amount of the liability.

[118] Secondly, the reasoning of and results in the English courts was substantially influenced by the fact that even though the plaintiffs were essentially to step into the insurance contracts, the terms of the contract were, by the statutory provisions, still

to govern. This meant that the plaintiffs took the insurance contracts as they found them and were subject to not only the benefits under the contracts, but also other provisions (or burdens) that might, for example, deny or limit coverage and therefore, recovery. As shown in the results found in those cases, that meant that the plaintiffs were subject to exclusive jurisdiction clauses and provisions requiring arbitration, which was the bargain struck in the insurance contracts.

[119] In *Through Transport*, the court stated at para. 58 that the claim was not "independent of the contract of insurance but under or in accordance with it."

[120] Here, *ERISA*'s provisions are entirely devoid of any mention of the underlying contractual obligations of Walter Resources. Those provisions simply provide that if there is a "withdrawal liability", the other members of the "controlled group" are liable for that amount. I see no basis upon which one could say that, in substance, the Walter Canada Group became a party to the 2011 CBA and the other pension documents by reason of *ERISA*'s provisions.

[121] For example, there is no suggestion that the other "controlled group" members could contest the amount of the withdrawal liability or advance any other substantive issues that Walter Resources might have raised under the terms of the 2011 CBA and the related documents. The evidence shows that the Walter Canada Group was not even notified of, let alone allowed to participate, in the contractual process by which the 1974 Plan determined the "withdrawal liability" under the 2011 CBA. The discussion of "absolute liability" of "controlled group" liability under *ERISA*, cited by the Union, found in *Connors v. Peles*, 724 F. Supp. 1538 (W.D. Pa. 1989) at 1577-8, is instructive on this point:

> … Under certain circumstances, one member of a controlled group may be responsible for the withdrawal liability of another member of the controlled group. These principles apply only when there are two or more separate businesses that are banded or associated together in a "controlled group". Participation in the controlled group, by itself, imposes equal responsibility upon all members of the controlled group for the withdrawal liability of an "employer" member of the controlled group, i.e., even though the "employer" member of a group of trades or businesses is the only one with a pension plan. Once notice to the "employer" is given, as required by 29 U.S.C. § 1399, it is totally irrelevant as to whether actual or even constructive notice is

> given or imputed to the "non-employer" members of a controlled group. The liability of the "non-employer" members of a controlled group does not rest on any notice safeguards under ERISA. The "non-employer" members of the controlled group do not even have to be engaged in the same business enterprise, or even in a similar business. A striking example is provided in *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 630 F.2d 4, 11-13 (1st Cir.1980), where one member of a controlled group (the "non-employer") did not even have any employees!
>
> Congress built the equivalent of withdrawal liability "guaranty's" into ERISA, at the time of the enactment of the multiemployer amendments. The "guaranty's", commonly known and referred to as the "controlled group" statutes, 29 U.S.C. § 1301(b)(1), and the regulations adopted thereunder, 29 C.F.R. Part 2612, and consider the entire group as but one "employer", 29 U.S.C. § 1002(5), and impose *absolute* liability upon all members of a control group for the withdrawal liability of any member of a statutory group of enterprises, even though the "employer" member of a group of trades or business is the only one with a pension plan, and regardless of whether their groups have employees. *Pension Benefit Guaranty Corp. v. Ouimet Corporation*, 630 F.2d 4 (1st Cir.1980). Under "controlled group" statutory liability, an inquiry as to the interrelationship of the members of the control group, with the employees of all members of the control group, as required under the "single employer" test, is totally unnecessary and irrelevant.
>
> [Emphasis added in underlining]

[122] During the hearing, the 1974 Plan's counsel referred to the 1974 Plan as having certain "contractual expectations". While this may have been true in relation to Walter Resources, in my view, the 1974 Plan could only have had "statutory expectations" in relation to other "controlled group" members in the Walter Energy Group arising from *ERISA*. Certainly, the Walter Canada Group had no "contractual expectations" in these circumstances; this is in contradistinction to the fact that the insurers in the English cases most certainly would have had "contractual expectations" arising from the insurance contracts they issued.

[123] I turn to consider the argument advanced by the Walter Canada Group that the appropriate choice of law characterization of the 1974 Plan's claim is one of the law of corporations and more specifically, one of separate legal existence or personality.

[124] The 1974 Plan argues that the choice of law rule advocated by the Walter Canada Group is intended only for matters related to corporate existence, such as

whether an entity has the capacity to sue or be sued. The 1974 Plan concedes that it may also apply to issues of corporate governance, such as shareholder rights, the authority of directors, the power to make contracts or rights to issue or transfer shares.

[125] I do not agree that such a narrow approach as advocated by the 1974 Plan is appropriate in characterizing the issue. The references in the cases to looking at the "substance" of the claim support a more far-ranging and holistic analysis. Indeed, although in support of its own argument, the 1974 Plan itself asserted that the characterization exercise is to be done in accordance with the rules and in a "flexible manner".

[126] In *Macmillan*, the English court of appeal was called upon to settle a dispute about shares that were wrongly offered as security in England, when in fact they were owned by an American company. In the choice of law analysis, Auld L.J., at 407, discussed the need to look beyond the strict or narrow formulation of the claim:

> …classification is governed by the *lex fori*. But characterisation or classification of what? It follows from what I have said that the proper approach is to look beyond the formulation of the claim and to identify according to the *lex fori* the true issue or issues thrown up by the claim and defence. This requires a parallel exercise in classification of the relevant rule of law. However, classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the *lex fori*, or that of the competing system of law, which may have no counterpart in the other's system. Nor should the issue be defined too narrowly so that it attracts a particular domestic rule under the *lex fori* which may not be applicable under the other system: see *Cheshire & North's Private International Law*, 12th ed., pp. 45-46, and *Dicey & Morris*, vol. 1, pp. 38-43, 45-48.

Here, the "true issues" that are raised by the claim go well beyond the narrow formulation advanced by the 1974 Plan.

[127] Further, the text authority cited by the 1974 Plan on this issue in fact supports the position of the Walter Canada Group. In *Castel & Walker*, the authors also adopt a wider view of the "law of corporations" as including questions of status, separate

legal personality and the limited liability that flows from that personality. At 30-1, the authors state:

> Questions concerning the status of a foreign corporation, especially whether it possesses the attributes of legal personality, are, on the analogy of natural persons, governed by the law of the domicile of the corporation. This domicile is in the state, province or territory of incorporation or organization and it cannot be changed during the corporation's existence even if the corporation carries on business elsewhere.
>
> …
>
> While the state, province or territory in which the foreign corporation intends to carry on business has the right to prescribe the extent to which the corporation may exercise its corporate powers and capacity, this does not mean that proceedings may be taken in this jurisdiction to affect its status as a corporation. …
>
> There is some controversy over which law determines the liability of a corporation for the obligations of a foreign subsidiary. Since the personality and status of the subsidiary is called into question, it would seem that the law applicable to the status and capacity of the subsidiary should determine whether its corporate veil can be pierced.
>
> [Emphasis added]

[128] The 1974 Plan also argues that this Court should consider the rationale of the choice of law rule it is applying and also the purposes of the substantive law to be characterized and then determine if the conflict rule covers the substantive law at issue (ie. the effect of a certain characterization): Dicey at 51 citing *Raiffeisen Zentralbank Osterreich AG v. An Feng Steel Co. Ltd.*, [2001] EWCA Civ 68 at para. 27. The 1974 Plan then says that the purpose of the substantive law (ie. *ERISA*) is to ensure that employees who are promised retirement benefits actually receive those benefits, citing *Connolly v. Pension Benefit Guaranty Corp.*, 475 US 211, 214 (1986). The 1974 Plan then asserts that this purpose is entirely different than that behind the corporate choice of law rule whose purpose is the determination of corporate matters or more specifically, corporate capacity or governance. After analyzing the underlying policy purposes of the conflicts rule, that corporations are governed by the substantive law of the country of incorporation, the 1974 Plan argues that this substantive law issue is not engaged here since its claim is about employees' pension entitlements, in which case U.S. law should apply.

[129] This argument is entirely without merit in that it confuses the intent or purpose behind the "controlled group" provisions found in *ERISA* with the effect of those provisions. I agree that *ERISA* has been employed by the U.S. Congress with the *intention* and *purpose* of seeking to ensure that U.S. retirees receive contracted for benefits; however, the *effect* of the "controlled group" provisions is to collapse the corporate structure to ensure that as many entities within a corporate group are liable for retirement plan withdrawal and that their assets are available to meet obligations to those retirees.

[130] Seen in that vein, the purpose of the choice of law rule proposed by the Walter Canada Group intersects with the substantive law under *ERISA*, in that both address the corporate status or the separate legal existence or personality of other persons, including the Walter Canada Group entities. *ERISA* ascribes liability based solely on corporate and other legal relationships.

[131] As the Walter Canada Group argues, it is trite law in British Columbia and Canada that corporations have separate legal personalities from that of its shareholders and that shareholders are not *prima facie* liable for the debts of the corporation: *Salomon v. Salomon & Co*, [1897] A.C. 22 (H.L.). A corporation has the capacity and the rights, powers and privileges of an individual of full capacity: *Business Corporations Act*, S.B.C. 2002, c. 57, s. 30.

[132] The well-known decision in *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* (1989), 37 B.C.L.R. (2d) 258 (C.A.) at 266-268 affirmed the sanctity of a corporation's existence per *Salomon* and discussed that the corporate veil may be pierced only in certain and exceptional circumstances. To similar effect, see *Edgington v. Mulek Estate*, 2008 BCCA 505 at paras. 20-25 where, following *B.G. Preeco*, the court stated at para. 21 that the "separate legal personality of the corporation will not be lightly disregarded". These and other cases were recently discussed in *Emtwo Properties Inc. v. Cineplex (Western Canada) Inc.*, 2011 BCSC 1072 beginning at para. 97 to similar effect.

[133] The intention behind, purpose and effect of *ERISA*'s "common control" or "controlled group" provisions are aided by interpretations of those provisions by the U.S. courts. In that respect, Mr. Abrams' expert report is again of assistance. He states at pp. 6-7 of his report:

> Courts have described the operation of ERISA's "controlled group" liability provisions as a "veil-piercing" statute that disregards formal business structures in order to impose liability on related businesses.
>
> …
>
> As the U.S. Supreme Court has recognized, in place of the "subjective, case-by-case analysis that had previously prevailed," Congress purposefully adopted an "objective test" for determining whether a controlled group exists, based on a "mechanical formula" that establishes "a sharp dividing line that is crossed by incremental changes in ownership." [citing *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 34 (1982)] Thus, the applicable regulations for withdrawal liability of "controlled groups" establish a "brightline test based purely on stock ownership," and affiliates are not required to have actually exercised control over the employer (or vice versa) or engaged in any wrongdoing or misconduct in order to be liable as a member of the "controlled group."

[134] The citations provided by Mr. Abrams for these comments amply support his summary of the U.S. courts' characterization of *ERISA*'s "controlled group" provisions. Other comments found in the U.S. cases cited by him are equally instructive:

a) the *ERISA* provisions were aimed at "curbing abuses of multiple incorporation": *United States v. Vogel Fertilizer Co.*, 455 U.S.16 (1982) at 36;

b) in *Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. – Pension Fund v. Gotham Fuel Corp.*, 860 F. Supp. 1044 at 1050, the court stated that members of the controlled group are "deemed, by law" to constitute a single entity. At 1050-1051, the court adopted an earlier statement of the legislative intent underlying *ERISA*:

> The legislative background of ERISA … makes it abundantly clear that, for the purpose of [ERISA], Congress was unconcerned with the actual corporate form of a business. …Congress instructed … the

> courts to disregard the corporate form and treat several inter-related corporations are one entity, the ERISA "employer" ...

and also stated:

> Controlled group members are statutorily determined to be 'single entities,' without the necessity of a finding of improper motive or wrongdoing.

c) in *PBGC v. Smith-Morris Corp.*, C.A. No. 94-cv-60042-AA, 1995 US Lexis 22510 at 8 (E.D. Mich. Sept. 13, 1995), the court stated that *ERISA*'s concern is not whether a stockholder who has a controlling share actually exercised control over corporate affairs but simply whether it had "the ability to control," as evidenced through stock ownership;

d) in *Sun Cap. Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129 at 138, the court stated that:

> … [ERISA's] broad definition of "employer" extends beyond the business entity withdrawing from the pension fund, thus imposing liability on related entities within the definition, which, in effect, pierces the corporate veil and disregards formal business structures. …

e) finally, in *Cent. States, S.E. & S.W. Areas Pension Fund v. Messina Prods., LLC*, 706 F.3d 874 (7th Cir. 2013), at 877-878, the court stated:

> When an employer participates in a multiemployer pension plan and then withdraws from the plan with unpaid liabilities, federal law can pierce corporate veils and impose liability on owners and related businesses. …
>
> …
>
> The [joint and several withdrawal liability] provision's purpose is to "prevent businesses from shirking their ERISA obligations by fractionalizing operations into many separate entities…" (Citing: *Central States, Southeast and Southwest Areas Pension Fund v. White*, 258 F.3d 636, 644 (7th Cir.2001)

[135] The 1974 Plan's expert witness as to U.S. law and specifically, *ERISA*, Judith Mazo, agrees. She describes at paragraph 37 of her report that the "arithmetic rules" or "bright lines" under *ERISA* apply to determine common control. She further states there is no other relevant consideration as to whether *ERISA* applies:

> 44. … Because the law uses mechanical tests and looks at highly concentrated levels of ownership, it does not matter whether the decision-makers actually exercised their control since they had the power to do so if they chose.

[136] Simply put, the 1974 Plan's claim arises solely by reason of Walter Energy U.S. owning more than an 80% stake in both Walter Resources and the Walter Canada Group entities. Arising from that "arithmetic" rule, *ERISA* dictates that the Walter Canada Group is liable for any withdrawal liability of a signatory (ie. Walter Resources) under the 1974 Plan.

[137] Accordingly, I agree with the Walter Canada Group that *ERISA*'s "controlled group" provisions impose liability by ignoring separate corporate personalities and effectively amalgamating, consolidating or collapsing "common control" entities into a single "employer" liable for any withdrawal liability of any other entity within that group. There can be no dispute that, but for *ERISA*'s provisions, the Walter Canada Group would not be liable for any obligations owing by Walter Resources under the 2011 CBA. It is only by reason of the Walter Canada Group's relationship with Walter Resources, through the indirect corporate ownership of Walter Energy U.S., that such liability arises.

[138] As the U.S. cases note, this is the essence of "lifting the corporate veil" so as to look beyond the corporate personality of Walter Resources and impose liability on other entities within the corporate group through common shareholdings.

[139] My conclusions are consistent with the comments found in *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 711 F.2d 1085, 6 (1st Cir.1983) where the Court of Appeals, First Circuit allocated a termination liability to certain solvent members of the Ouimet Group:

> On the surface this result may appear to disregard unduly the legal separateness of the corporate entities. There is precedent, however, for piercing the corporate veil in bankruptcy situations. Under its general equitable powers a bankruptcy court may "substantially consolidate" the assets and liabilities of various entities. Substantial consolidation will usually, but not always, involve only debtors and be granted if absolutely necessary for achieving reorganization or protecting creditors' economic interests. … Some of the facts a court will look for in deciding whether to grant a

> substantive consolidation include the parent owning a majority of the subsidiary's stock, the entities having common officers or directors, the subsidiary being grossly undercapitalized, the subsidiary transacting business solely with the parent, and both entities disregarding the legal requirements of the subsidiary as a separate corporation. …
>
> There is no need to show that any or all of these factors are present to justify holding the solvent members of the Ouimet Group responsible for the entire liability in this case. Avon's corporate veil was, in effect, pierced by Congress when it enacted the termination liability provisions of ERISA. The corporate form is a creation of state law and states may impose stringent limitations on attempts to disregard it; the factors courts consider in deciding whether to grant substantive consolidations reflect such limitations. These limitations, however, do not constrict a federal statute regulating interstate commerce for the purpose of effectuating certain social policies … *Corn Products Refining Co. v. Benson*, 232 F.2d 554, 565 (2d Cir.1956) (existence of separate corporate entity may be disregarded when necessary to further the purpose of a federal regulatory statute). Thus, concerns for corporate separateness are secondary to what we view as the mandate of ERISA in this case.
>
> [Emphasis added]

[140] Since *ERISA* is a creature of the U.S. Congress, there is no similar legislation in Canada that might be considered in this characterization exercise. There is no case authority from Canada that addresses *ERISA*, nor any case authority involving the type of characterization exercise involved here. Nevertheless, the Walter Canada Group argues that characterizing the 1974 Plan's claim as one implicating legal personality is consistent with at least one British Columbia authority.

[141] In *JTI-Macdonald Corp. v. British Columbia (Attorney General)*, 2000 BCSC 312, this court considered the constitutionality of the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 1997, c. 41 (the "*Tobacco Act*"). The *Tobacco Act* created a cause of action permitting the government to directly recoup medical costs from the tobacco industry. The *Tobacco Act* defined "manufacturer" broadly and, coupled with the group liability provisions, extended liability to affiliated (perhaps also foreign) companies (see paras. 156-158). Similar to *ERISA*, the *Tobacco Act* "imposed liability upon a foreign defendant not on the basis of wrongful conduct but on the basis of being deemed a member of a group in which another member commits a wrongful act." (para. 233).

[142] I agree with the 1974 Plan that the result in *JTI-Macdonald Corp.* is limited since it arose in the context of a constitutional challenge which is not involved here. Nevertheless, many of the comments of Justice Holmes in respect of the *Tobacco Act* strike a similar chord in terms of what *ERISA* seeks to accomplish as against the Walter Canada Group. I have included lengthy quotes of Holmes J. here, particularly given the degree of reliance placed on this case by the Walter Canada Group:

> [172] The combined effect of [provisions of the *Act*] purport to affect the status, structure and corporate personality of foreign corporations and the rights of their shareholders.
>
> [173] The *Act* has the effect of abolishing the separate corporate personalities of companies incorporated under federal or foreign law with domiciles outside British Columbia.
>
> [174] A company's registered office establishes its domicile. [*Gasque v. Inland Revenue Commissioners*, [1940], 2 K.B. 80; Fraser & Stewart, op. cit. at p.144; *National Trust Co. Ltd. v. Ebro Irrigation & Power Co. Ltd.,* [1954], 3 D.L.R. 326 (Ont.H.C.); *Voyage Co. Industries v. Craster*, [1998] B.C.J. No. 1884 (Unreported) (B.C.S.C.)].
>
> [175] A corporation's domicile determines the law respecting its creation and continuation (corporate personality), matters of internal management, share capital structure, and shareholder rights. [Castel, J.G., Canadian Conflict of Laws 4th ed., (Toronto: Butterworths, 1997) pp.574-575; *Voyage Co. Industries v. Craster*, *supra*; *National Trust Co. Ltd. v. Ebro Irrigation & Power Co. Ltd.*, *supra*; Fraser & Stewart, op. cit. p.144; Palmer's Company Law (looseleaf ed.) Vol. I, (London: Sweet & Maxwell, 1997) pp.2105-2106]:
>
> > Questions concerning the status of a foreign corporation, especially whether it possesses the attributes of legal personality, are, on the analogy of natural persons, governed by the law of the domicile of the corporation. This domicile is in the state or province of incorporation or organization and cannot be changed during the corporation's existence even if it carries on business elsewhere. Thus, the law of the state or province under which a corporation has been incorporated or organized determines whether it has come into existence, its corporate powers and capacity to enter into any legal transaction, the persons entitled to act on its behalf, including the extent of their liability for the corporation's debts, and the rights of the shareholders.
> >
> > [Castel, *supra,* at p.574-575].
>
> [176] It is a fundamental principle of company law that a corporation is a legal entity distinct from its shareholders. [*Salomon v. Salomon & Co. Ltd.*, [1897] A.C. 22 (H.C.); Palmer's Company Law 24th ed.**,** Schmitthoff, C.M. Ed., (London: Stevens & Sons, 1987) pp.200-201; Fraser & Stewart Company Law of Canada 6th ed.**,** (Carswell, 1993) at p.17; *Canada Business Corporations Act*, R.S.C. 1985, c.C-44, S.15(1)].

[177] This distinction is operative in a parent and subsidiary relationship and applies to related corporations owned by a common shareholder. [Fraser & Stewart, op. cit. at p.21, Davies, P.L., Gower's Principles of Modern Company Law 6th ed. (London: Sweet & Maxwell, 1997) at pp.80, 159-163; *BG Preeco I (Pacific Coast) Ltd. v. Bon Street Developments Ltd.* (1989), 60 D.L.R. (4th) 30 (B.C.C.A.)].

[178] There is a distinction in Canadian constitutional law between the power to incorporate and the power to regulate the activities of a company. The power to incorporate a company is the ability to bestow legal personality on an association of persons, regulate a corporate structure and define the rights of shareholders.

[179] A company once incorporated however will be responsible to the laws of jurisdictions in which it operates. A federally incorporated company is, for example, accountable under provincial security laws.

….

[189] The *Act* therefore attempts to alter and derogate from what are clearly domiciliary rights under the law of foreign jurisdictions, …

…

[205] The *Act* overrides the substantive laws of extra-territorial Canadian or foreign jurisdictions in four major areas:

> (a) in respect of the status and corporate personalities of corporate tobacco manufacturers with domiciles outside British Columbia;
>
> …. and
>
> (d) in respect of shareholder's rights and liabilities regarding shares of federal or foreign corporations.

….

[213] Sections [of the *Tobacco Act*], when they purport to govern the status, structure and corporate personality of a federally-incorporated company under the *Canada Business Corporations Act* are not only extra-territorial in effect they trench upon the exclusive jurisdiction of the Parliament of Canada.

[214] There is much force to the argument that a practical cumulative effect of these provisions of the *Act* is to "amalgamate" or "merge" defendant tobacco companies such that those "amalgamated" by the operation of the provisions of the *Act* incur liability for civil claims against others in the involuntary merger. That is a fundamental interference with a federal jurisdiction reserved under Part XV of the *Canada Business Corporations Act*.

[215] The combined effect of Sections…of the *Act* ignores the separate identities of federally-incorporated companies for the purpose of establishing a tobacco related wrong committed by a related company and for the purpose of calculating amounts assessed against them.

[216] The separate legal personality conferred under s.15(1) of the *Canada Business Corporations Act* is removed and the corporation loses its legal status as distinct from its shareholders.

…

> [218] The provisions of the *Act* appear not so much designed to "pierce the corporate veil" as they are to strip away separate identities and treat them as if they had legally merged or amalgamated. The effect of provisions of the *Act* is not to look through the façade of a company shell; it is to deny the right to any separate corporate existence.
>
> [Emphasis added]

[143] Applying these same comments to *ERISA*, it is clear that the "controlled group" provisions simply disregard the separate corporate personalities of other companies within the Walter Energy Group (including those within the Walter Canada Group) by lifting their corporate veils. It does this by ignoring the separate legal existence and personality of the Walter Canada Group entities (and limited liability per *Salomon*), effectively amalgamating or consolidating those entities, in deeming them to be one "employer" along with Walter Resources.

[144] I agree that *JTI-Macdonald* provides substantial support that a claim which purports to impose liability arising purely as a result of corporate relationships, such as *ERISA* does, are properly classified as claims concerning the status and legal personality of corporations. To use the words of Holmes J., the application of *ERISA* to the Walter Canada Group results in those entities' "separate legal personality" being removed or "stripped away" such that they lose their legal status as distinct from their shareholders.

[145] I agree that the 1974 Plan's claim against the Walter Canada Group, being founded on *ERISA*'s "controlled group" liability provisions, should be characterized as concerning the status and legal personality of corporations and partnerships within the Walter Canada Group.

[146] In conclusion, in my view, the legal nature of the 1974 Plan's claim is appropriately characterized as one of corporate or partnership law and specifically, a claim which results in a challenge to the status and separate legal personalities of the entities within the Walter Canada Group.

(2) What Choice of Law Rule Applies?

[147] Having characterized the claim, I now turn to the second step in the choice of law analysis. This involves a consideration of relevant "connecting factors".

[148] At page 221, Pitel and Rafferty state:

> As we will see, the selection of the connecting factor is critical in formulating the choice of law rule. There are many possible connecting factors. Some are relatively certain and predictable. These include the person's domicile or habitual residence and the place where a specific act occurs, such as the commission of a tort or the making of the contract. These sorts of connecting factors have a relatively narrow focus. They are quite specific and can therefore be described as rigid connecting factors. Other connecting factors have a broader focus and are thought to be more flexible. These include the "proper law" of a contract, ascertained by weighing several factual connections to various legal systems. One of the core debates in choice of law is how rigid or how flexible the connecting factor should be for a particular rule.

[149] It is worthwhile being reminded at this time of Castel & Walker's comment at 3-1, quoted above, that a "connecting factor" is a "fact or element connecting a legal question or issue with a particular legal system" which is then identified as the governing law.

[150] What then are the "connecting factors" to be considered after having characterized the 1974 Plan's claim as I have?

[151] Under Canadian choice of law rules, issues concerning a person's legal personality are governed by the law of the person's domicile: *Castel & Walker* at 30-1, quoted above. Similarly, Pitel and Rafferty state that the "status of non-natural persons is governed by the law of the person's 'home' jurisdiction" (at 245) and that there is a "well-established principle that a corporation's domicile is the country in which it was incorporated" (at 26-27).

[152] To similar effect, Dicey states at 1532-1533:

> Whether an entity exists as a matter of law must, in principle, depend upon the law of the country under which it was formed. That law will determine whether the entity has a separate legal existence. The law of that country will determine the legal nature of the entity so create, e.g. whether the entity is a

> corporation or partnership, and, if the latter, the legal incidents which attach to it.

[153] Domicile was addressed in *National Trust Co. v. Ebro Irrigation and Power Co. Ltd.* [1954] O.R. 463 (S.C.), where the court stated at 476:

> It is well established that the domicile of a corporation is in the country in which it was incorporated. In *Cheshire on Private International Law*, 4th ed. 1952, at pp. 193-4, it is stated that: "Questions concerning the status of a body of persons associated together for some enterprise, including the fundamental question whether it possesses the attribute of legal personality, must on principle be governed by the same law that governs the status of the individual, *i.e.* by the law of the domicil. … In the case of the natural person it is the domicil of his father, in the case of the juristic person it is the country in which it is born, *i.e.* in which it is incorporated." …

[154] The Walter Canada Group also refers to *Singer Sewing Machine Co. of Canada Ltd (Re)*, 2000 ABQB 116, a decision of the colourful Registrar Funduk. There, the Alberta court was considering whether to recognize an order from the U.S. Bankruptcy Court. It appears that the U.S. court has assumed jurisdiction not only over the Singer Sewing Machine entities in the U.S., but also over the Canadian subsidiary who only conducted business in Canada and whose assets were held in Canada. The intention of the U.S. court seemed to be toward assuming overall jurisdiction over the entire corporate group in terms of administering assets and presumably, claims against those assets.

[155] This case was decided before amendments to Part IV of the *CCAA* which provides for a robust degree of comity in terms of addressing cross-border insolvencies. Nevertheless, the comments of the Registrar in terms of rejecting what he considered was a collapsing of the Canadian entity and its assets within the broader international group have, in my view, some relevance here:

> 11. Canadian law says that a corporation is a person in law. Canadian law says that a corporation has an existence separate from its shareholders. Canadian law says that a shareholder is not liable for the corporation's debts. Canadian law says that a shareholder does not own the corporation's assets. Canadian law says that a corporation's business activities are not the shareholder's business activities.

[156] Similarly, amalgamation of corporations, characterized as a change of status, is governed by the law of the place of incorporation: *Castel & Walker*, vol. 2, at 30-5. If the merged or amalgamated corporations were incorporated in different jurisdictions, the merger must be valid under the laws of both jurisdictions: *Dicey* 1534. See also *Concept Oil Services Ltd. v. En-Gin Group LLP*, [2013] EWHC 1897 (Comm) at paras. 70-72.

[157] I agree with the Walter Canada Group that the 1974 Plan's claim depends entirely on *ERISA*'s provisions which allow the 1974 Plan to disregard the separate legal personalities of the Walter Canada Group entities as being distinct from that of Walter Resources. The 1974 Plan has not advanced any other theory of liability for its claim under British Columbia law or any other law; rather, it relies exclusively on *ERISA*'s "controlled group" provisions as the basis for its claim against the Walter Canada Group. Further, as I have already stated, the 1974 Plan's claim against the Walter Canada Group does not stem from any conduct by or contract with the Walter Canada Group.

[158] During its submissions, the 1974 Plan did not draw any particular distinction between its claims against the corporations within the Walter Canada Group (who are the only *CCAA* petitioners) and the partnerships, who are not petitioners, but who were granted certain protections under the Initial Order. The claim of the 1974 Plan advanced in its pleading is only as against the "petitioners". The Walter Canada Group suggests that since the 1974 Plan chose to assert its claim only against the "petitioners", any claim against the partnerships is barred pursuant to the claims bar date set under the Claims Procedure Order. I am not sure as to the effect of such a distinction in terms of the recovery under the claims.

[159] This "claims bar date" argument may have some merit, but I do not propose to base my decision as regards the partnerships solely on this basis. The simple answer is that the same analysis set out above in relation to the corporations applies equally to the partnerships, as was noted in Dicey at 1532-33, quoted above, which refers to the law of the country in which an "entity" was formed.

[160] The issue as to whether the Walter Canada Group's separate legal personalities can be ignored is subject to the Canadian choice of law rule that the status and legal personality of a corporation is governed by the law of the place in which it was incorporated, namely British Columbia and Alberta. Here, as with the corporations within the Walter Canada Group, both with limited liability and unlimited liability, it is admitted that all of the partnerships were organized under British Columbia law. Accordingly, the choice of law analysis leads to the same result in relation to the partnerships, namely British Columbia law, including under the *Partnership Act*, R.S.B.C. 1996, c. 348.

[161] The place of incorporation or organization is a matter of public record and all persons who would do business with or otherwise deal with the Walter Canada Group entities would or should be well aware of that fact.

[162] I agree that, under Canadian choice of law rules, the place of incorporation or organization of the Walter Canada Group entities is the appropriate "connecting factor" in relation to the issue arising from the 1974 Plan's claim. As a result, British Columbia and Alberta law determine whether the separate legal personalities of the Walter Canada Group entities can be ignored.

[163] The 1974 Plan also made substantial submissions concerning the choice of law rule applicable to its claim. Relying on this Court's analysis in *Minera* at paras. 184-207, the 1974 Plan asserts that one must consider which law has the "closest and most real connection" to the issue. Its further submissions are that the court must examine a non-exhaustive list of factors in that context (*Minera* at para. 200). This, of course led to the 1974 Plan's objection to this summary hearing and its positon that, since it has been denied any discovery from the Walter Energy Group, it has been hampered in its ability to put into evidence all relevant factors at this summary hearing.

[164] However, the analysis in *Minera* was made in the context of the Court's conclusion that the choice of law rule that applied to the unjust enrichment claim was the "proper law of the obligation". In addition, contrary to the two-step approach

illustrated in *Minera*, at the end of its submissions, the 1974 Plan's argument essentially conflated that process by suggesting that the Court should consider connecting factors (most of which it says have yet to be disclosed through discovery from the Walter Canada Group) in the characterization exercise in the first step.

[165] Rejecting the 1974 Plan's contention that its claim should be characterized as one of contract inevitably leads to the further conclusion that the appropriate choice of law rule is not the "proper law of the obligation".

[166] Accordingly, I do not intend to address the 1974 Plan's detailed submissions on the second step within the choice of law issue other than to briefly comment on certain aspects.

[167] The 1974 Plan argued that even if I accepted the characterization of the claim advanced by the Walter Canada Group, the Court would still need to address facts other than the place of incorporation. These facts were said to include the degree to which the Walter Canada Group was managed out of the U.S. and an understanding of the Walter Energy Group's global business. I reject these submissions on the basis of the above authorities. There is no need to look beyond the clear facts that when these Canadian entities were incorporated or organized, they were expressly created within these Canadian jurisdictions with the intention that their legal status and personality would be governed by Canadian laws. The same comment could presumably be made concerning the U.S. and English entities.

[168] The 1974 Plan argued that the "proper law of the obligation" approach would allow this court to consider the connecting factors that exist between the 1974 Plan's claim and the Walter Canada Group, including the degree to which the U.S. and Canadian operations were integrated, citing *Imperial Life Assurance Co. of Canada v. Colmenares*, [1967] S.C.R. 443 at 448 and *Minera*.

[169] However, my conclusions above have the effect of rendering moot the 1974 Plan's objections arising from the lack of discovery. In addition, it is clear enough that even if there was no degree of integration or management between the U.S.

and Canadian entities, the 1974 Plan's position is that all "contract" factors point to the U.S. - including the contractual documents, the location of and management of the 1974 Plan, the location of Walter Resources (the only counterparty to the 2011 CBA), that the benefits under the 2011 CBA are for Walter Resources' U.S. employees and that the withdrawal by Walter Resources from the 1974 Plan arose in the U.S. As I have emphasized, as regards the choice of law analysis, there is absolutely no contractual connecting factor between the 1974 Plan and the Canadian entities.

[170] In that regard, it is difficult to conceive (although I need not decide the issue) that any Canadian court would conclude that these "contractual" connecting factors pointed to anything other than the U.S. Any degree of integration or joint management could only add to such arguments; conversely, it is difficult to see that any lack of integration or joint management would detract from them.

[171] On this last point (ie. the degree of integration), what emerges as crystal clear from the 1974 Plan's position, supported by Ms. Mazo's opinion, is that *ERISA* expressly makes such a factual enquiry entirely irrelevant. The "bright line" or "arithmetic" test under *ERISA* entirely disregards anything other than the level of stock ownership: see *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 470 F.Supp 945 (1975).

[172] Other so-called "connecting factors" suggested by the 1974 Plan are bizarre to say the least. The 1974 Plan suggests that Walter Energy U.S. will be "enriched" given the potential payment of estate funds to that corporate level after payment to the Canadian creditors. This is hardly a relevant consideration. Further, any recovery available to the 1974 Plan against the U.S. entities is entirely driven by U.S. law, including *ERISA*, the Chapter 11 Proceedings and its participation in the Settlement Term Sheet. If the 1974 Plan obtains no recovery from the U.S. entities within the Walter Energy Group, that is of no moment as regards its claim against the Canadian entities.

[173] The other "connecting factor" said to arise by the 1974 Plan is that the application of Canadian law works an injustice on the 1974 Plan "because of the removal of assets out of reach of *ERISA*". This proposition begs the very question as to whether *ERISA* applies to the Walter Canada Group at all. If *ERISA* does not apply to the Walter Canada Group in these circumstances, the Canadian assets were never within reach of the 1974 Plan.

[174] The 1974 Plan further argues that accepting the Walter Canada Group's argument on choice of law would result in a "blanket denial" of all *ERISA* claims against Canadian entities in Canadian courts. In my view, this is an exaggeration. Canadian law allows for the imposition of liability on persons in a variety of ways - including tort and fraud (see *B.G. Preeco*). This decision is only intended to address whether these Canadian entities are subject to *ERISA* which seeks to impose liability on them, not by reason of any conduct or contract, but simply by reason of a corporate relationship.

[175] The 1974 Plan also suggests that a decision that *ERISA* does not apply to the Walter Canada Group would threaten principles of international comity in that a Canadian court could not recognize a judgment made by a U.S. court in respect of a Canadian entity for withdrawal liability under *ERISA*. This other "chicken little" argument is entirely speculative. Firstly, this case does not involve any judgment obtained against the Walter Canada Group. Further, in my view, my decision does not detract from the well-entrenched and long standing comity that has existed between Canada and the U.S. courts, particularly in the field of insolvency.

[176] As described above, the only facts and connecting factors relevant here given my characterization of the 1974 Plan's claim are uncontroversial and have been admitted. In these circumstances, I see no difficulty in proceeding to determine this matter in a summary fashion, based on the considerations discussed earlier in these reasons.

[177] In conclusion, I find that the 1974 Plan's claim is characterized as one of corporate or partnership law and specifically, one relating to the status, legal

existence and personality of corporations and partnerships. The appropriate choice of law rule is one of domicile or place of incorporation or organization. In the case of the entities within the Walter Canada Group, that is British Columbia or Alberta.

[178] *ERISA* is not part of British Columbia or Alberta law. Accordingly, the 1974 Plan's claim must fail for that reason.

VIII THE SECOND AND THIRD QUESTIONS

[179] The second and third issues posed by the Walter Canada Group are:

> If the 1974 Plan's claim against the Walter Canada Group is governed by United States substantive law (including *ERISA*), then as a matter of U.S. law, does "controlled group" liability for withdrawal liability related to a multiemployer pension plan under *ERISA* extend extraterritorially?
>
> If the 1974 Plan's claim against the Walter Canada Group is governed by U.S. substantive law (including *ERISA*), and *ERISA* applies extraterritorially, is that law unenforceable in Canada because it conflicts with Canadian public policy?

[180] As I noted above, the Walter Canada Group only needed to succeed on one of the questions raised in this application in order to defeat the 1974 Plan's claim.

[181] Accordingly, having found in favour of the Walter Canada Group on the first issue, it is not necessary to decide the other two questions. While they pose interesting issues, I see no need to delay these proceedings further in order to consider and decide those issues. A timely resolution is in the interests of justice and furthers the purposes of the *CCAA*.

IX CONCLUSION

[182] In conclusion, I grant a declaration that, under Canadian conflict of laws rules, the 1974 Plan's claim as against the Walter Canada Group is governed by Canadian substantive law and not U.S. substantive law (including *ERISA*).

[183] Costs are awarded against the 1974 Plan in favour of both the Walter Canada Group and the Union on the usual scale. If any party should wish to seek a different order of costs, such an application must be filed within 30 days of the release of

these reasons and the hearing to determine the matter should be set as soon as possible. Failing such application(s) being filed, my costs award shall stand.

"Fitzpatrick J."

TAB 3

COURT OF APPEAL FOR ONTARIO

CITATION: O'Reilly v. ClearMRI Solutions Ltd., 2021 ONCA 385
DATE: 20210607
DOCKET: C68215

Roberts, Zarnett and Sossin JJ.A.

BETWEEN

William O'Reilly

Plaintiff (Respondent)

and

ClearMRI Solutions Ltd., ClearMRI Solutions Inc., Jeff Hassman, Jae Kim, Stefan Larson, David Stopak, Tornado Medical Systems, Inc., Arsen Hajian, Jeff Courtney and Gordon Cheung

Defendants (Appellants)

Ted Brook and Paul Macchione, for the appellants Tornado Medical Systems, Inc. and Jae Kim

Jacqueline Horvat and Alexandria Chun, for the respondent

Heard: January 29, 2021 by videoconference

On appeal from the judgment of Honourable Justice Jane Ferguson of the Superior Court of Justice, dated February 11, 2020, with reasons reported at 2020 ONSC 938.

Zarnett J.A.:

I. INTRODUCTION

[1] This appeal concerns the scope and application of two avenues of recourse that are potentially available when employment entitlements have not been honoured.

[2] One avenue exists under the doctrine of common employer liability. This common law doctrine[1] recognizes that an employee may simultaneously have more than one employer. If an employer is a member of an interrelated corporate group, one or more other corporations in the group may also have liability for the employment obligations. However, and importantly, they will only have liability if, on the evidence assessed objectively, there was an intention to create an employer/employee relationship between the employee and those related corporations.

[3] A second avenue exists under the provisions of s. 131 of Ontario's *Business Corporations Act*, R.S.O. 1990, c. B.16 ("*OBCA*"). This section imposes liability on corporate directors, in favour of a corporate employee, for up to six months' unpaid wages and up to twelve months' vacation pay. That liability is subject to specific conditions.

---

[1] Only the common law doctrine of common employer liability was invoked by the respondent in this case. Section 4 of the *Employment Standards Act*, 2000, S.O. 2000, c. 41 provides for circumstances in which separate persons are treated as one employer. It is not necessary to comment on how the section might have applied in this case, a point on which the parties did not agree.

[4] The appellant, Tornado Medical Systems, Inc. (“Tornado”) stood at the top of a corporate group. It was the majority shareholder of ClearMRI Solutions Ltd. (“ClearMRI Canada”) which itself had a wholly owned subsidiary, ClearMRI Solutions, Inc. (“ClearMRI US”).

[5] The respondent, William O’Reilly, served as the Chief Executive Officer (“CEO”) of ClearMRI Canada and ClearMRI US (together, “ClearMRI companies”). His written employment agreement was with ClearMRI US, but he reported to, and his performance goals were set by, the board of directors of ClearMRI Canada.

[6] When his employment ended, Mr. O’Reilly was owed substantial sums for salary and other entitlements. He brought an action seeking recovery of all outstanding amounts from the ClearMRI companies and Tornado. While Mr. O’Reilly did not have a formal position or written agreement with Tornado, he alleged that it, along with the ClearMRI companies, were his common employers. The action also sought recovery from the directors of Tornado and ClearMRI Canada, including the appellant, Jae Kim (“Dr. Kim”), for six months’ unpaid wages and twelve months’ vacation pay under s. 131 of the *OBCA*.

[7] Mr. O’Reilly obtained default judgment against the ClearMRI companies. He subsequently moved for summary judgment against the other defendants. His motion was successful.

[8] Tornado appeals the judgment against it, arguing that the finding of the motion judge that it was liable to Mr. O'Reilly as a common employer is flawed. Tornado argues that the motion judge misconstrued the common employer doctrine, effectively finding it liable only because of its corporate affiliation to Mr. O'Reilly's contractual employer.

[9] Dr. Kim appeals the judgment finding him liable as a director of ClearMRI Canada. Dr. Kim contends that the motion judge improperly applied s. 131 of the *OBCA* to hold him liable without evidence that a condition to that liability – execution against ClearMRI Canada having been returned unsatisfied – had been met.

[10] Tornado and Dr. Kim both argue that the motion judge further erred in determining the quantum of their respective liability.

[11] I would allow the appeal by Tornado. The motion judge erred in her articulation and application of the common employer doctrine and thus made an extricable error of law in concluding that Tornado was a common employer.

[12] I would dismiss Dr. Kim's appeal, subject to one variation necessary to respect the *OBCA's* conditions for s. 131 director liability.

[13] Below, I set out my reasons for these conclusions.

II. BACKGROUND

A. Tornado and the ClearMRI Companies

[14] Tornado is an Ontario corporation. In 2010, it acquired licence rights to intellectual property that can be used to facilitate the refurbishment and upgrading of Magnetic Resonance Imaging (“MRI”) machines.

[15] Tornado is the majority shareholder of ClearMRI Canada, which is also an Ontario corporation. ClearMRI Canada was formed in 2012 to develop a business of upgrading and refurbishing MRI machines. For this purpose, Tornado assigned, to ClearMRI Canada, its licence rights to the intellectual property.

[16] In addition to the incidents of corporate control over ClearMRI Canada that flowed from its majority shareholding, Tornado had certain specified rights under a Unanimous Shareholder Agreement that related to ClearMRI Canada: Tornado’s consent was required for certain dividends, large capital expenditures, the sale of ClearMRI Canada’s business, any amalgamation with another corporation, or any winding-up, reorganization, or dissolution. Tornado’s consent rights did not, however, extend to changes in management of ClearMRI Canada or its subsidiaries, employment agreements, or dealing with loans from non-arms-length

persons – the Unanimous Shareholder Agreement required only the approval of the board of ClearMRI Canada, or a committee of the board, for these matters.[2]

[17] To some extent, the boards of directors of Tornado and ClearMRI Canada overlapped; ClearMRI Canada's board consisted of five directors, two of whom were also directors of Tornado. Dr. Kim was a director of both Tornado and ClearMRI Canada.

[18] ClearMRI US is a Delaware company, wholly owned by ClearMRI Canada. It was formed in May 2012 to obtain American regulatory approval of the ClearMRI technology and to develop the MRI upgrading and refurbishing business in the United States.

B. Mr. O'Reilly's Roles and Written Employment Agreement

[19] Mr. O'Reilly served as CEO of ClearMRI Canada from approximately the time of its formation. He was also one of its directors. When ClearMRI US was formed, he also became its CEO and sole director. Mr. O'Reilly did not hold any formal position with Tornado.

[20] On May 22, 2012, Mr. O'Reilly and ClearMRI US signed an agreement confirming the terms of his employment. The agreement named ClearMRI US as Mr. O'Reilly's employer. The agreement specified that Mr. O'Reilly was to serve as

[2] The motion judge described this latter category of decision as falling within Tornado's consent rights at para. 13 of her reasons, but this appears to misread sections 2.12 and 2.13 of the Unanimous Shareholder Agreement.

its CEO and was to be paid an annual base salary of $153,000 USD in 2012, increasing to $210,000 USD in 2013. He was also entitled to benefits including paid vacation and to specific payments if he was terminated without notice or cause. He was also eligible to earn a performance bonus of $80,000 USD and to receive other compensation.

[21] Although ClearMRI US was named in the written agreement as the employer, the motion judge found that Mr. O'Reilly was also employed by ClearMRI Canada and Tornado. Her reasons for doing so are discussed below.

C. Deferral of Salary, Non-Payment of Employment Obligations, and the Termination of Mr. O'Reilly's Employment

[22] Cash flow problems inhibited the successful launch of the MRI upgrading and refurbishment business. Mr. O'Reilly took certain steps to overcome that problem. To assist with the required funding, he agreed to defer his full salary commencing in 2013 until ClearMRI Canada started to earn revenue; the deferral continued in 2014. The motion judge found that Mr. O'Reilly had not agreed to defer his salary indefinitely, only temporarily, and that he received assurances from ClearMRI Canada and Tornado that ClearMRI Canada was committed to bringing its product to market. I return to the arrangements for the deferral and the assurance in more detail below.

[23] In December 2013, Mr. O'Reilly also made a $50,000 USD loan to ClearMRI Canada. To avoid the appearance of a conflict of interest, he resigned as a director

and CEO of both ClearMRI Canada and ClearMRI US. However, the motion judge noted that in reality he continued in the CEO role. This loan was not repaid.

[24] In April 2014, Mr. O'Reilly secured a regulatory clearance from the U.S. Food and Drug Administration. The motion judge found that this step entitled him to a performance bonus of $80,000 USD. However, the performance bonus was never paid.

[25] By the spring of 2014, it was apparent that ClearMRI Canada was no longer committed to bringing their product to market. On August 6, 2014, Mr. O'Reilly took the position that he had been constructively dismissed. His lawyer demanded payment from ClearMRI Canada and ClearMRI US of $281,315 USD in unpaid salary, and of the $50,000 USD loan.

D. The Action

[26] In October 2014, Mr. O'Reilly commenced this action against ClearMRI Canada, ClearMRI US, Tornado, and individual directors of ClearMRI Canada and Tornado, including Dr. Kim.

[27] The claims against the individuals were for six months' wages and twelve months' vacation pay under s. 131 of the *OBCA*. The corporations were each sued (as common employers) for all unpaid wages and employment entitlements. ClearMRI Canada and ClearMRI US were sued for the unpaid loan.

[28] On September 2, 2015, Mr. O'Reilly obtained default judgment against ClearMRI Canada and ClearMRI US for deferred salary, vacation pay, the performance bonus, and the unpaid loan, totalling $381,103.84 USD, plus costs.

[29] The default judgment was not satisfied, and Mr. O'Reilly moved for summary judgment against the remaining defendants.

E. The Motion Judge's Decision

[30] The motion judge was satisfied that this was an appropriate case for summary judgment.

[31] The motion judge described the common law doctrine of common employer liability as one that requires the court to "look past the immediate bilateral contractual relationship…and recognize that an employee may be employed by a number of different companies at the same time". A group of companies identified as "concurrent employers" will have "joint and several liability with respect to the rights and entitlements of the employee". The motion judge identified three factors that should be considered: the employment agreement itself; where the effective control over the employee resides; and whether there was common control between the different legal entities.

[32] The motion judge then addressed whether ClearMRI Canada was a common employer of Mr. O'Reilly. She concluded that it was, noting that the issue was not really in dispute and there was already a judgment against it. She found

that Mr. O'Reilly reported to the ClearMRI Canada board, which set his performance goals, and that, "[i]n practice, effective control over [Mr.] O'Reilly did reside with ClearMRI Canada"; she further remarked that ClearMRI Canada wholly owned ClearMRI US, and had incorporated it for a specific purpose. She was satisfied they "both had a single relationship with [Mr.] O'Reilly".

[33] The motion judge next considered the liability of the individuals who were directors of ClearMRI Canada, including Dr. Kim. She referred to the source of directors' liability for wages, s. 131 of the *OBCA*, which provides, in relevant part, as follows:

> **Director's Liability to employees for wages**
>
> (1) The directors of a corporation are jointly and severally liable to the employees of the corporation for all debts not exceeding six months' wages that become payable while they are directors for services performed for the corporation and for the vacation pay accrued while they are directors for not more than twelve months under the *Employment Standards Act*, and the regulations thereunder, or under any collective agreement made by the corporation.
>
> **Limitation of liability**
>
> (2) A director is liable under subsection (1) only if,
>
> > (a) the corporation is sued in the action against the director and execution against the corporation is returned unsatisfied in whole or in part; or
> >
> > (b) before or after the action is commenced, the corporation goes into liquidation, is ordered to be wound up or makes an authorized assignment under the *Bankruptcy and Insolvency Act* (Canada), or a receiving order under that Act

> is made against it, and, in any such case, the claim for the debt has been proved. 2002, c. 24, Sched. B, s. 27 (1).
>
> **Idem**
>
> (3) Where execution referred to in clause (2) (b) has issued, the amount recoverable from a director is the amount remaining unsatisfied after execution. R.S.O. 1990, c. B.16, s. 131 (3).

[34] She found that the ClearMRI Canada directors were jointly and severally liable under s. 131 of the *OBCA* to Mr. O'Reilly for "six months of…unpaid wages and twelve months of…vacation pay, specifically $153,400 USD." As Mr. O'Reilly was also a director, she found that he shared in that liability.

[35] Next, the motion judge considered whether Tornado was a common employer using the three factors she identified. She stated that it was not determinative that there was no employment agreement with Tornado. She found that Tornado exercised "a sufficient amount of control" over Mr. O'Reilly, as both Tornado and ClearMRI Canada had accepted his offers to defer his salary and to loan funds to ClearMRI Canada, both had assured Mr. O'Reilly that ClearMRI Canada was committed to bringing its product to market, and both shared the business objectives that Mr. O'Reilly was employed to achieve. She found common control between the different legal entities because Tornado had incorporated ClearMRI Canada to develop a specific business; Tornado had a majority controlling shareholder interest; Tornado had consent rights under the Unanimous Shareholder Agreement; there was an overlap in directors; and when

it came time to replace a director of ClearMRI Canada, Dr. Kim wished to discuss the replacement with Tornado. Accordingly, she found that Tornado was a common employer, jointly and severally liable for the employment related amounts of the default judgment – everything except the unpaid loan and interest on it.

[36] Finally, she held that if Tornado did not satisfy the judgment against it, the Tornado directors individually named in the action would share in the liability of the ClearMRI companies' directors for the six months' wages and twelve months' vacation pay.[3] She said that the judgment against the Tornado directors "is to remain in abeyance until and unless Tornado does not satisfy the judgment against it." There was no similar statement regarding the judgment against the ClearMRI companies' directors.

[37] The formal judgment indicated that the parties could return to the Court for directions concerning the liability of the two Tornado directors if execution against Tornado was returned unsatisfied. No similar provision appeared in the judgment concerning the liability of the ClearMRI Canada directors, including Dr. Kim.

[3] The motion judge subsequently varied her judgment to delete one of the individuals (Stefan Larson) as he had not been a director of either Tornado or ClearMRI Canada at the relevant time.

III. ANALYSIS

A. Was Tornado Properly Found to be a Common Employer?

The Arguments

[38] Tornado argues that although the motion judge mentioned effective control over the employee as part of the common employer test, nothing that she referred to showed any effective control by Tornado over Mr. O'Reilly as an employee. Tornado submits that the motion judge effectively treated Tornado's corporate relationship with the ClearMRI companies as rendering it liable, which is insufficient in law for a corporation to be liable for another's obligations.

[39] Tornado also argues that the motion judge gave no real consideration to the presence of a written employment agreement which specified Mr. O'Reilly's employer, and to the absence of an employment agreement with Tornado. It submits that it was necessary to consider whether Mr. O'Reilly had a reasonable expectation that Tornado was his employer – the written employment agreement and Mr. O'Reilly's senior role in the ClearMRI companies shows he could not have reasonably held such an expectation.

[40] Tornado also argues that the common employer doctrine only applies to wrongful dismissal claims, and that claims for unpaid salary against a corporation related to the employer must be made under s. 4 of the *Employment Standards*

Act, which was not invoked by Mr. O'Reilly. Further, it challenges how the motion judge arrived at the quantum of its liability.

[41] Mr. O'Reilly argues that the motion judge made no reversible error in reaching the conclusion that Tornado was a common employer, in holding it liable for unfulfilled employment obligations, and in determining the quantum of that liability.

[42] I begin by discussing the relationship between the concept of corporate separateness, under which corporations are not liable for debts and obligations of affiliated or subsidiary corporations, and the common employer doctrine, which may impose liability on related corporations. I also discuss the role of an employment agreement in that analysis. I then address why the common employer doctrine applies to claims beyond those for wrongful dismissal. Against that backdrop, I explain why I conclude that the motion judge erred in granting summary judgment based on her finding that Tornado was a common employer. In light of that conclusion, it is unnecessary to examine Tornado's arguments about quantum.

Corporate Separateness

[43] A corporation is a distinct legal entity with the powers and privileges of a natural person: *OBCA*, s. 15. These powers and privileges include owning assets

in its own right, carrying on its own business, and being responsible only for obligations it has itself incurred.

[44] The fact that one corporation owns the shares of or is affiliated with another does not mean they have common responsibility for their debts, nor common ownership of their businesses or assets. A corporation's business and assets are not, in law, the business or assets of its parent corporation: *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, 141 O.R. (3d) 1 at paras. 57-58, leave to appeal refused, [2018] S.C.C.A. No. 255; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560 at para. 34. Similarly, a parent (shareholder) corporation is not liable, as such, for the debts and obligations of a subsidiary: *OBCA*, s. 9

[45] The fact that corporations are related and coordinate their activities does not, in and of itself, change this paradigm. Ontario law rejects a "group enterprise theory" under which related corporations that operate closely would, by that very fact, be considered to jointly own their businesses or be liable for each other's obligations. Although the group might, from the standpoint of economics, appear as a unit or single enterprise, the legal reality of distinct corporations governs: *Meditrust Healthcare Inc. v. Shoppers Drug Mart* (2002), 61 O.R. (3d) 786 (C.A.) at paras. 29-31; *Yaiguaje*, at paras. 76-77.

[46] Corporate separateness has exceptions – the court may pierce the corporate veil and hold a parent corporation liable for obligations nominally incurred by a subsidiary corporation that is a mere façade:

> …in order to ignore the corporate separateness principle, the court must be satisfied that: (i) there is complete control of the subsidiary, such that the subsidiary is the "mere puppet" of the parent corporation; and (ii) the subsidiary was incorporated for a fraudulent or improper purpose or used by the parent as a shell for improper activity: *Yaiguaje*, at para. 66. [Citations omitted].

[47] As the test for piercing the corporate veil makes clear, control by one corporation over another, on its own, does not make the controlling corporation liable for the obligations of the controlled corporation; a fraudulent or improper purpose must also be present.

[48] It is not suggested in this case that there are grounds to pierce the corporate veil of any of the relevant corporations. Accordingly, the basis on which the common employer doctrine operates to hold related corporations liable, while remaining consistent with the concept of corporate separateness, is important.

The Common Employer Doctrine

[49] The common employer doctrine does not involve piercing the corporate veil or ignoring the separate legal personality of each corporation. It imposes liability on companies within a corporate group only if, and to the extent that, each can be said to have entered into a contract of employment with the employee: *Sinclair v.*

Dover Engineering Services Ltd., 49 D.L.R. (4th) 297 (B.C.C.A.) *("Sinclair (BCCA)")*, at para. 9.

[50] Thus, consistent with the doctrine of corporate separateness, a corporation is not held to be a common employer simply because it owned, controlled, or was affiliated with another corporation that had a direct employment relationship with the employee. Rather, a corporation related to the nominal employer will be found to be a common employer only where it is shown, on the evidence, that there was an intention to create an employer/employee relationship between the individual and the related corporation: *Gray v. Standard Trustco Ltd.* (1994), 8 C.C.E.L. (2d) 46 (Ont. Gen. Div.), at para. 3; *Downtown Eatery (1993) Ltd. v. Her Majesty the Queen in Right of Ontario* (2001), 54 O.R. (3d) 161 (C.A.), at paras. 31, 40, leave to appeal refused, [2002] 3 S.C.R. vi (note); *Rowland v. VDC Manufacturing Inc.*, 2017 ONSC 3351, at paras. 12-13.

[51] As illustrated by the issue in this case, where Mr. O'Reilly alleges that Tornado is liable for specific employment obligations, the common employer question is one of contractual formation – did the employee and the corporation alleged to be a common employer intend to contract about employment with each other on the terms alleged? When such an intention is found to exist, no violence is done to the concept of corporate separateness because the corporation is held liable for obligations it has undertaken.

[52] To determine whether the required intention to contract was present, the parties' subjective thoughts are irrelevant. Nor need the intention necessarily have been reflected in a written agreement. The common law's approach to contractual formation is objective; intention to contract can be derived from conduct. As the Supreme Court has stated in a similar common law contractual formation context, what is relevant is "how each party's conduct would appear to a reasonable person in the position of the other party": *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*, 2020 SCC 29, 450 D.L.R. (4th) 105, at para. 33.

[53] A variety of conduct may be relevant to whether there was an intention to contract between the employee and the alleged common employer(s). As they bear upon this case, two types of conduct are important. One is conduct that reveals where effective control over the employee resided. The second is the existence of an agreement specifying an employer other than the alleged common employer(s).

[54] The conduct most germane to showing an intention that there was an employment relationship with two or more members of an interrelated corporate group is conduct which reveals that effective control over the employee resided with those members[4] : *Downtown Eatery*, at paras. 32-33. This is consistent with

[4] This is a different question from the question of corporate control, which, at its most basic, refers to the ability of a shareholder to elect the majority of a corporation's board of directors: *OBCA*, s. 1(5). The fact that one corporation controls a second corporation does not equate to control by the first corporation over the second corporation's employees.

how the law distinguishes employment from other types of relationships. Control over such matters as the selection of employees, payment of wages or other remuneration, method of work, and ability to dismiss, can be important indicators of an employer/employee relationship: *Baldwin v. Erin District High School Board*, 1961 O.R. 687, at para 11, aff'd 36 D.L.R. (2d) 244 (SCC); see also *Bagby v. Gustavson International Drilling Co. Ltd.*, 1980 ABCA 227, 24 A.R. 181, at paras. 48-50.

[55] A written agreement that specifies an employer other than the corporation(s) alleged to be the common employers may also be relevant. The extent of its relevance depends on how the existence and terms of the written agreement, in light of the facts, informs the question of whether there was an intention that others were also employers.

[56] These points are illustrated in this court's leading decision on common employer liability, *Downtown Eatery*, and the case law which has followed.

[57] In *Downtown Eatery*, the employee was the manager of a nightclub called "For Your Eyes Only". The nightclub was operated together by a "highly integrated or seamless group of companies". One corporation owned the premises; a second owned the trademark and held the liquor and entertainment licences; a third owned the chattels and equipment; and a fourth was the paymaster: at para. 34. The

employee's contract was with the business name For Your Eyes Only, which itself was not a legal entity: at paras. 38-40.

[58] The court held that an individual may be found to be an employee of more than one corporation in a related group of corporations, as long as the evidence shows an intention to create an employer/employee relationship between the individual and the respective corporations within the group: at para. 31. To determine that issue, the operative question raised by the facts was "where effective control over the employee resides": at paras. 32-33.

[59] In *Downtown Eatery*, the answer to that question was that each of the commonly controlled corporations that was integrally and directly involved in owning and operating the nightclub, was exercising control over, and was therefore a common employer of, the manager.

[60] The court stated at para. 40:

> In conclusion, Alouche's true employer in 1993 was the consortium of Grad and Grosman companies which operated *For Your Eyes Only*. The contract of employment was between Alouche and *For Your Eyes Only* which was not a legal entity. Yet the contract specified that Alouche would be "entitled to the entire package of medical extended health care and insurance benefits as available in our sister organization". The sister organization was not identified. In these circumstances, and bearing in mind the important roles played by several companies in the operation of the nightclub, we conclude that Alouche's employer in June 1993 when he was wrongfully dismissed was all of Twin Peaks, The Landing Strip, Downtown Eatery and Best

> Beaver. This group of companies functioned as a single, integrated unit in relation to the operation of *For Your Eyes Only*. [Emphasis added.]

[61] The two emphasized passages deserve amplification.

[62] First, the written contract of employment in *Downtown Eatery*, by not naming a legal entity, did not indicate a choice of one entity over another in terms of identifying the employer. Rather, it indicated the employer was the nightclub, a business operated by the four corporations. Although there was a written agreement, it begged, rather than answered, the question of who the parties intended the employer to be.

[63] Second, each of the corporations found to be a common employer was directly involved in the operation of the nightclub that employed the manager. The nightclub was each of their business. Each was thus in a direct relationship of control with the employee who had been hired to manage their business. None were held to be employers simply because they had a relationship with another corporation that was directly involved with the employee. As Hourigan J.A. noted in *Yaiguaje*, the conclusion in *Downtown Eatery* "rested more on the plaintiff's relationship to the group of companies rather than the relationships among the companies in the group": at para. 69.

[64] In other cases, a common employer allegation has failed due to the presence of a written employment agreement that specified that only one company within the corporate group was the employer: *Dumbrell v. The Regional Group of*

Companies Inc., 2007 ONCA 59, 85 OR (3d) 616, at para. 83; *Mazza v. Ornge Corporate Services,* 2015 ONSC 7785, 52 B.L.R. (5th) 51 ("*Mazza (ONSC)*"), at paras. 93-99, aff'd 2016 ONCA 753, 62 B.L.R. (5th) 211 ("*Mazza (ONCA)*"). In each of these cases, the facts were such that the court could conclude that the employee knew the only entity to whom he could look for fulfillment of employment obligations: *Dumbrell*, at para. 83; *Mazza (ONSC)* at paras. 90, 93-94. As this court explained in *Mazza (ONCA)*, the common employer claim was precluded because "[t]he Employment Agreement identified only one employer and contained an express release of claims against affiliated corporations": at para. 8. In other words, the written agreements in those cases, in light of all the facts, did not permit the conclusion that there was an intention to create an employer/employee relationship with anyone beyond the employer specified in the written agreement.

[65] Nonetheless, as *Downtown Eatery* shows, a written agreement will not always preclude a finding of common employers. It depends on the terms of the written agreement, and the other facts of the case. The circumstances must reasonably permit the inference that there was an intention that the alleged common employers were also parties to the employment agreement. The inference is not available simply because the corporations are related: As Morgan J. explained in *Rowland*, at paras. 12-13:

> In order to establish that two or more legal entities are his common employer, the Plaintiff must demonstrate that he

> had a reasonable expectation that the Defendants were each a party to his employment contract…
>
> Where the employee is aware that he was employed by a single employer, the fact of interlocking shareholders with his formal employer does not itself establish a common employer. The onus is on the Plaintiff to demonstrate that there was "effective control over the employee" by all of the alleged common employer companies. There must be evidence of an actual "intention to create an employer/employee relationship between the individual and the respective corporations within the group". [Citations omitted.]

To summarize, the doctrine of common employer liability exists consistently with the principle of corporate separateness because it holds related corporations liable for obligations they actually undertook to perform in favour of the employee. It does not hold them liable simply because they have a corporate relationship with the nominal employer. Whether the related corporations actually undertook to perform those obligations is a question of contractual formation – did the parties objectively act in a way that shows they intended to be parties to an employment contract with each other, on the terms alleged? Of central relevance to that question is where effective control over the employee resided. The existence of a written agreement specifying an employer other than the alleged common employer(s) will also be relevant; the extent of the relevance will depend on the terms and the factual context.

To Which Claims Does the Common Employer Doctrine Apply?

[66] Tornado argues that the common employer doctrine applies only to wrongful dismissal claims. In my view, this argument must be rejected.

[67] Although the common employer doctrine has traditionally been applied to wrongful dismissal claims, there is no reason in principle to so limit it. Whether a corporation is a common employer is a function of whether it is properly considered a party to the employment agreement with the employee. Therefore, any claims that could be brought by reason of that agreement can be made against the common employer. This includes claims for a breach that consists of not paying salary, bonus, or other entitlements as much as it includes claims for a breach that consists of dismissing the employee without notice or cause.

[68] Against that backdrop, I turn to a consideration of the approach taken by the motion judge.

The Standard of Review

[69] Whether a common employer relationship exists is a question of mixed fact and law, as it involves the application of a legal standard to a set of facts. Appellate deference is generally warranted, but intervention is justified when the judge commits an extricable error of law, such as the formulation and application of the wrong test, or makes a palpable and overriding error of fact: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2. S.C.R. 235, at para. 36.

The Motion Judge Did Not Articulate or Apply the Correct Test

[70] The test to determine whether corporations are common employers may be stated in several ways that are in substance the same. For example, as articulated by Wallace J.A. in *Sinclair (BCCA)*: “The issue…reduces itself to determining which company or companies entered into a contract of employment with [the employee] pursuant to which he would provide services in return for his salary and benefits”: at para 8. Or, as adopted in *Downtown Eatery*, “One must find evidence of an intention to create an employer/employee relationship between the individual and the respective corporations within the group”: at para. 31.

[71] Mr. O’Reilly contended that Tornado owed him the same obligations as ClearMRI US under the written employment agreement – the same salary, benefits, and other employment entitlements. For that contention to succeed, it was necessary to find that Tornado and Mr. O’Reilly intended to contract with each other on those terms.

[72] As discussed below, the motion judge did not address that question. Although she referred to three factors that are relevant to determining whether a common employer relationship exists, she did not articulate the actual test, namely, whether there was an intention that Tornado was a party to the employment agreement with Mr. O’Reilly on the terms alleged. Nor did she apply

that test to the factors she considered. In other words, she did not ask, or answer, the right question.

[73] I deal, in turn, with the three factors the motion judge considered through the lens of the test.

The Effect of an Employment Agreement

[74] The first factor the motion judge discussed was Tornado's absence from Mr. O'Reilly's employment agreement. She held that this was not determinative. She said: "It is true that O 'Reilly's employment contract does not mention Tornado, and that Tornado did not pay him, but the factor of a contractual relationship is not determinative, or else it would be too simple for employers to evade their obligations towards their employees."

[75] To the extent that the motion judge suggested that there did not need to be any contractual relationship between Tornado and Mr. O'Reilly in order to consider Tornado a common employer, she erred. The whole point of the common employer inquiry was to determine whether Tornado was a party to an employment agreement imposing the obligations that Mr. O'Reilly sought to enforce. That did not require a written agreement with Tornado, but it did require a determination that a contractual relationship with Tornado on the terms alleged had been formed. The motion judge never adverted to that question.

[76] The motion judge cited *Downtown Eatery* for the proposition that a contractual relationship is not a decisive factor. However, the passage the motion judge cited spoke to the relevance of a written agreement that did not specifically name the common employers; the court was not suggesting that a corporation can be a common employer without a finding that it and the employee intended to be parties to an employment agreement with each other.

[77] To the extent that the motion judge was addressing the effect of the written agreement specifying only ClearMRI US as the employer, her consideration was incomplete. She did not address the agreement's fundamental difference from that in *Downtown Eatery* which, unlike the agreement in this case, neither selected an entity as the employer, nor implicitly excluded any others from consideration. Here, the written agreement specifically named a corporation for which the appellant actually worked.

[78] It was accordingly necessary to assess how the written agreement bore on the question of whether there was an intention that Tornado was a party to the employment agreement with the same obligations as ClearMRI US. This analysis would have to be made in light of all of the evidence.

[79] The motion judge did not, however, undertake this required analysis.

Tornado's "Control" Over Mr. O'Reilly As an Employee

[80] The second factor the motion judge considered was whether Tornado exercised "a sufficient amount of control" over Mr. O'Reilly. She held that it did, but her conclusion is tainted by her failure to relate the facts to the proper test.

[81] The motion judge relied on several facts which she said she took from Mr. O'Reilly's uncontested evidence: that Tornado and ClearMRI Canada "both agreed to accept [Mr.] O'Reilly's offer to defer his salary"; that Tornado and ClearMRI Canada both agreed to accept his offer to loan funds to ClearMRI Canada; that Tornado and ClearMRI Canada had assured Mr. O'Reilly that both were committed to bringing the ClearMRI products to market; and that Tornado shared business objectives that Mr. O'Reilly was employed to achieve. There are several problems with these findings.

[82] Beginning with the offer to defer salary, the motion judge misapprehended Mr. O'Reilly's evidence. Mr. O'Reilly did not say his offer to defer his salary was accepted by Tornado. Rather, he said that "[t]he Board of Directors [of ClearMRI Canada] discussed and approved of the arrangement to defer my salary 'until we are receiving revenue' at its meeting of February 27, 2013…" This evidence does not indicate that Tornado was exercising control over Mr. O'Reilly as an employee.

[83] Second, with respect to the loan, the motion judge did not relate her reliance on this to her later conclusion that the loan was "a private commercial debt and not

a debt related to employment duties". The motion judge did not explain, nor is it apparent, why Tornado's involvement in agreeing to the loan, which she found to be unrelated to employment duties, was relevant to whether it was exercising control over Mr. O'Reilly as an employee. For similar reasons, Tornado's offer that Mr. O'Reilly take shares in ClearMRI Canada in satisfaction of the loan – an offer Mr. O'Reilly did not accept – does not assist in showing that effective control over Mr. O'Reilly, as an employee, resided with Tornado.

[84] Third, Mr. O'Reilly's evidence about an assurance was that at the time he offered to defer his salary, he "was reassured by ClearMRI, Clear MRI's directors, Tornado and Tornado's directors, and had no reason to doubt that ClearMRI [Canada] was committed to bringing the product to market and subsequently earning significant revenue". The motion judge did not explain, and it is not apparent, why the provision of this assurance about what his employer, ClearMRI Canada, was committed to do, constituted Tornado exercising control over Mr. O'Reilly as an employee.

[85] The fourth fact the motion judge relied on, shared business objectives between Tornado and the ClearMRI companies, impermissibly strayed across the boundaries of corporate separateness. A shareholder's objectives may be aligned with that of the corporation, in that the corporation's success may accrue to the benefit of the shareholder. However, the business remains that of the corporation. An employee of a corporation is not controlled by a shareholder of that corporation

simply because the employee is working for the success of the corporation, and the shareholder hopes that such success will occur.

[86] Stepping back from the specific findings, the key question was whether there was evidence of an intention to create an employment agreement between Tornado and Mr. O'Reilly containing the obligations Mr. O'Reilly sought to enforce. The motion judge did not relate the evidence about control over Mr. O'Reilly to this critical question. She did not consider whether the evidence about control showed an intention that Tornado was one of Mr. O'Reilly's employers at the time Mr. O'Reilly commenced employment in 2012, or that Tornado was somehow added as one of his employers at a point after that.

Corporate Relationships

[87] The third factor the motion judge considered was whether there was a sufficient relationship between Tornado and the ClearMRI companies to apply the common employer doctrine. She found that there was, relying on Tornado's majority ownership and incidents of corporate control, Tornado's consent rights under the Unanimous Shareholder Agreement, and a desire of Dr. Kim to consult Tornado about a proposed replacement to ClearMRI Canada's board of directors.[5]

[5] Neither the director being replaced, or the replacement, was Mr. O'Reilly.

[88] That corporations to which the common employer doctrine is applied are related to each other, members of a corporate group, or commonly controlled, is a feature of the case law. It might usefully be described as a necessary, but not a sufficient, factor for the application of the common employer doctrine. The corporate interrelationships in this case were such that the common employer doctrine qualified for consideration. But the corporate interrelationships do not, on their own, justify applying the doctrine. If they did, the common employer doctrine would lose its consistency with the concept of corporate separateness.

[89] In some cases, the corporate set-up may shed light on with whom the employee has contracted, because it brings into sharper focus where effective control over the employee resided. For example, in *Downtown Eatery*, all of the commonly controlled corporations were directly operating the business that employed the manager. In *Sinclair*, the employee was required to work for two companies even though on the payroll of only one. Or the employee may have been transferred from company to company within a group in a manner that may indicate the employment agreement was with the parent corporation: *Bagby*, at para. 46.

[90] These features were not present here. The motion judge did not consider or explain why the aspects of the corporate relationship between Tornado and the ClearMRI companies indicated an intention that Tornado was a party to the employment agreement with Mr. O'Reilly. In the absence of something that shows

such an intention, share ownership and its incidents, including the power to elect directors and the alignment of financial objectives between parent and subsidiary corporations, are insufficient to establish common employer status on the parent. The motion judge referred to an overlap in directors, but there was no suggestion of confusion about the capacity in which directors were acting when they interacted with Mr. O'Reilly concerning employment. And while the motion judge relied on Tornado's consent rights under the Unanimous Shareholder Agreement, those rights did not extend to employment agreements or changes in senior management – matters reserved to the ClearMRI Canada board.

[91] Thus, on the key question of whether there was an intention that Tornado was a party to the employment arrangement with Mr. O'Reilly – even accepting the finding that the written agreement was not dispositive – the motion judge's conclusions about control over Mr. O'Reilly as an employee did not address the correct test and were thus legally insufficient to support summary judgment. The corporate interrelationships could not fill that gap.

Conclusion on Common Employer Liability

[92] Accordingly, I would set aside the summary judgment against Tornado, and substitute an order dismissing the motion for summary judgment against it.

B. Dr. Kim's Appeal

[93] In her reasons, the motion judge found Dr. Kim liable for six months' wages and twelve months' vacation pay on the basis that he was a director of ClearMRI Canada. Although he was also a director of Tornado, the formal judgment only addresses his liability as a director of ClearMRI Canada.

[94] Dr. Kim's primary argument on appeal is that even though ClearMRI Canada had not paid the judgment against it, the conditions to his liability in s. 131(2) of the *OBCA* are quite specific, and there was no evidence they were fulfilled. There was no evidence that ClearMRI Canada was in liquidation, ordered to be wound-up, or was formally bankrupt as contemplated by s. 131(2)(b). Nor was there evidence that an execution against ClearMRI Canada was returned unsatisfied as contemplated by s. 131(2)(a).

[95] The issue is how s. 131 is to be interpreted in this case, given that it contemplates the director and the corporation being sued in the same action, yet provides that a director's liability is conditional on, for example, an execution against the corporation being returned unsatisfied, a step that would occur after judgment.

[96] In a case where the issue of liability of both the corporation and the directors comes up for consideration at the same time, and judgment is given against the corporation, any judgment against the director may have to be conditional on the

occurrence of a subsequent event. That was how the motion judge, having found Tornado to be liable, approached the matter in respect of the Tornado directors. She directed the parties to return to address the responsibility of two Tornado directors (but not Dr. Kim) if execution against Tornado was returned unsatisfied.

[97] Mr. O'Reilly obtained judgment against ClearMRI Canada sometime before he brought a motion for summary judgment against Dr. Kim. Dr. Kim argues that Mr. O'Reilly could have included evidence in the summary judgment motion that execution had been returned unsatisfied against ClearMRI Canada if that were the case. Since he did not, Dr. Kim argues that no judgment at all should have been given against him. In any event, the judgment does not reflect that Dr. Kim's liability is conditional on s. 131(2) events occurring.

[98] I reject the argument that no judgment at all should have been granted against Dr. Kim. Nothing in s. 131 of the *OBCA* puts a time limit on when the conditions in s. 131(2) can be fulfilled. But the formal judgment should be amended to provide that the liability of Dr. Kim in para. 3 is conditional on an execution against ClearMRI Canada being returned unsatisfied, or one of the events referred to in s. 131(2)(b) occurring in relation to ClearMRI Canada. The parties should have leave to return to the motion judge for directions if any issue arises on this point.

C. Quantum Issues

[99] The appellants made various arguments regarding the quantum of the judgments against them. Given the disposition of Tornado's appeal, I address two that could apply to Dr. Kim.

[100] First, they argue that the motion judge did not consider the fact that Mr. O'Reilly resigned in December 2013, and that this should affect the quantum of his entitlement. I would reject that argument. The motion judge found that, notwithstanding the formal resignation, Mr. O'Reilly continued to work as CEO "in reality". This reality governs his compensation entitlement.

[101] Second, it is argued that the agreement to defer specified the circumstance under which payment would resume, namely, the business earning revenue, and this never occurred. Mr. O'Reilly gave evidence, however, that revenue was earned. In my view, there was evidence on which the motion judge could properly view the deferral as non-permanent, such that the entitlement to claim salary and other entitlements was not waived and was in place when the revenue was earned.

[102] Finally, it is argued that the motion judge simply accepted the amounts in the default judgment. There was evidence before the motion judge on the quantum of Mr. O'Reilly's entitlements as they pertained to Dr. Kim's liability. As well, his liability is derivative of that of ClearMRI Canada, which had been determined by judgment. I would not interfere with the quantum of the judgment against Dr. Kim.

IV. CONCLUSION

[103] Subject to the variation noted in para. 98 above, I would dismiss the appeal of Dr. Kim. I would allow Tornado's appeal and set aside the summary judgment against it.

[104] The parties made submissions on costs but did not specifically address the mixed result I have arrived at. If the parties cannot agree on costs, they should make written submissions limited to three pages each, within ten days of the release of these reasons.

Released: June 7, 2021 "L.R."

"B. Zarnett J.A."
"I agree. L.B. Roberts J.A."
"I agree. Sossin J.A."

TAB 4

Court File No. 04-CL-5491

DATE: 2006-05-16

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 AFTON FOOD GROUP LTD., AFTON FOOD GROUP INC., JOINT TECHNOLOGIES INC., KEDARD HOLDINGS LTD., ROBIN'S FOODS INC., MRS. POWELL'S (CANADA) INC., 241 PIZZA (1997) INC., RUFFAGE INTERNATIONAL INC., CYBERSENSATIONS CAFÉ INC., MRS. POWELL'S, INC. and KIDSPORTS CAPITAL CORPORATION AND OTHER APPLICANTS LISTED ON SCHEDULE "A", Applicants

BEFORE: Justice Spies

COUNSEL: G. Benchetrit and F. Tayar for the Receiver; Christopher W. Besant, for the Former Directors of Afton; R. van Kessel for Hans Koehle, Ian Barrett and Robert Coffey; B. Sachdeva and M. Nowina for Robert Macdonald and K. Kraft for Rabobank

HEARD: May 2, 2006

E N D O R S E M E N T

Overview

[1] By Order of Madam Justice Hoy dated February 28, 2005 (the "Receivership Order"), Zeifman Partners Inc. was appointed interim receiver and receiver and manager (the "Receiver") of all of the current and future assets, undertakings and properties of Afton Food Group Ltd. and certain of its subsidiaries and related corporations (collectively referred to herein as the "Debtors" or the "Applicants").

[2] Prior to the appointment of the Receiver, the Debtors had been operating under the Companies' Creditors Arrangement Act ("CCAA") pursuant to the Order of Mr. Justice

Cameron dated July 16, 2004 (the "CCAA Order"). The CCAA Order included only certain of the Debtors as applicants under the CCAA, but was later amended nunc pro tunc to include those Debtors not originally named. By way of several subsequent orders of this Court, the terms of the CCAA Order had been extended from time to time.

[3] In an endorsement dated October 18, 2004, Mr. Justice Farley ordered that the legal accounts of the Former Directors be paid on an ongoing basis, subject to an overall taxation at the end, with the proviso as to any "outrageous accounts".

[4] By Order of Mr. Justice Campbell dated March 10, 2006 (the "D&O Claims Order"), a claims process was established for the submission of D&O Claims (as defined therein) to the Receiver on or before April 3, 2006 (the "D&O Claims Bar Date).

[5] The Receiver received a total of 8 D&O Proofs of Claim by April 3, 2006 (including the motion record of Robert Macdonald referred to below). The Receiver also received a Proof of Claim filed by Cassels Brock & Blackwell LLP ("Cassels") as a precaution to preserve and assert the former directors' rights in connection with any actual or potential claims against them.

[6] The Receiver is not admitting or denying the validity or the quantum of any of these claims. Pursuant to Paragraph 12 of the D&O Claims Order, the process for review, resolution and adjudication of these claims is to be determined by further order of this Court.

[7] The Senior Lenders provided operating lines of credit to the Debtors pursuant to a Restated Credit Agreement dated October 23, 2003 (the "Credit Agreement"). Rabobank Nederland, Canadian Branch, is the agent for the Senior Lenders. The Senior Lenders are owed in excess of $21 million pursuant to the Credit Agreement. There seems to be no doubt that the Senior Lenders are going to suffer a significant shortfall on their recovery in any scenario.

[8] At present, there are 3 sets of counsel representing former directors of the Debtors:

a. Cassels represents all of the former directors of Afton; Robert Macdonald, Robert Coffey, Hans Koehle and Ian Barrett (the "Former Directors");
b. Lawrence, Lawrence, Stevenson LLP ("Lawrence") represents Robert Coffey, Hans Koehle and Ian Barrett (the "Koele Group") in connection with the claims made against them by Robert Macdonald; and
c. Pallett Valo LLP ("Pallett") represents Robert Macdonald in connection with his claims made against the Debtors and the Koehle Group for unpaid salary and pension entitlements.

[9] Following discussions among counsel for the Receiver, counsel for the Secured Lenders and counsel for the Former Directors, it was decided that there are a number of "threshold" issues relating to the scope of the Directors' Charge (as defined in the CCAA Order), which ought to be submitted to the Court for a determination. Accordingly, it was agreed that

the Receiver would bring a motion for advice and submit these issues to the court for determination

[10] In addition to the Receiver's motion for advice there are motions from: (i) the Former Directors seeking an order directing the Receiver to pay accounts of Cassels (ii) Robert Macdonald, one of the former directors, seeking an order that Issue #1 be answered in the affirmative, and in the alternative, an order for leave to commence an action against the Koehle Group and (iii) a cross motion from the Koehle Group seeking to vary the terms of the CCAA Order and Receivership Order if necessary.

Issues

[11] The Receiver brings this motion for advice and directions in connection with the following 6 issues listed in paragraph (b) of the Notice of Motion[1]:

1. Do the indemnification provisions of the various orders extend to liabilities for which the directors may be personally liable that existed before July 16, 2004 or do the provisions only secure liabilities that arose on or after that date?
2. Is the $1 million Directors' Charge on the indemnification provisions inclusive or exclusive of legal fees paid or payable to directors' counsel?
3. Does the indemnification for legal fees extend to counsel for Mr. Macdonald and to counsel for the other three former directors in response to the claims of Mr. Macdonald?
4. Is Afton obliged to pay the outstanding accounts of Cassels before any assessment or approval related thereto?
5. Has the Receiver, in any way, waived the rights of Afton or the senior lenders in relation to the accounts of Cassels that were paid during and after the CCAA process was ongoing?
6. On the assumption that the answer to question 5 is negative, where is the appropriate forum to have those accounts reviewed

[12] The Receiver also sought advice and direction of the Court with respect to whether any of the D&O Claims create any liability for the Receiver separate and apart from any liability that the Debtors or the Directors may have in connection with such claims, but this question was not pursued on the motion.

[13] Counsel advised that an agreement had been reached, which settled Issues numbered 4-6. The terms of the agreement are as follows:

> With respect to the relief sought in paragraph (b) (5) of the Receiver's notice of motion, the former Directors of Afton shall respond to the questions posed in

[1] The wording of the issues was modified slightly during argument, with the agreement of all counsel, from the wording in the Receiver's Report

writing by the Receiver on or preceding June 15, 2006. The adequacy of the responses and the procedure for the taxation ordered by Farley, J. may be the subject-matter of a further motion to be brought either by Cassels Brock or the Receiver.

The relief sought in paragraph (b)(6) of the Receiver's notice of motion and in paragraph (c) of the notice of motion of Robert Coffey, Robert MacDonald, Hans Koehle and Ian Barrett ("Former Directors"), are hereby withdrawn, without costs.

The relief sought in paragraph (b) of the motion of the Former Directors is hereby adjourned sine die. Similarly Item (b) (4) of the Receiver's motion shall be adjourned sine die. Pending the return of those motions, the Receiver shall continue to pay the legal accounts of the Former Directors in accordance with the endorsement of Madam Justice Mesbur of February 23, 2006. For greater certainty, payments by Afton shall be made directly to Cassels Brock and, conversely, any reductions of the Cassels Brock accounts (if any) are to be repaid by Cassels Brock directly to Afton (provided that this provision does not alter any rights between Cassels Brock and its clients concerning its accounts).

[14] This agreement also resolves the motion brought by the Former Directors.

Preliminary Issue

[15] Notice of this motion was not given to all of the claimants who filed claims in response to the D & O Claims Order. No counsel took the position that the claimants ought to be given notice.

[16] It is the position of counsel for the Receiver that the claimants do not have standing to make submissions on the Directors' Charge, which is in favour of the Former Directors. I agree. I am interpreting two court orders and in particular the rights of the Former Directors with respect to the indemnification provisions and the Directors' Charge. Although the claimants may be indirectly impacted by this decision, in my view the claimants do not have standing to intervene on the interpretation issues I have been asked to consider. The provisions is issue are for the direct benefit of the Former Directors only.

[17] Counsel for the Former Directors suggested that these issues should not be answered at this time, as the scope of the Directors' Charge should be interpreted in the context of specific claims. He submitted that the applicability of the CCAA Order, as it applies to any particular claim, needs to be considered in relation to specific claims, and in a manner that binds the claimant asserting the claim against the Directors. Counsel for the Receiver disagreed and submitted that I have all of the necessary facts in order to decide the issues put before me and that the Receiver needs to know the answers to the questions at this time.

[18] The issues I have been asked to decide do not determine whether or not the indemnification provisions of the Directors' Charge cover any particular claims. Counsel for

Macdonald made some submissions concerning his client's claim but I am not prepared to express an opinion on that claim nor do I need to do so in order to answer the issues before me. Accordingly in my opinion the issues can be considered and answered at this time.

Principles of Interpretation

[19] It is submitted by counsel for the Koehle Group that an initial order, like the CCAA Order, should be given a large and liberal interpretation and that the purpose of the CCAA must be kept in mind in interpreting a CCAA Order.

[20] Counsel relies on the decision of the Alberta Court of Appeal; Smoky River Coal Ltd. (Re)[2], which considered the principles that ought to be applied in interpreting CCAA orders. The court held that the purpose of the CCAA must be kept at the forefront in both drafting and interpreting a CCAA order. The court referred to the following passage from the decision of Farley J. in Re Lehndorff General Partner Ltd.[3] wherein he stated as follows:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan [sic] of compromise or arrangement to be prepared, filed and considered by their creditors and the court.

[21] In considering CCAA orders, the court in Smoky River stated that these orders become the "roadmap" for the proceedings and the litigation which may follow and so they must be drafted with clarity and precision:

> It is particularly important that the terms and scope of any charge created by an order be clearly defined. Creditors need to know from the outset whether or not they are entitled to benefit in any charge or other priority created by the order. Those extending credit…should not be forced to participate in litigation after the CCAA proceeding to discover whether or not they hold some form of security or are entitled to a super-priority. Similarly, secured creditors of a troubled company need to know from the outset the effect the CCAA process will have on their security. They should not be forced to wait until the end of the proceedings to discover that their security has been whittled away due to a **broad judicial interpretation** of qualification for super-priority status. A precise CCAA order will ensure commercial practicality by allowing all creditors of the debtor company to properly adjust the terms of their credit[4] (emphasis mine).

[2] [2001] A.J. No. 1006
[3] (1992), 17 C.B.R. (3) 24
[4] Supra at paras 16 and 17

[22] In the Smoky River case the appeal court was faced with a CCAA order that did not define a post-petition trade creditors charge. The court found that because the parties had failed to define the term, that the court had to attempt to balance the interests of the parties and presume that creditors would be taken to understand the purpose of the CCAA and to expect that the PPTC Charge would be interpreted to accord with the commercial reality that the insolvent business would operate in its ordinary course. In the circumstances of that case the court decided that they would interpret the issue on "commercially reasonable terms"[5].

[23] In applying these principles to the issues before me, I conclude that it is only if a provision of the CCAA Order is ambiguous or there is a gap or omission, that the Court should adopt a liberal interpretation and consider the purpose of the CCAA, attempt to balance the interests of the parties and consider what would be a commercially reasonable interpretation of the order. In the first instance, I should assume that the parties carefully drafted the terms of the CCAA Order and to the extent that the order is clear and unambiguous, I should interpret the order in accordance with its plain meaning and not engage in a "broad judicial interpretation". In doing so I am entitled to assume that the terms of the CCAA Order reflect the agreement negotiated between the parties, within the legal parameters that the court will impose, and that the agreement was codified in the order approved by the court.

[24] This is particularly important in addressing the issues raised in this case as the interests of the Former Directors and the Secured Lenders conflict. The directors argue that the indemnification provisions and Directors' Charge were fundamental to the agreement of the Directors to stay in office during the CCAA process and without the Directors continuing in office through the CCAA process, the Applicants would have had much more difficulty in preserving going concern value. The Secured Lenders on the other hand, are concerned if their security is eroded by payments made by the Applicants that will result in a reduced recovery of their outstanding loans.

The CCAA and Receivership Orders

[25] The CCAA Order includes provisions indemnifying the Former Directors of the Afton Group for certain liabilities, and the indemnity provisions are secured by a third-ranking charge on the Debtors' assets (the Directors' Charge). This charge was continued under the Receivership Order on certain specified terms.

[26] The indemnity provisions of the CCAA Order are as follows (emphasis mine):

> 27. THIS COURT ORDERS that the Applicants shall and do hereby **indemnify** the **Directors**, the Monitor, counsel to the Monitor and counsel to the Applicants of and from all claims, liabilities and obligations **of any nature whatsoever**, including, without limitation, legal fees and disbursements on a substantial indemnity basis, which **may arise** out of their involvement with the Applicants,

[5] Supra at para 19

> the Restructuring or the Plan, **from and after the date hereof** in the above-mentioned capacities, save and except as may arise from wilful misconduct or negligence on the part of any of them.
>
> 37. THIS COURT ORDERS that, **in addition to any existing indemnities**, the Applicants shall and do hereby **indemnify** each of the Directors (which for the purposes of this paragraph, for greater certainty, shall include all persons having actual or deemed or defacto director or officer liabilities) of the Applicants from **(i)** all costs, claims, disputes, liabilities, charges, expenses and obligations of any nature whatsoever (including, without limitation, legal fees on a full indemnity basis) ("**Claims**") which may arise from any **future** claims, disputes, liability, charges, expenses and obligations relating to the failure of the Applicants **to at any time pay their obligations**; **(ii)** all Claims which the Directors **sustain or incur** from their respective involvement with the Applicants, any sale of the Applicants of all or any part of the Property **from and after the date of this Order** in the above mentioned capacities save and except as may arise from the willful misconduct or gross negligence of such Director; and **(iii)** all reasonable fees and disbursements on a substantial indemnity basis of Director's counsel.

[27] The CCAA Order also contains a provision dealing with the payment of legal fees of counsel to the former directors of the Debtors as follows:

> 17. THIS COURT ORDERS that the Applicants shall pay the reasonable fees and disbursements on a substantial indemnity basis of counsel to the Directors in connection with these proceedings or in the preparation therefore, including without limitation in relation to any proceedings brought against any Director in such capacity seeking to assert claims against them relating in any way to the Directors Charge as defined herein.

[28] In addition the CCAA Order provides for a Directors' Charge in the following terms (emphasis mine):

> 38. THIS COURT ORDERS that **each of Directors** of the Applicants shall be entitled to the benefit of and are hereby granted a third ranking priority, security interest, fixed charge, mortgage and lien in the **maximum aggregate amount of $1,000,000.00** (the "Directors' Charge") upon the present and future Property of the Applicants **as security for the indemnity provided in this Order**, but such Directors' Charge shall only apply to the extent that the Directors do not have coverage or are not in fact covered under the provisions of any applicable directors' and officers' or fiduciary insurance. In respect of any Claim that is asserted against the Directors of the Applicants, if the Directors against whom the Claim is asserted (collectively, "Respondent Directors") do not receive satisfactory confirmation from the applicable insurer within 21 days of delivery of notice of the Claim to the applicable insurer confirming that the applicable insurer

> will provide coverage for and indemnify the Respondent Directors against the full amount of the Claim if successfully brought, then, without prejudice to the subrogation rights hereinafter referred to, the Applicants shall pay the amount of the Claim as it becomes payable by the Respondent Directors and, **failing such payment, the Respondent Directors shall be entitled to enforce the Directors' Charge**; provided that the Respondent Directors shall reimburse the Applicants (or, in the event that all or substantially all of the Applicants' assets are transferred pursuant to the Plan, the entity to which such assets are transferred) to the extent that they subsequently receive insurance proceeds in respect of a Claim paid by the Applicants, and provided further that the Applicants shall, in the event of such payment being made, be subrogated to the rights of the Respondent Directors to pursue recovery thereof from the applicable insurer as if no such payment had been made; and that the foregoing shall not constitute a contract of insurance and shall not constitute other valid and collectible insurance as such term may be used in any existing policy of insurance issued in favour of the Applicants, or any of its Directors.

[29] The corresponding provisions of the Receivership Order are paragraphs 24, 25 and 31 which provide as follows (emphasis mine):

> 24. THIS COURT ORDERS that the Administrative Charge and the **Directors Charge**, both as defined in the July 16, 2004 Order of this Court, as amended (the "Initial CCAA Order"), **are hereby continued and shall both retain their respective priorities**, and have **priority** over the Receiver's Charge and the Receiver's Borrowing Charge **in respect of the period ending February 28, 2005 (the "CCAA Period") in respect of any matter covered by the charge pertaining to the CCAA Period and in respect of the continuing legal fees and expenses of the Former Directors for any matters arising during the CCAA Period to the extent those legal fees and expenses pertain to matters covered by the Directors Charge** (as defined in the Initial Order) or to the continuing provisions of the CCAA Order as set out below in this Order, and in relation to such legal fees and expenses, the provisions regarding current payment of such amounts in the October 6, 2004 order in the CCAA proceedings of this Court shall continue subject to Receiver's rights to require a taxation thereof. For greater certainty the reasonable fees and expenses of counsel to the Former Directors incurred on and after February 28, 2005 in connection with the rights and/or obligations of the Former Directors in their capacities as directors of the Applicants shall hereby be paid by the Receiver as invoiced and shall hereby be covered by the Directors Charge subject to the Receiver's rights to require a taxation thereof.
>
> 25. THIS COURT ORDERS that as of the date hereof the Initial CCAA Order shall be of no further force or effect, save and except for paragraphs 2, 3, 5(f), 9,10,16 (insofar as is necessary to keep the policy and extended reporting period in force, but without the obligation to further renew coverage after February 28),

> **17 (insofar as is necessary to give full effect to paragraph 24)**, 20(e), 23, **27 (in respect of any matters arising during or pertaining to the CCAA Period),** 28, 32, 34, **37-39 (to the extent provided in the immediately preceding paragraph)**, 42, 43 (subject to paragraph 24 above), 44-46, and 48 of the Initial CCAA Order.
>
> 31. THIS COURT ORDERS that the Receiver shall pay **in the ordinary course out of the cash flow under its control** in the same manner as previously done by the Applicants all amounts owing by the Applicants to any person for obligations or expenses incurred during the CCAA Period including:
>
> (c) the fees and expenses of counsel to the directors;
>
> provided that all such fees and expenses shall be subject to taxation if so required by the Receiver, and shall allow all outstanding cheques approved by the Monitor and issued prior to or on the date hereof for such amounts to clear.

[30] Paragraph 24 of the Receivership Order includes a reference to "the provisions regarding current payment of [legal fees and expenses of the Former Directors] in the October 6, 2004 order in the CCAA proceedings of this Court". The only Order dated October 6, 2004 is the Order of Mr. Justice Farley, but that order does not include any provisions dealing with payments of legal fees and expenses. The reference to the "October 6, 2004 order" appears to be a reference to the endorsement made by Justice Farley on October 18, 2004.

Do the indemnification provisions extend to liabilities for which the directors may be personally liable that existed before July 16, 2004 (the date of the CCAA Order) or do the provisions only secure liabilities that arose on or after that date?

[31] The position of the Secured Lenders is that the indemnification provisions extend only to liabilities that arose on or after the date of the initial CCAA Order. It is submitted that the indemnification provisions do not extend to obligations for which the Former Directors may be personally liable that were already in existence at the time of the initial CCAA Order and that the order was drafted this way, as there were significant arrears of GST and PST in existence at the time of the CCAA Order.

[32] Paragraph 27 of the CCAA Order is a general indemnity provision, which indemnifies not only the Directors but the Monitor and others. The description of the nature of the claims covered by the indemnity is broad in that it specifies "all claims, liabilities and obligations of **any nature whatsoever**", including legal fees, provided, in the case of the Former Directors, those claims arise out of their "involvement" as Directors with the Applicants, the Restructuring or the Plan, "**from and after the date hereof**", referring to the date of the CCAA Order. On a plain reading of this paragraph, this indemnity only covers claims and liabilities arising from activities of the Directors after the date of the order and as such would not indemnify the Directors for claims and liabilities that existed before July 16, 2004.

[33] I must also consider however, the wording of paragraph 37 of the CCAA Order. In doing so the first question is the meaning of the introductory words: “in addition to any existing indemnities”. Counsel for the Former Directors argue that the indemnity provided to the Directors pursuant to paragraph 37 of the CCAA Order is in addition to the indemnity provided by paragraph 27. On the other hand, counsel for the Secured Lenders argues that paragraph 37 is more specific and is limited by paragraph 27 or is intended to explain the indemnity provided by paragraph 27 of the order and as such should be interpreted as being limited to claims and liabilities arising after the date of the Order.

[34] In my opinion, the reference in the opening words of paragraph 37 of the CCAA Order to “existing indemnities” is not a reference to paragraph 27 of the order, which is an indemnity created by the order, but rather a reference to whatever indemnities the Directors may have had at the time of the order as a result of the terms of the corporate by-laws, any prior agreements or at common law. Had this paragraph been intended to explain the scope of the indemnity provided at paragraph 27 of the order, paragraph 37 would have referred back to paragraph 27. Similarly, if it was intended that paragraph 27 of the order limit the scope of paragraph 37, again the order would have said so. Accordingly in my opinion, if the indemnity provided to the Directors by paragraph 37 of the order is different in scope than the indemnity provided by paragraph 27, I conclude that the Directors can claim the benefit of both indemnities.

[35] The question then is what is the meaning of the indemnity provided by paragraph 37 of the Order? As set out above, there are really three indemnities in that paragraph. The first indemnity, paragraph 37 (i), defines the term “Claims” which is then used in subparagraph (ii). Again the nature of claims covered is broadly defined and includes legal fees.

[36] In order for the indemnity in 37 (i) to apply, the Claims must “arise from **future** claims, disputes, liability, charges, expenses and obligations…” which I take to mean claims and disputes asserted against the Directors after the date of the order or liability determined or expenses incurred after the date of the order. However, paragraph 37(i) goes on to say that the claims, disputes, liability etc. must relate to “the failure of the Applicants to **at any time** pay their obligations”. Read as a whole, I find that paragraph 37(i) indemnifies the Directors for Claims as defined, which are asserted against the Directors after July 16, 2004, even if the Claim relates to a failure of the Applicants to pay their obligations before July 16, 2004.

[37] The language of paragraph 37(ii) however clearly provides for an indemnity that only applies to Claims (as defined in paragraph 37(i)) that the Directors “sustain or incur” “from and after the date of this Order” which in my opinion refers to claims that arise after July 16, 2004. This language is also found in paragraph 27 and does not appear in paragraph 37(i), which reinforces the conclusion I have reached as to the meaning of paragraph 37(i).

[38] Finally paragraph 37(iii) provides for an indemnity of all reasonable fees and disbursements on a substantial indemnity basis of “Director’s counsel”. I note that the reference here is to a single Director rather than counsel acting for all of the Directors. This is consistent with the conclusion that I reach in answer to Issue #3.

[39] The Secured Lenders rely on the provisions in the order dealing with Crown Priorities. Pursuant to paragraph 15 of the CCAA Order the Applicants were ordered only to pay or remit in accordance with legal requirements all Crown Priorities, which "accrue on or after the date [of the CCAA Order]". The definition of "Crown Priorities" is specifically referenced in Schedule 1 to the CCAA Order as referring to amounts for which the Directors bear personal **liability arising after the date of the Initial Order**. The fact that this provision, which deals with Crown Priorities, clearly refers to liabilities arising after the date of the CCAA Order does not in my view mean that other provisions of the order are to necessarily be interpreted in the same way. The obligations of the Applicants to pay certain liabilities may or may not match the indemnification provisions or what the Directors Charge covers.

[40] The terms of the Receivership Order do not alter my interpretation of the CCAA Order in order to answer this question. With respect to the indemnity provided in paragraph 27 of the CCAA Order, paragraph 25 of the Receivership Order reinforces the fact that that indemnity applies to the period after and during the CCAA Period. The indemnities in paragraph 38 of the CCAA Order however are continued "to the extent provided in the immediately preceding paragraph", referring to paragraph 24 of the Receivership Order and so the meaning of paragraph 24 must be considered.

[41] I find that paragraph 24 of the Receivership Order continues the indemnities in paragraph 37 of the CCAA Order and does not change the nature or scope of those indemnities. I should note however, that I express no opinion on whether or not the nature of the priority provided by the Directors' Charge in paragraph 38 of the CCAA Order is altered in any way. The language in paragraph 24 of the Receivership Order that I have bolded above, will have to be considered in determining priority issues, but that is not before me.

[42] According I find that the indemnification provisions in the CCAA Order and continued in the Receivership Order extend to liabilities for which the directors may be personally liable that existed before July 16, 2004, the date of the CCAA Order, if they otherwise fall within the meaning of paragraph 37 (i) of the CCAA Order.

Is the $1 million Directors' Charge on the indemnification inclusive or exclusive of legal fees paid or payable to directors' counsel?

[43] The Secured Lenders submit that the fees of the Directors' counsel are specifically incorporated within the indemnification and Directors' Charge and are subject to the "cap" of $1 million. Therefore, it is argued that the legal fees paid to the Directors' counsel form part of the $1 million cap and to the extent Directors' counsel fees are paid, the amount available to cover the Former Directors' legal obligations is correspondingly reduced on a dollar for dollar basis.

[44] I should also say that I have not been asked to give advice on the issue of Directors' insurance referred to in paragraph 37 of the CCAA Order. The issue I am really being asked to consider is whether or not the $1 million Directors' Charge is being reduced as legal fees are being paid to counsel for the Directors by the Applicants.

[45] Paragraph 17 of the CCAA Order requires the Applicants to pay certain reasonable fees and disbursements, on a substantial indemnity basis, of counsel to the Directors. Paragraphs 24 and 31 of the Receivership Order continue the Directors' Charge and expressly set out again the obligation of the Receiver to pay legal fees and expenses of counsel for the Directors. The legal fees and expenses are to be paid "in the ordinary course out of the cash flow" and "as invoiced" subject to the right of the Receiver to have the costs assessed.

[46] The first issue with respect to the Directors' Charge is the submission made by counsel for the Koehel Group that **each** Director has the benefit of a $1 million charge, which would mean that the aggregate charge is in fact $8 million. He suggests that if the order intended a single charge for all directors it would be worded differently. I do not accept that argument. Although the opening words of paragraph 38 of the CCAA Order could have been clearer (for e.g. "the directors"), reading that paragraph as a whole, it is clear that each Directors has the benefit of a single $1 million charge. This is clear from the words; "maximum **aggregate** amount of $1,000,000.00" in paragraph 37.

[47] This meaning is also reinforced by paragraph 42 (c) of the CCAA Order which refers to the Directors' Charge as being limited to $1 million as a third charge in terms of priority.

[48] There was no issue raised by counsel concerning the fact that paragraph 38 uses the term "indemnity" rather than "indemnities". Although I considered in connection with Issue #1, whether or not that gave some support for the proposition that I should read paragraphs 27 and 37 of the CCAA Order together as one indemnity, I concluded, for the reasons already stated, that those paragraphs together are not capable of such an interpretation. In my opinion, the use of the term "indemnity" in paragraph 38 of the order is a reference to the two indemnities provided by paragraphs 27 and 37 and although it is used in the singular form, it makes no specific reference to either indemnity and in my view is used to refer to both.

[49] The Directors' Charge is security for the Directors for the indemnities provided by paragraphs 27 and 37 of the CCAA Order and those indemnities include an indemnity for the legal fees of counsel for the Directors. As such the Directors' Charge is security for the legal fees.

[50] This is restated in paragraph 24 of the Receivership Order, which continues the Directors' Charge and also states that the reasonable fees and expenses of counsel to the Former Directors "shall be covered by the Directors' Charge". I interpret that phrase as being consistent with the wording of paragraph 38(iii) of the CCAA Order and simply confirming that the Directors' Charge is security for legal fees.

[51] Whether or not paragraph 24 changes the precise terms of the security provided by the Directors' Charge in terms of priority issues was not argued before me. As I have already stated it is not necessary for me to consider that in order to answer this question.

[52] What is clear is that if the Directors were compelled to look to the Directors' Charge for claims asserted against the Directors including legal fees, then those legal fees would

be included in the $1 million charge. On that basis the legal fees would reduce the amount of the security available for the claims. That however is not what has occurred in this case, nor is it what was contemplated by the orders.

[53] It is not disputed before me that subject to the number of counsel (see Issue #3) that the reasonable legal fees and disbursements of counsel for the Directors are payable by the Applicants as they are invoiced, subject to the right to have the accounts assessed. Although there have been issues about this in the past, if there was any doubt about this is in CCAA order, that was settled by the order of Farley J. at a time when the CCAA Order was in effect. This issues was revisited in paragraphs 24 and 31 of the Receivership Order and the subsequent agreement reached between counsel with respect to Issues numbered 4-6.

[54] Accordingly, in the ordinary course, the legal fees and disbursement of counsel for the Directors will be paid when invoiced and there will be no need for the Directors to look to the Directors' Charge. In that event the payment of the legal fees and disbursements does not reduce the $1 million amount of the Directors' Charge.

[55] In the course of argument it seemed that some counsel confused the Directors' Charge with what might in other circumstances be considered the limits of insurance coverage for the Directors. The Secured Lenders described the Charge as a "cap" and that is how the issue before me originally was drafted. In my opinion however, although the maximum amount that is secured by the Directors' Charge is $1 million, it does not operate as a "cap" in the manner suggested by the Secured Lenders.

[56] There is no monetary limit on the indemnification provisions for the Former Directors, to the extent that they apply to particular claims. The Directors' Charge however, is limited to the amount of $1 million and is security for the claims including legal costs up to the $1 million limit. It is not a line of credit or other source of funds that is notionally applied to the payment of those amounts, where the Applicants are obliged to pay and do pay. As long as the Applicants continue to pay the legal costs in the ordinary course out of the cash flow from ongoing operations, as required by the terms of the orders, subject to taxation and there is no need for the Directors to look to the Directors' Charge.

[57] Similarly to the extent that the Applicants pay obligations that might otherwise give rise to claims against the Directors if unpaid, there is no need for the Directors to look to the Directors' Charge for payment. It is only when the Applicants fail to make any of these payments that the Charge will be engaged.

[58] This interpretation is made clear by the language of the Directors' Charge itself. Paragraph 38 provides that the Applicants shall pay the amount of the Claim (as defined) "as it becomes payable by the Respondent Directors and **failing such payment,** the Respondent Directors shall be entitled to enforce the Directors' Charge".

[59] Accordingly the $1 million Directors' Charge, which secures the indemnification provisions, is exclusive of the legal fees and disbursements **paid** by the Applicants to counsel for the Former Directors in accordance with the terms of the orders.

Does the indemnification for legal fees extend to counsel for Mr. Macdonald and to counsel for the other three former directors in response to the claims of Mr. Macdonald?

[60] Although the Receiver framed the issue as liability of legal fees for both Mr. Macdonald and the Koehle Group, there is only a claim for legal fees that the Koehle Group asserts. The issue raised by this question is whether or not the Koehle Group is entitled to counsel at all given that the suit is by one of the directors and whether or not the Applicants are responsible for the reasonable fees and disbursements of a second law firm representing some of the Directors.

[61] By a Notice of Motion dated February 13, 2006, Macdonald moved for, inter alia, an order for leave to sue the Koehle Group and for an order that the Koehle Group is liable to MacDonald for $125,000 for unpaid wages pursuant to the provisions of the Business Corporations Act R.S.O. 1990, c. B. 16 as amended and s. 81 of the Employment Standards Act, 2000 S.O. 2000, c. 41 and for $285,567 for unpaid pension obligations. Counsel for Macdonald has confirmed that Macdonald's wage arrears claim against the Koehle Group is confined to the period prior to the CCAA Order

[62] Cassels is in a clear conflict because it acts for all of the Former Directors and one member of the Board, Macdonald, has taken legal action against the three other directors. There is no doubt that Cassels is unable to act on behalf of the Koehle Group in respect of the claims made against them by Macdonald. Accordingly, it was necessary for the Koehle Group to seek and obtain independent counsel to represent them in connection with the claims made against them by McDonald.

[63] Counsel for the Secured Lenders relies on paragraph 37 of the CCAA Order, although as I have already it refers to counsel for each Director as it used the phrase "Director's counsel", which suggests the possibility of more than one counsel. Paragraph 17 of the CCAA Order deals with "counsel to the Directors". Counsel for the Secured Lenders argues that these provisions speak to counsel acting for all the Directors and that although it is conceivable that there can be a situation where the Former Directors as a group may need to retain a second law firm to deal with an issue, it defies conventional logic to think that the indemnification extends to a situation where one of the Former Directors is suing the remaining Former Directors which is the case here.

[64] I disagree. The provisions of the CCAA Order and the Receivership Order do not provide that there is no indemnity for legal costs where the plaintiff is another Director. Mr. Macdonald is suing the Koehle Group in their capacity as Directors. Furthermore, at no place in the orders is it indicated that the type of proceeding that is covered excludes claims by one Director against the others. Counsel raised an issue as to whether or not Mr. Macdonald is suing in his capacity as an employee or Director but in my view it makes no difference. It is the capacity of the defendant Directors that is in issue and clearly they are being sued as Directors.

[65] Furthermore, at no place in the CCAA Order or the Receivership Order is it indicated that only one law firm can act for the Former Directors. The phrase in paragraph 17,

which is the main provision providing for the payment of legal fees, refers to "counsel to the Directors" the phrase does not preclude more than one firm acting for the Directors. The term "counsel" can of course refer to one or more persons or more than one law firm. Furthermore there are no terms in the orders that suggest that all the Directors must be sued together in one proceeding for paragraph 17 to apply.

[66] Clearly the intention was only to pay for legal costs of counsel retained by the Former Directors to defend claims and Mr. Macdonald has not asked to be indemnified for his costs in prosecuting his action against the rest of the Directors. In my opinion however, given the conflict and the fact that Cassels is unable to act for the Koehle Group, the Directors are entitled to retain separate counsel and the indemnity as to legal fees applies to that counsel in the case of the claim by Mr. Macdonald.

Conclusion

[67] Accordingly, in answer to Issue #1, I find that the indemnification provisions in the CCAA Order and continued in the Receivership Order extend to liabilities for which the directors may be personally liable that existed before July 16, 2004, the date of the CCAA Order, if they otherwise fall within the meaning of paragraph 37 (i) of the CCAA Order.

[68] In answer to Issue #2, I find that the $1 million Directors' Charge, which secures the indemnification provisions in the Orders, is exclusive of legal fees and disbursement that have been **paid** by the Applicants to counsel for the Directors in accordance with the terms of the Orders.

[69] In answer to Issue #3, I conclude that the Koehle Group of Directors are entitled to retain separate counsel and the indemnity as to legal fees applies to the reasonable fees and disbursements of that counsel, subject to assessment, in the case of the claim asserted against the Koehle Group by Mr. Macdonald.

[70] Given my conclusion with respect to Issue #1, it is not necessary for me to consider the motion by the Koehle Group to amend the CCAA Order and the Receivership Order or Macdonald's motion for an order for leave to commence an action against the Koehle Group.

Spies J.

Released: May 16, 2006

TAB 5

Century Services Inc. *Appellant*

v.

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

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

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

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

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

Century Services Inc. *Appelante*

c.

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

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

2010 CSC 60

N^{o} du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Facts and Decisions of the Courts Below

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

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

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

1. Faits et décisions des juridictions inférieures

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

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

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

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

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

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

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

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

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

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

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

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

2. Issues

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

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

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

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

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

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

2. Questions en litige

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

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

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

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

3. Analysis

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

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

3.1 *Purpose and Scope of Insolvency Law*

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

3. Analyse

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2 *GST Deemed Trust Under the CCAA*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

222. . . .

. . .

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

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

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

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

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

222. . . .

. . .

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

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

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

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

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

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

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

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

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

18.3 . . .

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

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

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

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

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

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

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

18.3 . . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

in those Acts carving out an exception for GST claims.

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

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

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

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

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

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

[49] Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

[48] Peut-être l'effet de l'arrêt *Ottawa Senators* est-il atténué si la restructuration est tentée en vertu de la *LFI* au lieu de la *LACC*, mais il subsiste néanmoins. Si l'on suivait cet arrêt, la priorité de la créance de la Couronne relative à la TPS différerait selon le régime — *LACC* ou *LFI* — sous lequel la restructuration a lieu. L'anomalie de ce résultat ressort clairement du fait que les compagnies seraient ainsi privées de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la *LACC*, régime privilégié en cas de réorganisations complexes.

[49] Les indications selon lesquelles le législateur voulait que les créances relatives à la TPS soient traitées différemment dans les cas de réorganisations et de faillites sont rares, voire inexistantes. Le paragraphe 222(3) de la *LTA* a été adopté dans le cadre d'un projet de loi d'exécution du budget de nature générale en 2000. Le sommaire accompagnant ce projet de loi n'indique pas que, dans le cadre de la *LACC*, le législateur entendait élever la priorité de la créance de la Couronne à l'égard de la TPS au même rang que les créances relatives aux retenues à la source ou encore à un rang supérieur à celles-ci. En fait, le sommaire mentionne simplement, en ce qui concerne les fiducies réputées, que les modifications apportées aux dispositions existantes visent à « faire en sorte que les cotisations à l'assurance-emploi et au Régime de pensions du Canada qu'un employeur est tenu de verser soient pleinement recouvrables par la Couronne en cas de faillite de l'employeur » (Sommaire de la L.C. 2000, ch. 30, p. 4a). Le libellé de la disposition créant une fiducie réputée à l'égard de la TPS ressemble à celui des dispositions créant de telles fiducies relatives aux retenues à la source et il comporte la même formule dérogatoire et la même mention de la *LFI*. Cependant, comme il a été souligné précédemment, le législateur a expressément précisé que seules les fiducies réputées visant les retenues à la source demeurent en vigueur. Une exception concernant la *LFI* dans la disposition créant les fiducies réputées à l'égard des retenues à la source est sans grande conséquence, car le texte explicite de la *LFI* elle-même (et celui de la *LACC*) établit ces fiducies et maintient leur effet. Il convient toutefois de souligner que ni la *LFI* ni la *LACC* ne comportent de disposition équivalente assurant le maintien en vigueur des fiducies réputées visant la TPS.

[50] It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

[51] Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

[52] I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough

[50] Il semble plus probable qu'en adoptant, pour créer dans la *LTA* les fiducies réputées visant la TPS, le même libellé que celui utilisé pour les fiducies réputées visant les retenues à la source, et en omettant d'inclure au par. 222(3) de la *LTA* une exception à l'égard de la *LACC* en plus de celle établie pour la *LFI*, le législateur ait par inadvertance commis une anomalie rédactionnelle. En raison d'une lacune législative dans la *LTA*, il serait possible de considérer que la fiducie réputée visant la TPS continue de produire ses effets dans le cadre de la *LACC*, tout en cessant de le faire dans le cas de la *LFI*, ce qui entraînerait un conflit apparent avec le libellé de la *LACC*. Il faut cependant voir ce conflit comme il est : un conflit apparent seulement, que l'on peut résoudre en considérant l'approche générale adoptée envers les créances prioritaires de la Couronne et en donnant préséance au texte de l'art. 18.3 de la *LACC* d'une manière qui ne produit pas un résultat insolite.

[51] Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Il crée simplement un conflit apparent qui doit être résolu par voie d'interprétation législative. L'intention du législateur était donc loin d'être dépourvue d'ambiguïté quand il a adopté le par. 222(3) de la *LTA*. S'il avait voulu donner priorité aux créances de la Couronne relatives à la TPS dans le cadre de la *LACC*, il aurait pu le faire de manière aussi explicite qu'il l'a fait pour les retenues à la source. Or, au lieu de cela, on se trouve réduit à inférer du texte du par. 222(3) de la *LTA* que le législateur entendait que la fiducie réputée visant la TPS produise ses effets dans les procédures fondées sur la *LACC*.

[52] Je ne suis pas convaincue que le raisonnement adopté dans *Doré* exige l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. La question principale dans *Doré* était celle de l'impact de l'adoption du *C.c.Q.* sur les règles de droit administratif relatives aux municipalités. Bien que le juge Gonthier ait conclu, dans cet arrêt, que le délai de prescription établi à l'art. 2930 du *C.c.Q.* avait eu pour effet d'abroger implicitement une disposition de la *Loi sur les cités et villes* portant sur la prescription, sa conclusion n'était pas

contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

[53] A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

[54] I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding

fondée seulement sur une analyse textuelle. Il a en effet procédé à une analyse contextuelle approfondie des deux textes, y compris de l'historique législatif pertinent (par. 31-41). Par conséquent, les circonstances du cas dont était saisie la Cour dans *Doré* sont loin d'être « identiques » à celles du présent pourvoi, tant sur le plan du texte que sur celui du contexte et de l'historique législatif. On ne peut donc pas dire que l'arrêt *Doré* commande l'application automatique d'une règle d'abrogation implicite.

[53] Un bon indice de l'intention générale du législateur peut être tiré du fait qu'il n'a pas, dans les modifications subséquentes, écarté la règle énoncée dans la *LACC*. D'ailleurs, par suite des modifications apportées à cette loi en 2005, la règle figurant initialement à l'art. 18.3 a, comme nous l'avons vu plus tôt, été reprise sous une formulation différente à l'art. 37. Par conséquent, dans la mesure où l'interprétation selon laquelle la fiducie réputée visant la TPS demeurerait en vigueur dans le contexte de procédures en vertu de la *LACC* repose sur le fait que le par. 222(3) de la *LTA* constitue la disposition postérieure et a eu pour effet d'abroger implicitement le par. 18.3(1) de la *LACC*, nous revenons au point de départ. Comme le législateur a reformulé et renuméroté la disposition de la *LACC* précisant que, sous réserve des exceptions relatives aux retenues à la source, les fiducies réputées ne survivent pas à l'engagement de procédures fondées sur la *LACC*, c'est cette loi qui se trouve maintenant à être le texte postérieur. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS.

[54] Je ne suis pas d'accord avec ma collègue la juge Abella pour dire que l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, permet d'interpréter les modifications de 2005 comme n'ayant aucun effet. La nouvelle loi peut difficilement être considérée comme une simple refonte de la loi antérieure. De fait, la *LACC* a fait l'objet d'un examen approfondi en 2005. En particulier, conformément à son objectif qui consiste à faire concorder l'approche de la *LFI* et celle de la *LACC* à l'égard de l'insolvabilité, le législateur a apporté aux deux textes des modifications allant dans le même sens en ce qui concerne les

the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

[55] In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

[56] My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

propositions présentées par les entreprises. De plus, de nouvelles dispositions ont été ajoutées au sujet des contrats, des conventions collectives, du financement temporaire et des accords de gouvernance. Des clarifications ont aussi été apportées quant à la nomination et au rôle du contrôleur. Il convient par ailleurs de souligner les limites imposées par l'art. 11.09 de la *LACC* au pouvoir discrétionnaire du tribunal d'ordonner la suspension de l'effet des fiducies réputées créées en faveur de la Couronne relativement aux retenues à la source, limites qui étaient auparavant énoncées à l'art. 11.4. Il n'est fait aucune mention des fiducies réputées visant la TPS (voir le Sommaire de la L.C. 2005, ch. 47). Dans le cadre de cet examen, le législateur est allé jusqu'à se pencher sur les termes mêmes utilisés dans la loi pour écarter l'application des fiducies réputées. Les commentaires cités par ma collègue ne font que souligner l'intention manifeste du législateur de maintenir sa politique générale suivant laquelle seules les fiducies réputées visant les retenues à la source survivent en cas de procédures fondées sur la *LACC*.

[55] En l'espèce, le contexte législatif aide à déterminer l'intention du législateur et conforte la conclusion selon laquelle le par. 222(3) de la *LTA* ne visait pas à restreindre la portée de la disposition de la *LACC* écartant l'application des fiducies réputées. Eu égard au contexte dans son ensemble, le conflit entre la *LTA* et la *LACC* est plus apparent que réel. Je n'adopterais donc pas le raisonnement de l'arrêt *Ottawa Senators* et je confirmerais que l'art. 18.3 de la *LACC* a continué de produire ses effets.

[56] Ma conclusion est renforcée par l'objectif de la *LACC* en tant que composante du régime réparateur instauré la législation canadienne en matière d'insolvabilité. Comme cet aspect est particulièrement pertinent à propos de la deuxième question, je vais maintenant examiner la façon dont les tribunaux ont interprété l'étendue des pouvoirs discrétionnaires dont ils disposent lorsqu'ils surveillent une réorganisation fondée sur la *LACC*, ainsi que la façon dont le législateur a dans une large mesure entériné cette interprétation. L'interprétation de la *LACC* par les tribunaux aide en fait à comprendre comment celle-ci en est venue à jouer un rôle si important dans le droit canadien de l'insolvabilité.

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

[57] Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

[58] *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

[59] Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a *LACC* est par nature schématique » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]'histoire du droit relatif à la LACC correspond à l'évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la *LACC* découlent souvent de l'exercice discrétionnaire de certains pouvoirs. C'est principalement au fil de l'exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la *LACC* a évolué de façon graduelle et s'est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L'exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la *LACC*. Le caractère réparateur dont j'ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l'un des premiers exemples :

> [TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu'elle fournit un moyen d'éviter les effets dévastateurs, — tant sur le plan social qu'économique — de la faillite ou de l'arrêt des activités d'une entreprise, à l'initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la *LACC* comporte plusieurs aspects. Le tribunal doit d'abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

[61] When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la *LACC* ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la *LACC*. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la *LACC*, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

[62] Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

[62] L'utilisation la plus créative des pouvoirs conférés par la *LACC* est sans doute le fait que les tribunaux se montrent de plus en plus disposés à autoriser, après le dépôt des procédures, la constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur lorsque cela est nécessaire pour que ce dernier puisse continuer d'exploiter son entreprise pendant la réorganisation (voir, p. ex., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (C. Ont. (Div. gén.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, conf. (1999), 12 C.B.R. (4th) 144 (C.S.); et, d'une manière générale, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 93-115). La *LACC* a aussi été utilisée pour libérer des tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents (voir *Metcalfe & Mansfield*). Au départ, la nomination d'un contrôleur chargé de surveiller la réorganisation était elle aussi une mesure prise en vertu du pouvoir de surveillance conféré par la *LACC*, mais le législateur est intervenu et a modifié la loi pour rendre cette mesure obligatoire.

[63] Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) What are the sources of a court's authority during *CCAA* proceedings? (2) What are the limits of this authority?

[63] L'esprit d'innovation dont ont fait montre les tribunaux pendant des procédures fondées sur la *LACC* n'a toutefois pas été sans susciter de controverses. Au moins deux des questions que soulève leur approche sont directement pertinentes en l'espèce : (1) Quelles sont les sources des pouvoirs dont dispose le tribunal pendant les procédures fondées sur la *LACC*? (2) Quelles sont les limites de ces pouvoirs?

[64] The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against

[64] La première question porte sur la frontière entre les pouvoirs d'origine législative dont dispose le tribunal en vertu de la *LACC* et les pouvoirs résiduels dont jouit un tribunal en raison de sa compétence inhérente et de sa compétence en equity, lorsqu'il est question de surveiller une réorganisation. Pour justifier certaines mesures autorisées à l'occasion de procédures engagées sous le régime de la *LACC*, les tribunaux ont parfois prétendu se fonder sur leur compétence en equity dans le but

purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

[65] I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

[66] Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

[67] The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company . . . on the application of any person interested in the

de réaliser les objectifs de la Loi ou sur leur compétence inhérente afin de combler les lacunes de celle-ci. Or, dans de récentes décisions, des cours d'appel ont déconseillé aux tribunaux d'invoquer leur compétence inhérente, concluant qu'il est plus juste de dire que, dans la plupart des cas, les tribunaux ne font simplement qu'interpréter les pouvoirs se trouvant dans la *LACC* elle-même (voir, p. ex., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, par. 45-47, la juge Newbury; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 31-33, le juge Blair).

[65] Je suis d'accord avec la juge Georgina R. Jackson et la professeure Janis Sarra pour dire que la méthode la plus appropriée est une approche hiérarchisée. Suivant cette approche, les tribunaux procédèrent d'abord à une interprétation des dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la *LACC* (voir G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2007* (2008), 41, p. 42). Selon ces auteures, pourvu qu'on lui donne l'interprétation téléologique et large qui s'impose, la *LACC* permettra dans la plupart des cas de justifier les mesures nécessaires à la réalisation de ses objectifs (p. 94).

[66] L'examen des parties pertinentes de la *LACC* et de l'évolution récente de la législation me font adhérer à ce point de vue jurisprudentiel et doctrinal : dans la plupart des cas, la décision de rendre une ordonnance durant une procédure fondée sur la *LACC* relève de l'interprétation législative. D'ailleurs, à cet égard, il faut souligner d'une façon particulière que le texte de loi dont il est question en l'espèce peut être interprété très largement.

[67] En vertu du pouvoir conféré initialement par la *LACC*, le tribunal pouvait, « chaque fois qu'une demande [était] faite sous le régime de la présente loi à l'égard d'une compagnie, [. . .] sur demande

matter, . . . subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

[68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, . . . make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

[69] The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

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

d'un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l'ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l'espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l'art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu'il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d'une demande initiale que d'une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu'elle est indiquée et qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s'agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l'objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. J'ajouterais que le critère de l'opportunité s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. Les tribunaux

stakeholders are treated as advantageously and fairly as the circumstances permit.

[71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

[72] The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

[73] In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

doivent se rappeler que les chances de succès d'une réorganisation sont meilleures lorsque les participants arrivent à s'entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[71] Il est bien établi qu'il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la *LACC* et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l'échec » (voir *Chef Ready*, p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l'ordonnance demandée contribue vraiment à la réalisation des objectifs de la *LACC*, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l'habilite à rendre à cette ordonnance.

[72] L'analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la *LACC*, le pouvoir de maintenir la suspension des procédures à l'encontre de la Couronne, une fois qu'il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[73] En Cour d'appel, le juge Tysoe a conclu que la *LACC* n'habilitait pas le tribunal à maintenir la suspension des mesures d'exécution de la Couronne à l'égard de la fiducie réputée visant la TPS après l'arrêt des efforts de réorganisation. Selon l'appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l'objectif fondamental de la *LACC* et n'a pas donné à ce texte l'interprétation téléologique et large qu'il convient de lui donner et qui autorise le prononcé d'une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d'autre choix que d'autoriser les mesures d'exécution à l'endroit de la fiducie réputée visant la TPS lorsqu'il a levé la suspension de procédures qui avait été ordonnée en application de la *LACC* afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J'ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la *LACC*. Je vais maintenant traiter de la question de savoir si l'ordonnance était autorisée par la *LACC*.

[74] It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

[74] Il n'est pas contesté que la *LACC* n'assujettit les procédures engagées sous son régime à aucune limite temporelle explicite qui interdirait au tribunal d'ordonner le maintien de la suspension des procédures engagées par la Couronne pour recouvrer la TPS, tout en levant temporairement la suspension générale des procédures prononcée pour permettre au débiteur de faire cession de ses biens.

[75] The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

[75] Il reste à se demander si l'ordonnance contribuait à la réalisation de l'objectif fondamental de la *LACC*. La Cour d'appel a conclu que non, parce que les efforts de réorganisation avaient pris fin et que, par conséquent, la *LACC* n'était plus d'aucune utilité. Je ne partage pas cette conclusion.

[76] There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament . . . that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as

[76] Il ne fait aucun doute que si la réorganisation avait été entreprise sous le régime de la *LFI* plutôt qu'en vertu de la *LACC*, la Couronne aurait perdu la priorité que lui confère la fiducie réputée visant la TPS. De même, la Couronne ne conteste pas que, selon le plan de répartition prévu par la *LFI* en cas de faillite, cette fiducie réputée cesse de produire ses effets. Par conséquent, après l'échec de la réorganisation tentée sous le régime de la *LACC*, les créanciers auraient eu toutes les raisons de solliciter la mise en faillite immédiate du débiteur et la répartition de ses biens en vertu de la *LFI*. Pour pouvoir conclure que le pouvoir discrétionnaire dont dispose le tribunal ne l'autorise pas à lever partiellement la suspension des procédures afin de permettre la cession des biens, il faudrait présumer l'existence d'un hiatus entre la procédure fondée sur la *LACC* et celle fondée sur la *LFI*. L'ordonnance du juge en chef Brenner suspendant l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS faisait en sorte que les créanciers ne soient pas désavantagés par la tentative de réorganisation fondée sur la *LACC*. Cette ordonnance avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et, de ce fait, elle contribuait à la réalisation des objectifs de la *LACC*, dans la mesure où elle établit une passerelle entre les procédures régies par la *LACC* d'une part et celles régies par la *LFI* d'autre part. Cette interprétation du pouvoir discrétionnaire du tribunal se trouve renforcée par

the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

[77] The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

[78] Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be

l'art. 20 de la *LACC*, qui précise que les dispositions de la Loi « peuvent être appliquées conjointement avec celles de toute loi fédérale [. . .] autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers », par exemple la *LFI*. L'article 20 indique clairement que le législateur entend voir la *LACC* être appliquée *de concert* avec les autres lois concernant l'insolvabilité, telle la *LFI*.

[77] La *LACC* établit les conditions qui permettent de préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde. Étant donné que, souvent, la seule autre solution est la faillite, les participants évaluent l'impact d'une réorganisation en regard de la situation qui serait la leur en cas de liquidation. En l'espèce, l'ordonnance favorisait une transition harmonieuse entre la réorganisation et la liquidation, tout en répondant à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure collective.

[78] À mon avis, le juge d'appel Tysoe a donc commis une erreur en considérant la *LACC* et la *LFI* comme des régimes distincts, séparés par un hiatus temporel, plutôt que comme deux lois faisant partie d'un ensemble intégré de règles du droit de l'insolvabilité. La décision du législateur de conserver deux régimes législatifs en matière de réorganisation, la *LFI* et la *LACC*, reflète le fait bien réel que des réorganisations de complexité différente requièrent des mécanismes légaux différents. En revanche, un seul régime législatif est jugé nécessaire pour la liquidation de l'actif d'un débiteur en faillite. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*. Toutefois, comme l'a signalé le juge Laskin de la Cour d'appel de l'Ontario dans un litige semblable opposant des créanciers garantis et le Surintendant des services financiers de l'Ontario qui invoquait le bénéfice d'une fiducie réputée, [TRADUCTION] « [l]es deux lois sont

lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

[79] The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

[80] Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition

liées » et il n'existe entre elles aucun « hiatus » qui permettrait d'obtenir l'exécution, à l'issue de procédures engagées sous le régime de la *LACC*, de droits de propriété qui seraient perdus en cas de faillite (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, par. 62-63).

[79] La priorité accordée aux réclamations de la Couronne fondées sur une fiducie réputée visant des retenues à la source n'affaiblit en rien cette conclusion. Comme ces fiducies réputées survivent tant sous le régime de la *LACC* que sous celui de la *LFI*, ce facteur n'a aucune incidence sur l'intérêt que pourraient avoir les créanciers à préférer une loi plutôt que l'autre. S'il est vrai que le tribunal agissant en vertu de la *LACC* dispose d'une grande latitude pour suspendre les réclamations fondée sur des fiducies réputées visant des retenues à la source, cette latitude n'en demeure pas moins soumise à des limitations particulières, applicables uniquement à ces fiducies réputées (*LACC*, art. 11.4). Par conséquent, si la réorganisation tentée sous le régime de la *LACC* échoue (p. ex. parce que le tribunal ou les créanciers refusent une proposition de réorganisation), la Couronne peut immédiatement présenter sa réclamation à l'égard des retenues à la source non versées. Mais il ne faut pas en conclure que cela compromet le passage harmonieux au régime de faillite ou crée le moindre « hiatus » entre la *LACC* et la *LFI*, car le fait est que, peu importe la loi en vertu de laquelle la réorganisation a été amorcée, les réclamations des créanciers auraient dans les deux cas été subordonnées à la priorité de la fiducie réputée de la Couronne à l'égard des retenues à la source.

[80] Abstraction faite des fiducies réputées visant les retenues à la source, c'est le mécanisme complet et exhaustif prévu par la *LFI* qui doit régir la répartition des biens du débiteur une fois que la liquidation est devenue inévitable. De fait, une transition ordonnée aux procédures de liquidation est obligatoire sous le régime de la *LFI* lorsqu'une proposition est rejetée par les créanciers. La *LACC* est muette à l'égard de cette transition, mais l'ampleur du pouvoir discrétionnaire conféré au tribunal par cette loi est suffisante pour établir une passerelle vers une liquidation opérée sous le régime

to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

de la *LFI*. Ce faisant, le tribunal doit veiller à ne pas perturber le plan de répartition établi par la *LFI*. La transition au régime de liquidation nécessite la levée partielle de la suspension des procédures ordonnée en vertu de la *LACC*, afin de permettre l'introduction de procédures en vertu de la *LFI*. Il ne faudrait pas que cette indispensable levée partielle de la suspension des procédures provoque une ruée des créanciers vers le palais de justice pour l'obtention d'une priorité inexistante sous le régime de la *LFI*.

[81] I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

[81] Je conclus donc que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir de lever la suspension des procédures afin de permettre la transition au régime de liquidation.

3.4 *Express Trust*

3.4 *Fiducie expresse*

[82] The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

[82] La dernière question à trancher en l'espèce est celle de savoir si le juge en chef Brenner a créé une fiducie expresse en faveur de la Couronne quand il a ordonné, le 29 avril 2008, que le produit de la vente des biens de LeRoy Trucking — jusqu'à concurrence des sommes de TPS non remises — soit détenu dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Un autre motif invoqué par le juge Tysoe de la Cour d'appel pour accueillir l'appel interjeté par la Couronne était que, selon lui, celle-ci était effectivement la bénéficiaire d'une fiducie expresse. Je ne peux souscrire à cette conclusion.

[83] Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).

[83] La création d'une fiducie expresse exige la présence de trois certitudes : certitude d'intention, certitude de matière et certitude d'objet. Les fiducies expresses ou « fiducies au sens strict » découlent des actes et des intentions du constituant et se distinguent des autres fiducies découlant de l'effet de la loi (voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 28-29, particulièrement la note en bas de page 42).

[84] Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008 sufficient to support an express trust.

[84] En l'espèce, il n'existe aucune certitude d'objet (c.-à-d. relative au bénéficiaire) pouvant être inférée de l'ordonnance prononcée le 29 avril 2008 par le tribunal et suffisante pour donner naissance à une fiducie expresse.

[85] At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

[86] The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

[87] Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear

[85] Au moment où l'ordonnance a été rendue, il y avait un différend entre Century Services et la Couronne au sujet d'une partie du produit de la vente des biens du débiteur. La solution retenue par le tribunal a consisté à accepter, selon la proposition de LeRoy Trucking, que la somme en question soit détenue séparément jusqu'à ce que le différend puisse être réglé. Par conséquent, il n'existait aucune certitude que la Couronne serait véritablement le bénéficiaire ou l'objet de la fiducie.

[86] Le fait que le compte choisi pour conserver séparément la somme en question était le compte en fiducie du contrôleur n'a pas à lui seul un effet tel qu'il suppléerait à l'absence d'un bénéficiaire certain. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à la priorité de rang, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question. Cependant, il se peut fort bien que le juge en chef Brenner ait estimé que, conformément à l'arrêt *Ottawa Senators*, la créance de la Couronne à l'égard de la TPS demeurerait effective si la réorganisation aboutissait, ce qui ne serait pas le cas si le passage au processus de liquidation régi par la *LFI* était autorisé. Une somme équivalente à cette créance serait ainsi mise de côté jusqu'à ce que le résultat de la réorganisation soit connu.

[87] Par conséquent, l'incertitude entourant l'issue de la restructuration tentée sous le régime de la *LACC* exclut l'existence d'une certitude permettant de conférer de manière permanente à la Couronne un intérêt bénéficiaire sur la somme en question. Cela ressort clairement des motifs exposés de vive voix par le juge en chef Brenner le 29 avril 2008, lorsqu'il a dit : [TRADUCTION] « Comme il est notoire que [des procédures fondées sur la *LACC*] peuvent échouer et que cela entraîne des faillites, le maintien du statu quo en l'espèce me semble militer en faveur de l'acceptation de la proposition d'ordonner au contrôleur de détenir ces fonds en fiducie. » Il y avait donc manifestement un doute quant à la question de savoir qui au juste pourrait toucher l'argent

that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

[88] I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

[89] For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J. —

I

[90] I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

[91] More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

en fin de compte. L'ordonnance ultérieure du juge en chef Brenner — dans laquelle ce dernier a rejeté, le 3 septembre 2008, la demande de la Couronne sollicitant le bénéfice de la fiducie présumée après qu'il fut devenu évident que la faillite était inévitable — confirme l'absence du bénéficiaire certain sans lequel il ne saurait y avoir de fiducie expresse.

4. Conclusion

[88] Je conclus que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne sollicitant le bénéfice de la fiducie réputée visant la TPS, tout en levant par ailleurs la suspension des procédures de manière à permettre à LeRoy Trucking de faire cession de ses biens. Ma conclusion selon laquelle le par. 18.3(1) de la *LACC* neutralisait la fiducie réputée visant la TPS pendant la durée des procédures fondées sur cette loi confirme que les pouvoirs discrétionnaires exercés par le tribunal en vertu de l'art. 11 n'étaient pas limités par la priorité invoquée par la Couronne au titre de la TPS, puisqu'il n'existe aucune priorité de la sorte sous le régime de la *LACC*.

[89] Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de déclarer que la somme de 305 202,30 $ perçue par LeRoy Trucking au titre de la TPS mais non encore versée au receveur général du Canada ne fait l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Cette somme ne fait pas non plus l'objet d'une fiducie expresse. Les dépens sont accordés à l'égard du présent pourvoi et de l'appel interjeté devant la juridiction inférieure.

Version française des motifs rendus par

LE JUGE FISH —

I

[90] Je souscris dans l'ensemble aux motifs de la juge Deschamps et je disposerais du pourvoi comme elle le propose.

[91] Plus particulièrement, je me rallie à son interprétation de la portée du pouvoir discrétionnaire conféré au juge par l'art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C.

And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

[93] In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

[94] Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

[95] Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

1985, ch. C-36 (« *LACC* »). Je partage en outre sa conclusion suivant laquelle le juge en chef Brenner n'a pas créé de fiducie expresse en faveur de la Couronne en ordonnant que les sommes recueillies au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] J'estime néanmoins devoir ajouter de brefs motifs qui me sont propres au sujet de l'interaction entre la *LACC* et la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »).

[93] En maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), et les décisions rendues dans sa foulée ont eu pour effet de protéger indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. À mon avis, il convient en l'espèce de rompre nettement avec ce courant jurisprudentiel.

[94] La juge Deschamps expose d'importantes raisons d'ordre historique et d'intérêt général à l'appui de cette position et je n'ai rien à ajouter à cet égard. Je tiens toutefois à expliquer pourquoi une analyse comparative de certaines dispositions législatives connexes vient renforcer la conclusion à laquelle ma collègue et moi-même en arrivons.

[95] Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité. Il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il ne nous appartient pas de nous interroger sur les raisons de ce choix. Nous devons plutôt considérer la décision du législateur de maintenir en vigueur les dispositions en question comme un exercice délibéré du pouvoir discrétionnaire de légiférer, pouvoir qui est exclusivement le sien. Avec égards, je rejette le point de vue suivant lequel nous devrions plutôt qualifier l'apparente contradiction entre le par. 18.3(1) (maintenant le par. 37(1)) de la *LACC* et l'art. 222 de la *LTA* d'anomalie rédactionnelle ou de lacune législative susceptible d'être corrigée par un tribunal.

II

[96] In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

[97] This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

[98] The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), where s. 227(4) *creates* a deemed trust:

(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

[99] In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person . . . equal in value to the amount so deemed to be held in trust is deemed

(*a*) to be held, from the time the amount was deducted or withheld by the person, separate and

II

[96] Dans le contexte du régime canadien d'insolvabilité, on conclut à l'existence d'une fiducie réputée uniquement lorsque deux éléments complémentaires sont réunis : en premier lieu, une disposition législative qui *crée* la fiducie et, en second lieu, une disposition de la *LACC* ou de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* ») qui *confirme* l'existence de la fiducie ou la maintient explicitement en vigueur.

[97] Cette interprétation se retrouve dans trois lois fédérales, qui renferment toutes une disposition relative aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*.

[98] La première est la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) (« *LIR* »), dont le par. 227(4) *crée* une fiducie réputée :

(4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi. [Dans la présente citation et dans celles qui suivent, les soulignements sont évidemment de moi.]

[99] Dans le paragraphe suivant, le législateur prend la peine de bien préciser que toute disposition législative fédérale ou provinciale à l'effet contraire n'a aucune incidence sur la fiducie ainsi constituée :

(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne [. . .] d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu,

apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, . . .

. . .

. . . and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[100] The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

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

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

[101] The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

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

[102] Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

[100] Le maintien en vigueur de cette fiducie réputée est expressément *confirmé* à l'art. 18.3 de la *LACC* :

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

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

[101] L'application de la fiducie réputée prévue par la *LIR* est également confirmée par l'art. 67 de la *LFI* :

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

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

[102] Par conséquent, le législateur a *créé*, puis *confirmé le maintien en vigueur* de la fiducie réputée établie par la *LIR* en faveur de Sa Majesté *tant* sous le régime de la *LACC que* sous celui de la *LFI.*

[103] The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

[104] As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

[105] The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

[106] The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a

[103] La deuxième loi fédérale où l'on retrouve ce mécanisme est le *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8 (« *RPC* »). À l'article 23, le législateur crée une fiducie réputée en faveur de la Couronne et précise qu'elle existe malgré les dispositions contraires de toute autre loi fédérale. Enfin, la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23 (« *LAE* »), crée dans des termes quasi identiques, une fiducie réputée en faveur de la Couronne : voir les par. 86(2) et (2.1).

[104] Comme nous l'avons vu, le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions de la *LIR*, du *RPC* et de la *LAE* est confirmé au par. 18.3(2) de la *LACC* et au par. 67(3) de la *LFI*. Dans les trois cas, le législateur a exprimé en termes clairs et explicites sa volonté de voir la fiducie réputée établie en faveur de la Couronne produire ses effets pendant le déroulement de la procédure d'insolvabilité.

[105] La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne *confirme* pas l'existence de la fiducie — ni ne prévoit expressément le maintien en vigueur de celle-ci — dans la *LFI* ou dans la *LACC*. Le second des deux éléments obligatoires que j'ai mentionnés fait donc défaut, ce qui témoigne de l'intention du législateur de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

[106] Le texte des dispositions en cause de la *LTA* est substantiellement identique à celui des dispositions de la *LIR*, du *RPC* et de la *LAE* :

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit

security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

. . .

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

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, . . .

. . .

. . . and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

[107] Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

[108] In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

[109] With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust

versé au receveur général ou retiré en application du paragraphe (2).

. . .

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

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[107] Pourtant, aucune disposition de la *LACC* ne prévoit le maintien en vigueur de la fiducie réputée une fois que la *LACC* entre en jeu.

[108] En résumé, le législateur a imposé *deux* conditions explicites — ou « composantes de base » — devant être réunies pour que survivent, sous le régime de la *LACC*, les fiducies réputées qui ont été établies par la *LIR*, le *RPC* et la *LAE*. S'il avait voulu préserver de la même façon, sous le régime de la *LACC*, les fiducies réputées qui sont établies par la *LTA*, il aurait inséré dans la *LACC* le type de disposition confirmatoire qui maintient explicitement en vigueur d'autres fiducies réputées.

[109] Avec égards pour l'opinion contraire exprimée par le juge Tysoe de la Cour d'appel, je ne trouve pas [TRADUCTION] « inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception » (2009 BCCA

provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

[110] Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

[111] Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

[112] Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

[113] For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada

205, 98 B.C.L.R. (4th) 242, par. 37). *Toutes* les dispositions établissant des fiducies réputées qui sont reproduites ci-dessus font explicitement mention de la *LFI*. L'article 222 de la *LTA* ne rompt pas avec ce modèle. Compte tenu du libellé presque identique des quatre dispositions établissant une fiducie réputée, il aurait d'ailleurs été étonnant que le législateur ne fasse aucune mention de la *LFI* dans la *LTA*.

[110] L'intention du législateur était manifestement de rendre inopérantes les fiducies réputées visant la TPS dès l'introduction d'une procédure d'insolvabilité. Par conséquent, l'art. 222 mentionne la *LFI* de manière à l'*exclure* de son champ d'application — et non de l'y *inclure*, comme le font la *LIR*, le *RPC* et la *LAE*.

[111] En revanche, je constate qu'*aucune* de ces lois ne mentionne expressément la *LACC*. La mention explicite de la *LFI* dans ces textes n'a aucune incidence sur leur interaction avec la *LACC*. Là encore, ce sont les dispositions confirmatoires que l'on trouve *dans les lois sur l'insolvabilité* qui déterminent si une fiducie réputée continuera d'exister durant une procédure d'insolvabilité.

[112] Enfin, j'estime que les juges siégeant en leur cabinet ne devraient pas, comme cela s'est produit en l'espèce, ordonner que les sommes perçues au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur pendant le déroulement d'une procédure fondée sur la *LACC*. Il résulte du raisonnement de la juge Deschamps que les réclamations de TPS deviennent des créances non garanties sous le régime de la *LACC*. Le législateur a délibérément décidé de supprimer certaines superpriorités accordées à la Couronne pendant l'insolvabilité; nous sommes en présence de l'un de ces cas.

III

[113] Pour les motifs qui précèdent, je suis d'avis, à l'instar de la juge Deschamps, d'accueillir le pourvoi avec dépens devant notre Cour et devant les juridictions inférieures, et d'ordonner que la somme de 305 202,30 $ — qui a été perçue par LeRoy Trucking

be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

[114] ABELLA J. (dissenting) — The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

[115] Section 11[1] of the *CCAA* stated:

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

1 Section 11 was amended, effective September 18, 2009, and now states:

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

au titre de la TPS mais n'a pas encore été versée au receveur général du Canada — ne fasse l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne.

Version française des motifs rendus par

[114] LA JUGE ABELLA (dissidente) — La question qui est au cœur du présent pourvoi est celle de savoir si l'art. 222 de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), et plus particulièrement le par. 222(3), donnent préséance, dans le cadre d'une procédure relevant de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. À l'instar du juge Tysoe de la Cour d'appel, j'estime que tel est le cas. Il s'ensuit, à mon avis, que le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC* est circonscrit en conséquence.

[115] L'article 11[1] de la *LACC* disposait :

11. (1) Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

Pour être en mesure de déterminer la portée du pouvoir discrétionnaire conféré au tribunal par l'art. 11, il est nécessaire de trancher d'abord la question de la priorité. Le paragraphe 222(3), la disposition de la *LTA* en cause en l'espèce, prévoit ce qui suit :

1 L'article 11 a été modifié et le texte modifié, qui est entré en vigueur le 18 septembre 2009, est rédigé ainsi :

11. Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

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

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

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

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[116] Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

[116] Selon Century Services, la disposition dérogatoire générale de la *LACC*, le par. 18.3(1), l'emportait, et les dispositions déterminatives à l'art. 222 de la *LTA* étaient par conséquent inapplicables dans le cadre d'une procédure fondée sur la *LACC*. Le paragraphe 18.3(1) dispose :

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

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

[117] As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory

[117] Ainsi que l'a fait observer le juge d'appel MacPherson, dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), le par. 222(3) de la *LTA* [TRADUCTION] « entre nettement en conflit » avec le par. 18.3(1) de la *LACC* (par. 31). Essentiellement, la résolution du conflit entre ces deux dispositions requiert à mon sens une

interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

[118] By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* . . . . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[119] MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

[120] The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from

opération relativement simple d'interprétation des lois : Est-ce que les termes employés révèlent une intention claire du législateur? À mon avis, c'est le cas. Le texte de la disposition créant une fiducie réputée, soit le par. 222(3) de la *LTA*, précise sans ambiguïté que cette disposition s'applique malgré toute autre règle de droit sauf la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »).

[118] En excluant explicitement une seule loi du champ d'application du par. 222(3) et en déclarant de façon non équivoque qu'il s'applique malgré toute autre loi ou règle de droit au Canada *sauf* la *LFI*, le législateur a défini la portée de cette disposition dans des termes on ne peut plus clairs. Je souscris sans réserve aux propos suivants du juge d'appel MacPherson dans l'arrêt *Ottawa Senators* :

> [TRADUCTION] L'intention du législateur au par. 222(3) de la *LTA* est claire. En cas de conflit avec « tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) », c'est le par. 222(3) qui l'emporte. En employant ces mots, le législateur fédéral a fait deux choses : il a décidé que le par. 222(3) devait l'emporter sur tout autre texte législatif fédéral et, fait important, il a abordé la question des exceptions à cette préséance en en mentionnant une seule, la *Loi sur la faillite et l'insolvabilité* [. . .] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[119] L'opinion du juge d'appel MacPherson suivant laquelle le fait que la *LACC* n'ait pas été soustraite à l'application de la *LTA* témoigne d'une intention claire du législateur est confortée par la façon dont la *LACC* a par la suite été modifiée après l'édiction du par. 18.3(1) en 1997. En 2000, lorsque le par. 222(3) de la *LTA* est entré en vigueur, des modifications ont également été apportées à la *LACC*, mais le par. 18.3(1) de cette loi n'a pas été modifié.

[120] L'absence de modification du par. 18.3(1) vaut d'être soulignée, car elle a eu pour effet de maintenir le statu quo législatif, malgré les

various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

demandes répétées de divers groupes qui souhaitaient que cette disposition soit modifiée pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. En 2002, par exemple, lorsque Industrie Canada a procédé à l'examen de la *LFI* et de la *LACC*, l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation ont recommandé que les règles de la *LFI* en matière de priorité soient étendues à la *LACC* (Joint Task Force on Business Insolvency Law Reform, *Report* (15 mars 2002), ann. B, proposition 71). Ces recommandations ont été reprises en 2003 par le Comité sénatorial permanent des banques et du commerce dans son rapport intitulé *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*, ainsi qu'en 2005 par le Legislative Review Task Force (Commercial) de l'Institut d'insolvabilité du Canada et de l'Association canadienne des professionnels de l'insolvabilité *et de la* réorganisation dans son *Report on the Commercial Provisions of Bill C-55*, et en 2007 par l'Institut d'insolvabilité du Canada dans un mémoire soumis au Comité sénatorial permanent des banques et du commerce au sujet de réformes alors envisagées.

[121] Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

[121] La *LFI* demeure néanmoins la seule loi soustraite à l'application du par. 222(3) de la *LTA*. Même à la suite de l'arrêt rendu en 2005 dans l'affaire *Ottawa Senators*, qui a confirmé que la *LTA* l'emportait sur la *LACC*, le législateur n'est pas intervenu. Cette absence de réaction de sa part me paraît tout aussi pertinente en l'espèce que dans l'arrêt *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, où la Cour a déclaré ceci :

> Le silence du législateur n'est pas nécessairement déterminant quant à son intention, mais en l'espèce, il répond à la demande pressante de Telus et des autres entreprises et organisations intéressées que la loi prévoie expressément la possibilité d'un remboursement des frais raisonnables engagés pour communiquer des éléments de preuve conformément à une ordonnance. L'historique législatif confirme selon moi que le législateur n'a pas voulu qu'une indemnité soit versée pour l'obtempération à une ordonnance de communication. [par. 42]

[122] All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

[123] Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

[124] Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

[122] Tout ce qui précède permet clairement d'inférer que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

[123] Je ne vois pas non plus de « considération de politique générale » qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur. Je ne saurais expliquer mieux que ne l'a fait le juge d'appel Tysoe les raisons pour lesquelles l'argument invoquant des considérations de politique générale ne peut, selon moi, être retenu en l'espèce. Je vais donc reprendre à mon compte ses propos à ce sujet :

> [TRADUCTION] Je ne conteste pas qu'il existe des raisons de politique générale valables qui justifient d'inciter les entreprises insolvables à tenter de se restructurer de façon à pouvoir continuer à exercer leurs activités avec le moins de perturbations possibles pour leurs employés et pour les autres intéressés. Les tribunaux peuvent légitimement tenir compte de telles considérations de politique générale, mais seulement si elles ont trait à une question que le législateur n'a pas examinée. Or, dans le cas qui nous occupe, il y a lieu de présumer que le législateur a tenu compte de considérations de politique générale lorsqu'il a adopté les modifications susmentionnées à la *LACC* et à la *LTA*. Comme le juge MacPherson le fait observer au par. 43 de l'arrêt *Ottawa Senators*, il est inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception. Je signale par ailleurs que les modifications apportées en 1992 à la *LFI* ont permis de rendre les propositions concordataires opposables aux créanciers garantis et que, malgré la plus grande souplesse de la *LACC*, il est possible pour une compagnie insolvable de se restructurer sous le régime de la *LFI*. [par. 37]

[124] Bien que je sois d'avis que la clarté des termes employés au par. 222(3) tranche la question, j'estime également que cette conclusion est même renforcée par l'application d'autres principes d'interprétation. Dans leurs observations, les parties indiquent que les principes suivants étaient, selon elles, particulièrement pertinents : la Couronne a invoqué le principe voulant que la loi « postérieure » l'emporte; Century Services a fondé son argumentation sur le principe de la préséance de la loi spécifique sur la loi générale (*generalia specialibus non derogant*).

[125] The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

[126] The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

[127] The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> . . . the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, . . . at p. 239 . . . :
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the

[125] Le principe de la préséance de la « loi postérieure » accorde la priorité à la loi la plus récente, au motif que le législateur est présumé connaître le contenu des lois alors en vigueur. Si, dans la loi nouvelle, le législateur adopte une règle inconciliable avec une règle préexistante, on conclura qu'il a entendu déroger à celle-ci (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 346-347; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3e éd. 2000), p. 358).

[126] L'exception à cette supplantation présumée des dispositions législatives préexistantes incompatibles réside dans le principe exprimé par la maxime *generalia specialibus non derogant* selon laquelle une disposition générale plus récente n'est pas réputée déroger à une loi spéciale antérieure (Côté, p. 359). Comme dans le jeu des poupées russes, cette exception comporte elle-même une exception. En effet, une disposition spécifique antérieure peut dans les faits être « supplantée » par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale (*Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862).

[127] Ces principes d'interprétation visent principalement à faciliter la détermination de l'intention du législateur, comme l'a confirmé le juge d'appel MacPherson dans l'arrêt *Ottawa Senators*, au par. 42 :

> [TRADUCTION] . . . en matière d'interprétation des lois, la règle cardinale est la suivante : les dispositions législatives doivent être interprétées de manière à donner effet à l'intention du législateur lorsqu'il a adopté la loi. Cette règle fondamentale l'emporte sur toutes les maximes, outils ou canons d'interprétation législative, y compris la maxime suivant laquelle le particulier l'emporte sur le général (*generalia specialibus non derogant*). Comme l'a expliqué le juge Hudson dans l'arrêt *Canada c. Williams*, [1944] R.C.S. 226, [. . .] à la p. 239 . . . :
>
> > On invoque la maxime *generalia specialibus non derogant* comme une règle qui devrait trancher la question. Or cette maxime, qui n'est pas une règle de droit mais un principe d'interprétation, cède le pas

legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

[128] I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

[129] It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(*f*)). It directs that new enactments not be construed as

2 The amendments did not come into force until September 18, 2009.

devant l'intention du législateur, s'il est raisonnablement possible de la dégager de l'ensemble des dispositions législatives pertinentes.

(Voir aussi Côté, p. 358, et Pierre-André Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), par. 1335.)

[128] J'accepte l'argument de la Couronne suivant lequel le principe de la loi « postérieure » est déterminant en l'espèce. Comme le par. 222(3) de la *LTA* a été édicté en 2000 et que le par. 18.3(1) de la *LACC* a été adopté en 1997, le par. 222(3) est, de toute évidence, la disposition postérieure. Cette victoire chronologique peut être neutralisée si, comme le soutient Century Services, on démontre que la disposition la plus récente, le par. 222(3) de la *LTA*, est une disposition générale, auquel cas c'est la disposition particulière antérieure, le par. 18.3(1), qui l'emporte (*generalia specialibus non derogant*). Mais, comme nous l'avons vu, la disposition particulière antérieure n'a pas préséance si la disposition générale ultérieure paraît la « supplanter ». C'est précisément, à mon sens, ce qu'accomplit le par. 222(3) de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » *sauf la LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3).

[129] Il est vrai que, lorsque la *LACC* a été modifiée en 2005[2], le par. 18.3(1) a été remplacé par le par. 37(1) (L.C. 2005, ch. 47, art. 131). Selon la juge Deschamps, le par. 37(1) est devenu, de ce fait, la disposition « postérieure ». Avec égards pour l'opinion exprimée par ma collègue, cette observation est réfutée par l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui décrit expressément l'effet (inexistant) qu'a le remplacement — sans modifications notables sur le fond — d'un texte antérieur qui a été abrogé (voir *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663, qui portait sur

2 Les modifications ne sont entrées en vigueur que le 18 septembre 2009.

"new law" unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

. . .

(*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an "enactment" as "an Act or regulation or any portion of an Act or regulation".

[130] Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

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

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

[131] The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the

la disposition qui a précédé l'al. 44*f*)). Cet alinéa précise que le nouveau texte ne doit pas être considéré de « droit nouveau », sauf dans la mesure où il diffère au fond du texte abrogé :

44. En cas d'abrogation et de remplacement, les règles suivantes s'appliquent :

. . .

f) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n'est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

Le mot « texte » est défini ainsi à l'art. 2 de la *Loi d'interprétation* : « Tout ou partie d'une loi ou d'un règlement. »

[130] Le paragraphe 37(1) de la *LACC* actuelle est pratiquement identique quant au fond au par. 18.3(1). Pour faciliter la comparaison de ces deux dispositions, je les ai reproduites ci-après :

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

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

[131] L'application de l'al. 44*f*) de la *Loi d'interprétation* vient tout simplement confirmer l'intention clairement exprimée par le législateur, qu'a indiquée Industrie Canada dans l'analyse du Projet de loi C-55, où le par. 37(1) était qualifié de « modification d'ordre technique concernant le réaménagement des dispositions de la présente loi ». Par ailleurs, durant la deuxième lecture du projet de loi

Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

[132] Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

[133] This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

[134] While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request

au Sénat, l'honorable Bill Rompkey, qui était alors leader adjoint du gouvernement au Sénat, a confirmé que le par. 37(1) représentait seulement une modification d'ordre technique :

> Sur une note administrative, je signale que, dans le cas du traitement de fiducies présumées aux fins d'impôt, le projet de loi ne modifie aucunement l'intention qui sous-tend la politique, alors que dans le cas d'une restructuration aux termes de la LACC, des articles de la loi ont été abrogés et remplacés par des versions portant de nouveaux numéros lors de la mise à jour exhaustive de la LACC.

(*Débats du Sénat*, vol. 142, 1re sess., 38e lég., 23 novembre 2005, p. 2147)

[132] Si le par. 18.3(1) avait fait l'objet de modifications notables sur le fond lorsqu'il a été remplacé par le par. 37(1), je me rangerais à l'avis de la juge Deschamps qu'il doit être considéré comme un texte de droit nouveau. Mais comme les par. 18.3(1) et 37(1) ne diffèrent pas sur le fond, le fait que le par. 18.3(1) soit devenu le par. 37(1) n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure » (Sullivan, p. 347).

[133] Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. La question qui se pose alors est celle de savoir quelle est l'incidence de cette préséance sur le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC*.

[134] Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, L.R.C. 1985, ch. W-11, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi *autre* que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1) ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent,

for payment of the GST funds during the *CCAA* proceedings.

[135] Given this conclusion, it is unnecessary to consider whether there was an express trust.

[136] I would dismiss the appeal.

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

. . .

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

[135] Vu cette conclusion, il n'est pas nécessaire d'examiner la question de savoir s'il existait une fiducie expresse en l'espèce.

[136] Je rejetterais le présent pourvoi.

ANNEXE

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 13 décembre 2007)

11. (1) [Pouvoir du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

. . .

(3) [Demande initiale — ordonnances] Dans le cas d'une demande initiale visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour une période maximale de trente jours :

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

(4) [Autres demandes — ordonnances] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime indiquée :

(*a*) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

. . .

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

(*a*) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

. . .

(6) [Preuve] Le tribunal ne rend l'ordonnance visée aux paragraphes (3) ou (4) que si :

a) le demandeur le convainc qu'il serait indiqué de rendre une telle ordonnance;

b) dans le cas de l'ordonnance visée au paragraphe (4), le demandeur le convainc en outre qu'il a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue.

11.4 (1) [Suspension des procédures] Le tribunal peut ordonner :

a) la suspension de l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents, à l'égard d'une compagnie lorsque celle-ci est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour une période se terminant au plus tard :

(i) à l'expiration de l'ordonnance rendue en application de l'article 11,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and

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

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

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

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(*a*) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

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

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) la suspension de l'exercice par Sa Majesté du chef d'une province, pour une période se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l'égard d'une compagnie, lorsque celle-ci est un débiteur visé par la loi provinciale et qu'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

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

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

(2) [Cessation] L'ordonnance cesse d'être en vigueur dans les cas suivants :

a) la compagnie manque à ses obligations de paiement pour un montant qui devient dû à Sa Majesté après l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

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

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou

as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

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

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

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

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

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

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

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

(A) has been withheld or deducted by a person from a payment to another person

d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

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

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

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

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

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

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

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

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne,

and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

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

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

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

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

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

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

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same

ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

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

(3) [Effet] Les ordonnances du tribunal, autres que celles rendues au titre du paragraphe (1), n'ont pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

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

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

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

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

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou

effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

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

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

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

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

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

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

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

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

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and

18.4 (1) [Réclamations de la Couronne] Dans le cadre de procédures intentées sous le régime de la présente loi, toutes les réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail, y compris les réclamations garanties, prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

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

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

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

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

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii),

in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

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

11.02 (1) [Stays, etc. — initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. — other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

20. [La loi peut être appliquée conjointement avec d'autres lois] Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 18 septembre 2009)

11. [Pouvoir général du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

11.02 (1) [Suspension : demande initiale] Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de trente jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(2) [Suspension : demandes autres qu'initiales] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)*a*);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

(*a*) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(*b*) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

. . .

11.09 (1) [Stay — Her Majesty] An order made under section 11.02 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income*

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(3) [Preuve] Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

. . .

11.09 (1) [Suspension des procédures : Sa Majesté] L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition

Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(*a*) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

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

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

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the

législative de cette province à l'égard d'une compagnie qui est un débiteur visé par la loi provinciale, s'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

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

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

(2) [Cessation d'effet] Les passages de l'ordonnance qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*) cessent d'avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l'égard de toute somme qui devient due à Sa Majesté après le prononcé de l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

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

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la

collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

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

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

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

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

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

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection

perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

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

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

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

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

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

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

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

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens

3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

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

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

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

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

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(3) [Effet] L'ordonnance prévue à l'article 11.02, à l'exception des passages de celle-ci qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*), n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

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

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

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

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

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured

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

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des sommes réputées détenues en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, si, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est une province instituant un régime général de pensions au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un régime provincial de pensions au sens de ce paragraphe, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier de la compagnie et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15 (en date du 13 décembre 2007)

222. (1) [Montants perçus détenus en fiducie] La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la

creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

. . .

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

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) [Montants perçus avant la faillite] Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

. . .

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

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (en date du 13 décembre 2007)

67. (1) [Biens du failli] Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

a) les biens détenus par le failli en fiducie pour toute autre personne;

b) les biens qui, à l'encontre du failli, sont exempts d'exécution ou de saisie sous le régime des lois applicables dans la province dans laquelle sont situés ces biens et où réside le failli;

b.1) dans les circonstances prescrites, les paiements au titre de crédits de la taxe sur les produits et services et les paiements prescrits qui sont faits à des personnes physiques relativement à leurs besoins essentiels et qui ne sont pas visés aux alinéas *a*) et *b*),

mais ils comprennent :

c) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération;

d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

(2) [Fiducies présumées] Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) [Exceptions] Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Exceptions] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

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

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

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

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

86. (1) [Réclamations de la Couronne] Dans le cadre d'une faillite ou d'une proposition, les réclamations prouvables — y compris les réclamations garanties — de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

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

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

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

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

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Appeal allowed with costs, ABELLA J. *dissenting.*

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

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

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

Pourvoi accueilli avec dépens, la juge ABELLA *est dissidente.*

Procureurs de l'appelante : Fraser Milner Casgrain, Vancouver.

Procureur de l'intimé : Procureur général du Canada, Vancouver.

TAB 6

CITATION: Sproule v. Nortel Networks Corporation, 2009 ONCA 833
DATE: 20091126
DOCKET: C50986 and C50988

COURT OF APPEAL FOR ONTARIO

Goudge, Feldman and Blair JJ.A.

BETWEEN:

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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION

C50986

Donald Sproule, David D. Archibald and Michael Campbell on their own behalf and on behalf of Former Employees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Appellants

and

Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor

Respondents

C50988

AND BETWEEN:

National Automobile, Aerospace, Transportation and General Workers Union of Canada

(CAW-Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905 and/or 1915

George Borosh and other retirees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Appellants

and

Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor

Respondents

Mark Zigler, Andrew Hatnay and Andrea McKinnon, for the appellants Nortel Networks Former Employees

Barry E. Wadsworth, for the appellant CAW-Canada

Suzanne Wood and Alan Mersky, for the respondents Nortel Networks Limited, Nortel Networks Corporation, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Lyndon A.J. Barnes and Adam Hirsh, for the respondents Board of Directors of Nortel Networks Corporation and Nortel Networks Limited

Benjamin Zarnett, for the monitor Ernst & Young Inc.

Gavin H. Finlayson, for the Informal Nortel Noteholder Group

Thomas McRae, for the Nortel Canadian Continuing Employees

Massimo Starnino, for the Superintendent of Financial Services

Alex MacFarlane and Jane Dietrich, for the Official Committee of Unsecured Creditors

Heard: October 1, 2009

On appeal from the order of Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated June 18, 2009, with reasons reported at (2009), 55 C.B.R. (5th) 68.

Goudge and Feldman JJ.A.:

[1] On January 14, 2009, the Nortel group of companies (referred to in these reasons as "Nortel") applied for and was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, ("*CCAA*").

[2] In order to provide Nortel with breathing space to permit it to file a plan of compromise or arrangement with the court, that order provided, *inter alia*, a stay of all proceedings against Nortel, a suspension of all rights and remedies against Nortel, and an order that during the stay period, no person shall discontinue, repudiate, or cease to perform any contract or agreement with Nortel.

[3] The CAW-Canada ("Union") represents employees of Nortel at two sites in Ontario. The Union and Nortel are parties to a collective agreement covering both sites. On April 21, 2009, the Union and a group of former employees of Nortel ("Former Employees") each brought a motion for directions seeking certain relief from the order

granted to Nortel on January 14, 2009. On June 18, 2009, Morawetz J. denied both motions.

[4] The Union and the Former Employees both appealed from that decision. Their appeals were heard one after the other on October 1, 2009. The appeal of the Former Employees was supported by a group of Canadian non-unionized employees, whose employment with Nortel continues. Nortel was supported in opposing the appeals by the board of directors of two of the Nortel companies, an informal Nortel noteholders group, and the Official Committee of Unsecured Creditors of Nortel.

[5] We will address each of the two appeals in turn.

THE UNION APPEAL

Background

[6] The collective agreement between the Union and Nortel sets out the terms and conditions of employment of the 45 employees that have continued to work for Nortel since January 14, 2009. The collective agreement also obliges Nortel to make certain periodic payments to unionized former employees who have retired or been terminated from Nortel. The three kinds of periodic payments at issue in this proceeding are monthly payments under the Retirement Allowance Plan ("RAP"), payments under the Voluntary Retirement Option ("VRO"), and termination and severance payments to

unionized employees who have been terminated or who have severed their employment at Nortel.

[7] Since the January 14, 2009 order, Nortel has continued to pay the continuing employees their compensation and benefits as required by the collective agreement. However, as of that date, it ceased to make the periodic payments at issue in this case.

[8] The Union's motion requested an order directing Nortel to resume those periodic payments as required by the collective agreement. The Union's argument hinges on s. 11.3(a) of the *CCAA*. At the time this appeal was argued, it read as follows:[1]

> 11.3 No order made under section 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made.

[9] The Union's argument before the motion judge was that the collective agreement is a bargain between it and Nortel that ought not to be divided into separate obligations and therefore the "compensation" for services performed under it must include all of Nortel's monetary obligations, not just those owed specifically to those who remain actively employed. The Union argued that the contested periodic payments to Former Employees must be considered part of the compensation for services provided after January 14, 2009, and therefore exempted from the order of that date by s. 11.3(a) of the

[1] The analogous section to the former s. 11.3(a) is now found in s. 11.01(a) of the recently amended *CCAA*.

CCAA.

[10] The motion judge dismissed this argument. The essence of his reasons is as follows at para. 67:

> The flaw in the argument of the Union is that it equates the crystallization of a payment obligation under the Collective Agreement to a provision of a service within the meaning of s. 11.3. The triggering of the payment obligation may have arisen after the Initial Order but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view, some current activity by a service provider post-filing that gives rise to a payment obligation post-filing. The distinction being that the claims of the Union for termination and severance pay are based, for the most part, on services that were provided pre-filing. Likewise, obligations for benefits arising from RAP and VRO are again based, for the most part, on services provided pre-filing. The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

[11] The Union challenges this conclusion.

[12] In this court, neither the Union nor any other party argues that Nortel's obligation to make the contested periodic payments should be decided by arbitration under the collective agreement rather than by the court.

[13] Nor does the Union argue that any of the unionized former employees, who would receive these periodic payments, have themselves provided services to Nortel since the January 14, 2009 order.

[14] Rather, the Union reiterates the argument it made at first instance, namely that these periodic payments are protected by s. 11.3(a) of the *CCAA* as payment for service provided after the January 14, 2009 order was made by the Union members who have continued as employees of Nortel.

[15] In our opinion, this argument must fail.

Analysis

[16] Two preliminary points should be made. First, as the motion judge wrote at para. 47 of his reasons, the acknowledged purpose of the *CCAA* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, to the end that the company is able to continue in business. The primary instrument provided by the *CCAA* to achieve its purpose is the power of the court to issue a broad stay of proceedings under s. 11. That power includes the power to stay the debt obligations of the company. The order of January 14, 2009 is an exercise of that power, and must be read in the context of the purpose of the legislation. Nonetheless, it is important to underline that, while that order stays those obligations, it does not eliminate them.

[17] Second, we also agree with the motion judge when he stated at para. 66:

> In my view, section 11.3 is an exception to the general stay provision authorized by section 11 provided for in the Initial Order. As such, it seems to me that section 11.3 should be narrowly construed.

[18] Because of s. 11.3(a) of the *CCAA*, the January 14, 2009 order cannot stay Nortel's obligation to make immediate payment for the services provided to it after the date of the order.

[19] What then does the collective agreement require of Nortel as payment for the work done by its continuing employees? The straightforward answer is that the collective agreement sets out in detail the compensation that Nortel must pay and the benefits it must provide to its employees in return for their services. That bargain is at the heart of the collective agreement. Indeed, as counsel for the Union candidly acknowledged, the typical grievance, if services of employees went unremunerated, would be to seek as a remedy not what might be owed to former employees but only the payment of compensation and benefits owed under the collective agreement to those employees who provided the services. Indeed, that package of compensation and benefits represents the commercially reasonable contractual obligation resting on Nortel for the supply of services by those continuing employees. It is that which is protected by s. 11.3(a) from the reach of the January 14, 2009 order: see *Re: Mirant Canada Energy Marketing Ltd.* (2004), 36 Alta. L.R. (4th) 87 (Q.B.).

[20] Can it be said that the payment required for the services provided by the continuing employees of Nortel also extends to encompass the periodic payments to the former employees in question in this case? In our opinion, for the following reasons the answer is clearly no.

[21] The periodic payments to former employees are payments under various retirement programs, and termination and severance payments. All are products of the ongoing collective bargaining process and the collective agreements it has produced over time. As Krever J.A. wrote regarding analogous benefits in *Metropolitan Police Service Board v. Ontario Municipal Employees Retirement Board et al.* (1999), 45 O.R. (3d) 622 (C.A.) at 629, it can be assumed that the cost of these benefits was considered in the overall compensation package negotiated when they were created by predecessor collective agreements. These benefits may therefore reasonably be thought of as deferred compensation under those predecessor agreements. In other words, they are compensation deferred from past agreements but provided currently as periodic payments owing to former employees for prior services. The services for which these payments constitute "payment" under the *CCAA* were those provided under predecessor agreements, not the services currently being performed for Nortel.

[22] Moreover, the rights of former employees to these periodic payments remain currently enforceable even though those rights were created under predecessor collective agreements. They become a form of "vested" right, although they may only be enforceable by the Union on behalf of the former employees: see *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230 at 274. That is entirely inconsistent with the periodic payments constituting payment for current services. If current service was the source of the obligation to make these periodic payments then, if there were no current services

being performed, the obligation would evaporate and the right of the former employees to receive the periodic payments would disappear. It would in no sense be a "vested" right.

[23] In summary, we can find no basis upon which the Union's position can be sustained. The periodic payments in issue cannot be characterized as part of the payment required of Nortel for the services provided to it by its continuing employees after January 14, 2009. Section 11.3(a) of the *CCAA* does not exclude these payments from the effect of the order of that date.

[24] The Union's appeal must be dismissed.

THE FORMER EMPLOYEES' APPEAL

Background

[25] The Former Employees' motion was brought by three men as representatives of former employees including pensioners and their survivors. On the motion their claim was for an order varying the Initial Order to require Nortel to pay termination pay, severance pay, vacation pay, an amount for continuation of the Nortel benefit plans during the notice period in accordance with the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("*ESA*") and any other provincial employment legislation. The representatives also sought an order varying the Initial Order to require Nortel to pay the Transitional Retirement Allowance ("TRA") and certain pension benefit payments to affected former employees. The motion judge described the motion by the former employees as "not

dissimilar to the CAW motion, such that the motion of the former employees can almost be described as a “Me too motion.”

[26] After he dismissed the union motion, the motion judge turned to the “me too” motion of the former employees. The former employees wanted to achieve the same result as the unionized employees. The motion judge described their argument as based on the position that Nortel could not contract out of the *ESA* of Ontario or another province. However, as he noted, rather than trying to contract out, it was acknowledged that the *ESA* applied, except that immediate payment of amounts owing as required by the *ESA* were stayed during the stay period under the Initial Order, so that the former employees could not enforce the acknowledged payment obligation during that time. The motion judge concluded that on the same basis as the union motion, the former employees’ motion was also dismissed.

[27] For the purposes of the appeal, the former employees narrowed their claim only to statutory termination and severance claims under the *ESA* that were not being paid by Nortel pursuant to the Initial Order, and served a Notice of Constitutional Question. The appellant asks this court to find that judges cannot use their discretion to order a stay under the *CCAA* that has the effect of overriding valid provincial minimum standards legislation where there is no conflict between the statutes and the doctrine of paramountcy has not been triggered.

[28] Neither the provincial nor the federal governments responded to the notice on this appeal.

[29] Paragraphs 6 and 11 of the Initial Order (as amended) provide as follows:

> 6. THIS COURT ORDERS that each of the Applicants, either on its own or on behalf of another Applicant, *shall be entitled but not required to pay* the following expenses whether incurred prior to, on or after the date of this Order:
>
> (a) all outstanding and future wages, salaries and employee benefits (including but not limited to, employee medical and similar benefit plans, relocation and tax equalization programs, the Incentive Plan (as defined in the Doolittle affidavit) and employee assistance programs), current service, special and similar pension benefit payments, vacation pay, commissions and employee and director expenses, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;
>
> 11. THIS COURT ORDERS that each of the Applicants shall have the right to:
>
> …
>
> (b) terminate the employment of such of its employees or temporarily lay off such employees as it deems appropriate *and to deal with the consequences thereof in the Plan or on further order of the Court*.
>
> …
>
> all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business. [Emphasis added.]

[30] Pursuant to these paragraphs, from the date of the Initial Order, Nortel stopped making payments to former employees as well as employees terminated following the Initial Order for certain retirement and pension allowances as well as for statutory severance and termination payments. The *ESA* sets out obligations to provide notice of termination of employment or payment in lieu of notice and severance pay in defined circumstances. By virtue of s. 11(5), those payments must be made on the later of seven days after the date employment ends or the employee's next pay date.

[31] As the motion judge stated, it is acknowledged by all parties on this motion that the *ESA* continues to apply while a company is subject to a *CCAA* restructuring. The issue is whether the company's provincial statutory obligations for virtually immediate payment of termination and severance can be stayed by an order made under the *CCAA*.

[32] Sections 11(3), dealing with the initial application, and (4), dealing with subsequent applications under the *CCAA* are the stay provisions of the Act. Section 11(3) provides:

> 11. (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection 1; [the Bankruptcy and Insolvency Act and the Winding Up Act]

> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company;
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Analysis

[33] As earlier noted, the stay provisions of the *CCAA* are well recognized as the key to the successful operation of the *CCAA* restructuring process. As this court stated in *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 at para. 36:

> In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme…

[34] Parliament has carved out defined exceptions to the court's ability to impose a stay. For example, s. 11.3(a) prohibits a stay of payments for goods and services provided after the initial order, so that while the company is given the opportunity and privilege to carry on during the *CCAA* restructuring process without paying its existing creditors, it is on a pay-as-you-go basis only. In contrast, there is no exception for statutory termination

and severance pay.[2] Furthermore, as the respondent Boards of Directors point out, the recent amendments to the *CCAA* that came into force on September 18, 2009 do not address this issue, although they do deal in other respects with employee-related matters.

[35] As there is no specific protection from the general stay provision for *ESA* termination and severance payments, the question to be determined is whether the court is entitled to extend the effect of its stay order to such payments based on the constitutional doctrine of paramountcy: *Crystalline Investments Ltd. v. Domgroup Ltd*., [2004] 1 S.C.R. 60 at para. 43.

[36] The scope, intent and effect of the operation of the doctrine of paramountcy was recently reviewed and summarized by Binnie and Lebel JJ. in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 at paras. 69-75. They reaffirmed the "conflict" test stated by Dickson J. in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R.161:

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

[2] The issue of post-initial order employee terminations, and specifically whether any portion of the termination or severance that may be owed is attributable to post-initial order services, was not at issue in this motion. In *Windsor Machine & Stamping Ltd. (Re)* [2009] O.J. No. 3195, decided one month after this motion, the issue was discussed more fully and Morawetz J. determined that it could be decided as part of a post-filing claim. Leave to appeal has been filed.

[37] However, they also explained an important proviso or gloss on the strict conflict rule that has developed in the case law since *Multiple Access*:

> Nevertheless, there will be cases in which imposing an obligation to comply with provincial legislation would in effect frustrate the purpose of a federal law even though it did not entail a direct violation of the federal law's provisions. The Court recognized this in Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, in noting that Parliament's "intent" must also be taken into account in the analysis of incompatibility. The Court thus acknowledged that the impossibility of complying with two enactments is not the sole sign of incompatibility. The fact that a provincial law is incompatible with the purpose of a federal law will also be sufficient to trigger the application of the doctrine of federal paramountcy. This point was recently reaffirmed in Mangat and in Rothmans, Benson & Hedges Inc. v. Saskatchewan, [2005] 1 S.C.R. 188, 2005 SCC 13. (para. 73)

[38] Therefore, the doctrine of paramountcy will apply either where a provincial and a federal statutory provision are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. Binnie and Lebel JJ. concluded by summarizing the operation of the doctrine in the following way:

> To sum up, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law. (para. 75)

[39] The *CCAA* stay provision is a clear example of a case where the intent of Parliament, to allow the court to freeze the debt obligations owing to all creditors for past

services (and goods) in order to permit a company to restructure for the benefit of all stakeholders, would be frustrated if the court's stay order could not apply to statutory termination and severance payments owed to terminated employees in respect of past services.

[40] The record before the court indicates that the motion judge made the initial order and the amended order in the context of the insolvency of a complex, multinational conglomerate as part of co-ordinated proceedings in a number of countries including the U.S. In June 2009, an Interim Funding and Settlement Agreement was negotiated which, together with the proceeds of certain ongoing asset sales, is providing funds necessary in the view of the court appointed Monitor, for the ongoing operations of Nortel during the next few months of the *CCAA* oversight operation. This funding was achieved on the basis that the stay applied to the severance and termination payments. The Monitor advises that if these payments were not subject to the stay and had to be funded, further financing would have to be found to do that and also maintain operations.

[41] In that context, the motion judge exercised his discretion to impose a stay that could extend to the severance and termination payments. He considered the financial position of Nortel, that it was not carrying "business as usual" and that it was under financial pressure. He also considered that the *CCAA* proceeding is at an early stage, before the claims of creditor groups, including former employees and others have been

considered or classified for ultimate treatment under a plan of arrangement. He noted that employees have no statutory priority and their claims are not secured claims.

[42] While reference was made to the paramountcy doctrine by the motion judge, it was not the main focus of the argument before him. Nevertheless, he effectively concluded that it would thwart the intent of Parliament for the successful conduct of the *CCAA* restructuring if the initial order and the amended order could not include a stay provision that allowed Nortel to suspend the payment of statutory obligations for termination and severance under the *ESA*.

[43] The respondents also argued that if the stay did not apply to statutory termination and severance obligations, then the employees who received these payments would in effect be receiving a "super-priority" over other unsecured or possibly even secured creditors on the assumption that in the end there will not be enough money to pay everyone in full. We agree that this may be the effect if the stay does not apply to these payments. However, that could also be the effect if Nortel chose to make such payments, as it is entitled to do under paragraph 6 (a) of the amended initial order. Of course, in that case, any such payments would be made in consultation with appropriate parties including the Monitor, resulting in the effective grant of a consensual rather than a mandatory priority. Even in this case, the motion judge provided a "hardship" alleviation program funded up to $750,000, to allow payments to former employees in clear need.

This will have the effect of granting the "super-priority" to some. This is an acceptable result in appropriate circumstances.

[44] However, this result does not in any way undermine the paramountcy analysis. That analysis is driven by the need to preserve the ability of the *CCAA* court to ensure, through the scope of the stay order, that Parliament's intent for the operation of the *CCAA* regime is not thwarted by the operation of provincial legislation. The court issuing the stay order considers all of the circumstances and can impose an order that has the effect of overriding a provincial enactment where it is necessary to do so.

[45] Morawetz J. was satisfied that such a stay was necessary in the circumstances of this case. We see no error in that conclusion on the record before him and before this court.

[46] Another issue was raised based on the facts of this restructuring as it has developed. It appears that the company will not be restructured, but instead its assets will be sold. It is necessary to continue operations in order to maintain maximum value for this process to achieve the highest prices and therefore the best outcome for all stakeholders. It is true that the basis for the very broad stay power has traditionally been expressed as a necessary aspect of the restructuring process, leading to a plan of arrangement for the newly restructured entity. However, we see no reason in the present circumstances why the same analysis cannot apply during a sale process that requires the business to be carried on as a going concern. No party has taken the position that the

CCAA process is no longer available because it is not proceeding as a restructuring, nor has any party taken steps to turn the proceeding into one under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

[47] The former employee appellants have raised the constitutional question whether the doctrine of paramountcy applies to give to the *CCAA* judge the authority, under s. 11 of the Act, to order a stay of proceedings that has the effect of overriding s. 11(5) of the *ESA*, which requires almost immediate payment of termination and severance obligations. The answer to this question is yes.

[48] We note again that the question before this court was limited to the effect of the stay on the timing of required statutory payments under the *ESA* and does not deal with the inter-relation of the *ESA* and the *CCAA* for the purposes of the plan of arrangement and the ultimate payment of these statutory obligations.

[49] The appeal by the former employees is also dismissed.

RELEASED: November 26, 2009 (“S.T.G.”)

“S.T. Goudge J.A.”
“K.N. Feldman J.A.”
“I agree. R.A. Blair J.A.”

TAB 7

SUPREME COURT OF CANADA

CITATION: Canada *v.* Canada North Group Inc., 2021 SCC 30

APPEAL HEARD: December 1, 2020
JUDGMENT RENDERED: July 28, 2021
DOCKET: 38871

BETWEEN:

Her Majesty The Queen in Right of Canada
Appellant

and

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

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

REASONS: (paras. 1 to 74) Côté J. (Wagner C.J. and Kasirer J. concurring)

CONCURRING REASONS: (paras. 75 to 182) Karakatsanis J. (Martin J. concurring)

JOINT DISSENTING REASONS: (paras. 183 to 253)	Brown and Rowe JJ. (Abella J. concurring)
DISSENTING REASONS: (paras. 254 to 265)	Moldaver J.

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

Her Majesty The Queen in Right of Canada *Appellant*

v.

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

and

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

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

2021 SCC 30

File No.: 38871.

2020: December 1; 2021: July 28.

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

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

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

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52 C.B.R. (6th) 308, [2018] 2 W.W.R. 731, [2017] A.J. No. 930 (QL), 2017 CarswellAlta 1631 (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 intervener the Insolvency Institute of Canada.

Randal Van de Mosselaer, for the intervener 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 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.

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 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.
>
> **(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.

[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 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 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.

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 (*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, 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, "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'" (*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 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. 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 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).

[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, "Professional 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 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.

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 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 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
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> > **(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 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 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.

[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.

As this Court held in *Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31, "Three 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). 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 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 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 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 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 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 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" (reasons of Brown and Rowe JJ., at 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 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 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 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 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, "The legislature is presumed to know its own statute book and to draft 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 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 no such restriction in s. 11. As Lalonde J. recognized, [TRANSLATION] "In 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 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 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*.

[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 immoveable 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, 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.

[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 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 JJ.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 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 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.

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. Analysis

A. *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 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 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.

[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 trust. I agree that the definition of "security interest" in s. 224(1.3) of the *ITA* is broad, capturing

[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).

"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.

(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).

[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 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 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.

(i) 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, "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 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.

(ii) 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), 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 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 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 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 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 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, 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 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 $1000 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 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 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).

[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 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 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 overextends 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.

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 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):

> **(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.

[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 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.

[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 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, "These 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 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).

[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 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*.

[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,
>
> > **(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.

[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 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.

The reasons of Abella, Brown and Rowe JJ. were delivered by

BROWN AND ROWE JJ. —

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 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 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:

[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.

> **(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
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> > **(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.

[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 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* (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)).

[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 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 Statues 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 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 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 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, "The 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. 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 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 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.

[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.

[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.

(3) Conclusion

[215] It is this 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 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, 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 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 "preser[ve] 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): 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 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 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 (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 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*.

[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.

[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*.

(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 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 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 bypasses 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 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;

2. under the *CCAA*, 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 *CCAA*, 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 *ITA* 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 *ITA*.

D. *Policy Reasons Do Not Support a Different Interpretation*

[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.

[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 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.

The following are the reasons delivered by

MOLDAVER J. —

[254] 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 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, 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.
>
> **(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, "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" (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 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.

[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 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.

TAB 8

CITATION: (Re) Clothing for Modern Times Ltd., 2011 ONSC 7522
COURT FILE NO.: 31-1513595
DATE: 20111216

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: IN THE MATTER OF THE Notice of Intention to make a Proposal of Clothing for Modern Times Ltd.

BEFORE: D. M. Brown J.

COUNSEL: M. Poliak and H. Chaiton, for the Applicant

M. Forte, for A. Farber & Partners Inc., the Proposal Trustee and Proposed Monitor

I. Aversa, for Roynat Asset Finance

D. Bish, for Cadillac Fairview

L. Galessiere, for Ivanhoe Cambridge Inc., Oxford Properties Group Inc., Primaris Retail Estate Investment Trust, Morguard Investment Limited and 20 VIC Management Inc.

M. Weinczuk, for 7951388 Canada Inc.

HEARD: December 16, 2011

REASONS FOR DECISION

I. Motion to continue *BIA* Part III proposal proceedings under the *CCAA*

[1] Clothing for Modern Times Ltd. ("CMT"), a retailer of fashion apparel, filed a Notice of Intention to Make a Proposal pursuant to section 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, on June 27, 2011. A. Farber & Partners Inc. was appointed CMT's proposal trustee. At the time of the filing of the NOI CMT operated 116 retail stores from leased locations across Canada. CMT sold fashion apparel under the trade names Urban Behavior, Costa Blanca and Costa Blanca X.

[2] CMT has obtained from this Court several extensions of time to file a proposal. That time will expire on December 22, 2011. Under section 50.4(9) of the *BIA*, no further extensions are possible.

[3] Accordingly, CMT moves under section 11.6(a) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 for an order, effective December 22, 2011, continuing CMT's restructuring proceeding under the *CCAA* and granting an Initial Order, as well as approving a sale process as a going concern for part of CMT's business.

II. Key background events

[4] Following the filing of the NOI, pursuant to orders of this Court, CMT conducted a self-liquidation of underperforming stores across Canada and, as well, a going-concern sale of its Urban Behavior business. The latter transaction is scheduled to close on January 16, 2012.

[5] At the time of the filing of the NOI there were three major secured creditors of CMT: Roynat Asset Finance, CIC Asset Management Inc., and CMT Sourcing. The company's indebtedness to those creditors totaled approximately $28.3 million. CMT anticipates that the proceeds from the Urban Behavior transaction and the liquidation of under-performing stores will prove sufficient to repay its loan obligations to Roynat in full before the expiration of a forbearance period on January 16, 2012.

[6] When CMT was last in court on November 7, 2011 it stated it intended to make a proposal to its unsecured creditors, an intention supported by the two remaining secured creditors, CIC and CMT Sourcing. Subsequently CMT met with representatives of certain landlords and commenced discussions about its proposed restructuring plan. As a result of those discussions CMT lacks the confidence that its proposal would be approved by the requisite majority of its unsecured creditors, and it does not believe that it can make a viable proposal to its creditors. Instead, CMT thinks that a going-concern sale of its Costa Blanca business would be in the best interests of stakeholders and would preserve employment for about 500 remaining employees, both full-time and hourly retail staff.

[7] In its Sixth Report dated December 14, 2011 Farber agrees that a going concern sale of the Costa Blanca business would be in the best interests of CMT's stakeholders, maximize recoveries to the two secured creditors, CIC and CMT Sourcing, and preserve employment for CMT's remaining employees. Farber supports CMT's request to continue its restructuring under the *CCAA*. Farber consents to act as the Monitor under *CCAA* proceedings and to administer the proposed sale process.

III. Continuation under the *CCAA*

A. Principles governing motions to continue *BIA* Part III proposal proceedings under the *CCAA*

[8] Continuations of *BIA* Part III proposal proceedings under the *CCAA* are governed by section 11.6(a) of that Act which provides:

> 11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,
>
> (*a*) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part.

[9] It strikes me that on a motion to continue under the *CCAA* an applicant company should place before the court evidence dealing with three issues:

(i) The company has satisfied the sole statutory condition set out in section 11.6(a) of the *CCAA* that it has not filed a proposal under the *BIA*;

(ii) The proposed continuation would be consistent with the purposes of the *CCAA*; and,

(iii) Evidence which serves as a reasonable surrogate for the information which section 10(2) of the *CCAA* requires accompany any initial application under the Act.

Let me deal with each in turn

B. The applicant has not filed a proposal under the *BIA*

[10] The evidence shows that CMT has satisfied this statutory condition.

C. The continuation would be consistent with the purposes of the *CCAA*

[11] In *Century Services Inc. v. Canada (Attorney General)*,[1] the Supreme Court of Canada articulated the purpose of the *CCAA* in several ways:

(i) To permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets;[2]

(ii) To provide a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made;[3]

(iii) To avoid the social and economic losses resulting from liquidation of an insolvent company;[4]

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[1] 2010 SCC 60.
[2] *Century Services*, para. 15.
[3] *Ibid.*, para. 59.
[4] *Ibid.*, para. 70.

(iv) To create conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all.[5]

As the Supreme Court noted in *Century Services*, proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved "through a rules-based mechanism that offers less flexibility."[6] In the present case CMT bumped up against one of those less flexible rules – the inability of a court to extend the time to file a proposal beyond six months after the filing of the NOI.

[12] The jurisprudence under the *CCAA* accepts that in appropriate circumstances the purposes of the *CCAA* will be met even though the re-organization involves the sale of the company as a going concern, with the consequence that the debtor no longer would continue to carry on the business, as is contemplated in the present case. In *Re Stelco Inc.* Farley J. observed that if a restructuring of a company is not feasible, "then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part".[7] It also is well-established in the jurisprudence that a court may approve a sale of assets in the course of a *CCAA* proceeding before a plan of arrangement has been approved by creditors.[8] In *Re Nortel Networks Inc.* Morawetz J. set out the rationale for this judicial approach:

> The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.[9]

[13] The evidence filed by CMT and Farber supports a finding that a continuation under the *CCAA* to enable a going-concern sale of the Costa Blanca business and assets would be consistent with the purposes of the *CCAA*. Such a sale likely would maximize the recovery for the two remaining secured creditors, CIC and CMT Sourcing, preserve employment for many of the 500 remaining employees, and provide a tenant to the landlords of the 35 remaining Costa Blanca stores. Avoidance of the social and economic losses which would result from a liquidation and the maximization of value would best be achieved outside of a bankruptcy.

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[5] *Ibid*., para. 77.
[6] *Ibid*., para. 15.
[7] (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.), para. 1. In *Consumers Packaging Inc., Re*, 2001 CarswellOnt 3482 the Court of Appeal held that a sale of a business as a going concern during a *CCAA* proceeding is consistent with the purposes of that Act.
[8] See the cases collected by Morawetz J. in *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), paras. 35 to 39. See also section 36 of the *CCAA*.
[9] *Ibid*., para. 40.

D. Evidence which serves as a reasonable surrogate for *CCAA* s. 10(2) information

[14] As the Supreme Court of Canada observed in *Century Services*, "the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority."[10] On an initial application under the *CCAA* a court will have before it the information specified in section 10(2) which assists it in considering the appropriateness, good faith and due diligence of the application. Section 10(2) of the *CCAA* provides:

> 10. (2) An initial application must be accompanied by
>
> (*a*) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
>
> (*b*) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and
>
> (*c*) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

[15] Section 11.6 of the *CCAA* does not stipulate the information which must be filed in support of a continuation motion, but a court should have before it sufficient financial and operating information to assess the viability of a continuation under the *CCAA*. In the present case CMT has filed, on a confidential basis,[11] cash flows for the period ending January 31, 2012, which show a net positive cash flow for the period and that CMT has sufficient resources to continue operating in the *CCAA* proceeding, as well as to conduct a sale process without the need for additional financing.

[16] In addition, the Proposal Trustee filed on this motion its Sixth Report in which it reported on its review of the cash flow statements. Although its opinion was expressed in the language of a double negative, I take from its report that it regards the cash flow statements as reasonable.

[17] Finally, the previous extension orders made by this Court under section 50.4(9) of the *BIA* indicate that CMT satisfied the Court that it has been acting in good faith and with due diligence.

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[10] *Century Services*, para. 70.

[11] CMT has filed evidence explaining that disclosure of the cash flows prior to the closing of the Urban Behavior transaction would make public the proceeds expected from that transaction. I agree that such information should not be made public until the deal has closed. CMT has satisfied the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 and a sealing order should issue.

E. Conclusion

[18] No interested person opposes CMT's motion to continue under the *CCAA*. Its two remaining secured creditors, CIC and CMT Sourcing, support the motion. From the evidence filed I am satisfied that CMT has satisfied the statutory condition contained in section 16(a) of the *CCAA* and that a continuation of its re-structuring under the *CCAA* would be consistent with the purposes of that Act.

IV. Sale Process

[19] In *Re Nortel Networks Corp.* Morawetz J. identified the factors which a court should consider when reviewing a proposed sale process under the *CCAA* in the absence of a plan:

> (a) is a sale transaction warranted at this time?
>
> (b) will the sale benefit the whole "economic community"?
>
> (c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
>
> (d) is there a better viable alternative?[12]

[20] No objection has been taken to CMT's proposed sale of its Costa Blanca business or the proposed sale process under the direction of Farber as Monitor. Chris Johnson, CMT's CFO, deposed that CMT is not in a position to make a viable proposal to its creditors and has concluded that a going-concern sale of the Costa Blanca business would be the most appropriate course of action. The Proposal Trustee concurs with that assessment. In light of those opinions, an immediate sale of the Costa Blanca business would be warranted in order to attract the best bids for that business on a going-concern basis. Such a sale, according to the evidence, stands the best chance of maximizing recovery by the remaining secured creditors and preserving the employment of a large number of people. No better viable alternative has been put forward.

[21] Accordingly, I approve the proposed sale process as described in paragraph 37 of the affidavit of Chris Johnson.

V. Administration Charges

[22] CMT seeks approval under section 11.52 of the *CCAA* of an Administration Charge over the assets of CMT to secure the professional fees and disbursements of Farber as Monitor and its counsel, as well as the fees of Ernst & Young Orenda Corporate Finance Inc. ("E&Y"), who has been acting as CMT's financial advisor, together with its counsel. The order sought reflects, in

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[12] *Nortel Networks, supra.*, para. 49. See also *Re Brainhunter Inc.* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J.), para. 13.

large part, the priorities of various charges approved during the *BIA* Part III proposal process. CMT proposes that the Professionals Charge approved under the *BIA* orders and the CCAA Administration Charge rank *pari passu*, and that whereas the *BIA* orders treated as ranking fourth "the balance of any indebtedness under the Professionals Charge", the *CCAA* order would place a cap of $250,000 on such portions of the Professionals and CCAA Administration Charges.

[23] No interested person opposes the charges sought.

[24] I am satisfied that the charge requested is appropriate given the importance of the professional advice to the completion of the Urban Behavior transaction and the sale process for the Costa Blanca business.

VI. Order granted

[25] I have reviewed the draft Initial Order submitted by CMT and am satisfied that an order should issue in that form.

[26] CMT also seeks a variation of paragraph 3 of the Approval and Vesting Order of Morawetz J. made November 7, 2011 in respect of the Urban Behavior transaction to include, in the released claims, the Professionals Charge and the CCAA Administration Charge. None of the secured creditors objects to the variation sought and it is consistent with the intent of the existing language of that order. I therefore grant the variation sought and I have signed the order.

_____(original signed by)_____
D. M. Brown J.

Date: December 16, 2011

TAB 9

Credit Suisse AG v.Great Basin Gold Ltd.

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.C. Fitzpatrick J.

Heard: June 9, 2015.

Judgment: July 10, 2015.

Docket: S134749

Registry: Vancouver

[2015] B.C.J. No. 1474 | 2015 BCSC 1199 | 2015 CarswellBC 1953 | 27 C.B.R. (6th) 32

Between Credit Suisse AG, Petitioner, and Great Basin Gold Ltd., Respondent

(76 paras.)

Case Summary

Bankruptcy and insolvency law — Proceedings — Practice and procedure — Effect on other proceedings — Stays — Application by creditors for declaration action was unaffected by stay of proceedings allowed — Receivership order followed termination of creditor protection proceedings that had resulted in commencement of sale of company's gold mining assets — Order included stay of proceedings in respect of company and its property — Applicants sued company's directors and officers alleging misrepresentations in public documents and breaches of various duties — Based on surrounding circumstances, wording of stay and nature of allegations, action was not in respect of company or property and was outside scope of stay — Companies' Creditors Arrangement Act, s. 11.03(1).

Application by creditors, Linden Advisors, Crystalline Management and Wolverine Asset Management for declaration that their action was unaffected by a stay of proceedings. A receivership order granted following the termination of creditor protection proceedings in respect of Great Basin Gold included a stay of proceedings. The creditor protection proceedings had resulted in the commencement of the sale of major gold-mining assets. The stay of proceedings in the receivership order was granted in respect of the property of Great Basin, which was defined as all of the assets, undertakings and properties acquired for, or used in relation to the business, including all proceeds thereof. The receivership included an indemnity provision in favour of Great Basin's directors and officers. The applicants commenced an action against Great Basin's directors and officers alleging misrepresentations and omissions in financial statements, prospectuses and press releases. They sought $40 million in damages for breaches of common-law, statutory and fiduciary duties. The applicants sought a declaration that proper interpretation of the receivership order permitted continuation of their action without leave of the court.
HELD: Application allowed.

All aspects of the matter, including the creditor protection circumstances predating the receivership order, the pleadings, the circumstances surrounding the proposed action, and the wording of the order itself, supported a conclusion that the receivership order did not stay the applicants' action against Great Basin's directors and officers. A stay in respect of the directors and officers was granted in the course of the creditor protection proceedings, and was specifically terminated prior to the receivership order. The change in the scope of the stay was reflected in the express language within the receivership order. A plain reading of the pleadings supported the view that the allegations were that the directors and officers were personally liable. The action was not in respect of Great Basin or its property, and therefore was not caught within the scope of the stay.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, *R.S.C. 1985, c. B-3, s. 243*(1)

Business Corporations Act, *SBC 2002, CHAPTER 57, s. 105*,

Companies' Creditors Arrangement Act, *R.S.C. 1985, c. C-36, s. 11.03*(1)

Counsel

Counsel for Linden Advisors LP, Crystalline Management Inc. and Wolverine Asset Management, LLC: S. Dvorak, R. Jacobs, J. Dietrich.

Counsel for Patrick Cooke, Estate of David M.S. Elliott, Octavia Matloa, Terrence Barry Coughlan, Harry Wayne Kirk, Joshua C. Ngoma, Walter T. Segsworth, Anu Dhir, Philip Kotze and Ronald Thiessen: M. Clemens, Q.C.

Counsel for Ferdinard Dippenaar, Lourens van Vuuren, Willem Beckmann, Philip N. Bentley, Bheki Khumalo and Dana Roets: J.K. McEwan, Q.C., J. Hughes.

Counsel for Credit Suisse AG: P. Rubin.

Reasons for Judgment

S.C. FITZPATRICK J.

Introduction

1 This application concerns the scope of a stay of proceedings ordered by the court arising from the granting of a receivership order as against the respondent, Great Basin Gold Ltd. ("Great Basin").

2 The issue is whether the proper interpretation of the stay provision is such that it includes a stay of proceedings in favour of the former directors and officers of Great Basin.

3 Linden Advisors LP, Crystalline Management Inc. and Wolverine Asset Management, LLC (collectively, the "Applicant Creditors"), had previously commenced an action against Great Basin's directors and officers and the issue of the stay has been recently raised. The Applicant Creditors now seek clarification concerning the proper interpretation of the receivership order, namely, whether the stay prevents them from continuing with their action, save with leave of the court.

Background Facts

The Insolvency Proceedings

4 On September 19, 2012, Great Basin applied for and was granted creditor protection under the *Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36* (the "*CCAA*"). Despite the filing having taken place in Vancouver, British Columbia, Great Basin's gold-mining operations, through its subsidiaries, were principally located elsewhere. Various properties were held around the world, but the principal assets were gold mines in Nevada and South Africa.

5 On the filing date, I granted an initial order, as is typically granted in *CCAA* proceedings (the "Initial Order"). I remained seized of the *CCAA* proceedings and would issue all of the court orders in those proceedings and in the later receivership proceedings as discussed in these reasons.

6 The Initial Order imposed a stay of proceedings against or in respect of Great Basin or affecting the "Business" and "Property" of Great Basin:

> 15. Until and including October 19, 2012 or such later date as this Court may order (the "Stay Period"), no action, suit or proceeding in any court or tribunal (each, a "Proceeding") against or in respect of [Great Basin] or the Monitor, or affecting the Business or the Property, shall be commenced or continued except with the written consent of [Great Basin] and the Monitor or with leave of this Court, and any and all Proceedings currently under way against or in respect of [Great Basin] or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

7 "Property" was defined in the Initial Order as "current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof". Great Basin was ordered to continue to carry on its business in the ordinary course (defined as the "Business").

8 In addition, the Initial Order provided for a stay of proceedings as against the directors and officers of Great Basin in respect of pre-filing matters:

> 22. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against the directors or officers of [Great Basin] with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of [Great Basin] whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of a such obligations, until a compromise or arrangement in respect of [Great Basin], if one is filed, is sanctioned by this Court or is refused by the creditors of [Great Basin] or this Court. Nothing in this Order, including in this paragraph, shall prevent the commencement of a Proceeding to preserve any claim against a director or officer of [Great Basin] that might otherwise be barred or extinguished by the effluxion of time, provided that no further step shall be taken in respect of such Proceeding except for service of the initiating documentation on the applicable director or officer.

9 By June 28, 2013, the *CCAA* proceedings had run their course with sales of the major gold-mining assets having been concluded or substantially underway. On that date, this Court granted an order terminating the *CCAA* proceedings at the request of Great Basin and with the support of its largest secured creditor, the petitioner Credit Suisse AG (the "Termination Order"). The Termination Order specifically provided that the stays of proceedings as set out above in paragraphs 15 and 22 of the Initial Order were terminated and set aside.

10 Concurrent with the termination of the *CCAA* proceedings, on June 28, 2013, Credit Suisse AG applied to the Court and was granted an order (the "Receivership Order"), appointing a receiver over the "Property" of Great Basin, who was defined as the "Debtor".

11 The definition of "Property" in the Receivership Order was different than that found in the Initial Order. The term was defined as "all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof." This definition of "Property" was consistent with the wording of the model receivership order published on the Court's website, and also consistent with the language found in s. 243(1) of the *Bankruptcy and Insolvency Act*, *R.S.C. 1985, c. B-3*, which is the statutory authority for the appointment of the receiver.

12 The central issue on this application arises from the terms of the Receivership Order which imposed a stay of proceedings against or "in respect of" Great Basin and the Property, as defined:

> 12. No Proceedings against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court; provided, however, that nothing in this Order shall prevent any Person from commencing a Proceeding regarding a claim that might otherwise become

barred by statute or an existing agreement if such Proceeding is not commenced before the expiration of the stay provided by this paragraph and provided that no further step shall be taken in respect of Proceeding except for service of the initiating documentation on the Debtor and the Receiver.

13 Under the Receivership Order, FTI Consulting Canada Inc. was appointed receiver and manager (the "Receiver").

14 The evidence at the June 28, 2013 hearing -- at which time the Termination Order and the Receivership Order were granted -- referred to the following relevant circumstances:

a) the stay of proceedings under the Initial Order was set to expire on June 30, 2013;

b) no extension of the *CCAA* proceedings was being sought by Great Basin as there was no prospect for a restructuring of Great Basin and there was no on-going business being conducted by Great Basin. As such, there was no need to continue the *CCAA* proceedings and incur the cost of doing so;

c) the remaining directors and officers of Great Basin were set to resign on the earlier of June 30, 2013 or the date on which the *CCAA* proceedings were terminated. This was tied to the expiry of the then-existing insurance policy in place for the directors and officers of Great Basin; and

d) it was considered necessary that a receiver be appointed to complete the remaining matters that were outstanding in the *CCAA* proceedings. Those matters included causing Great Basin's subsidiaries in other jurisdictions to finalize the sales of the principal gold-mining assets through insolvency proceedings in those jurisdictions. Specifically:

i. in May 2013, the Hollister gold mine in Nevada had been sold through insolvency proceedings commenced under chapter 11 of the *United States Bankruptcy Code*, 11 U.S.C. and it was anticipated that certain administrative matters needed to be finalized to conclude those proceedings; and

ii. the sales process of the Burnstone mine in South Africa was underway at the time pursuant to business rescue proceedings commenced in South Africa. Those sale proceedings had not been completed, and it was contemplated that a sale would require later transactions to be completed by Great Basin and certain Cayman Islands subsidiaries.

15 Paragraph 23 of the Initial Order provided that Great Basin indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers on account of legal defence costs after the commencement of the *CCAA* proceedings. As security for this obligation, the directors and officers were granted a "Directors' Charge" as against Great Basin's "Property" (as defined in the Initial Order) limited to $500,000. The Director's Charge was granted priority behind the "Administration Charge" but ahead of the "DIP Lenders' Charge" for the interim financing.

16 Pursuant to paragraph 22 of the Termination Order, the Directors' Charge continued to attach to the "Property" as defined in the Initial Order. The priorities of the various court-ordered charges were further addressed in the Receivership Order, but the Directors' Charge remained second in priority only behind the Administration Charge.

Action Brought by the Applicant Creditors

17 On August 14, 2014, the Applicant Creditors commenced an action in this Court against the former directors and officers of Great Basin (the "Action"). In essence, the Applicant Creditors allege that various public disclosures, including financial statements, prospectuses and press releases made by Great Basin contained misrepresentations and omissions. The Applicant Creditors allege that the directors and officers breached their common-law, statutory and fiduciary duties and obligations owed to certain stakeholders of Great Basin, including the Applicant Creditors. They seek damages in the amount of $40 million plus interest.

18 As counsel for the directors and officers point out, there is some emphasis in the Action on the disclosure in a

November 2009 prospectus issued by Great Basin for certain unsecured convertible debentures in which the Applicant Creditors invested. There are also allegations concerning the public disclosure made before and after that offering.

19 In addition, on January 9, 2015, Credit Suisse AG commenced a claim against some directors and officers of Great Basin in the Second Judicial District Court of the State of Nevada. Similar to the action commenced by the Applicant Creditors, Credit Suisse AG alleges that the officers and directors misrepresented certain matters relating to Great Basin, which Credit Suisse AG relied upon in granting significant loans to Great Basin, both prior to and after the *CCAA* proceedings began. Credit Suisse AG also alleges that the officers and directors "recklessly mismanaged" Great Basin's subsidiaries.

20 In May 2015, counsel for the officers and directors advised counsel for the Applicant Creditors of their position that the Applicant Creditors had filed the Action in violation of the stay of proceedings granted per paragraph 12 of the Receivership Order. Among other things, the directors and officers asserted that, given the allegations about public disclosures made by Great Basin, and the indemnities that Great Basin gave to each of the officers and directors, the stay applied. Counsel for the officers and directors therefore took the position that the Receivership Order stayed the Action unless and until written consent was obtained from the Receiver or leave was obtained from this Court.

21 Initially, there was some issue about why the matter of the stay was only being raised some time following the commencement of the Action in August 2014. However, counsel for the officers and directors advised that the Receivership Order had only recently come to their attention in May 2015, which explanation I accept. In my view, nothing arises from any delay in bringing forward the issue as the matter can be addressed on its merits.

22 Certain of the defendants in the Action, being officers and directors appointed prior to the *CCAA* proceedings, intend to file response material denying any wrongdoing. Specifically, they contend that the acts that are the subject of the Action are "the acts of [Great Basin] and not the acts of the [officers and directors]". In addition, they propose to file a counterclaim alleging that the Action is in breach of the trust indenture by which the Applicant Creditors invested in Great Basin. That trust indenture provided that there would be no recourse against certain persons, including directors and officers.

23 Other defendants in the Action, being directors and officers appointed after the *CCAA* proceedings began, also intend to file response material. They also contend that the representations and conduct that are the subject of the Action were "representations made by or conduct of [Great Basin], not these Defendants personally". They also propose to file a counterclaim alleging that the Action is in breach of the trust indenture by which the Applicant Creditors invested in Great Basin.

The Issue

24 The Applicant Creditors dispute the interpretation of paragraph 12 of the Receivership Order advanced by the directors and officers that they require leave of the court in order to proceed with the Action. Nevertheless, in order to clarify the matter, the Applicant Creditors now bring this application for a declaration that the stay of proceedings does not operate to stay the Action and that no leave is required.

25 The Receiver has indicated that it takes no position in respect of this application so, obviously, no consent to bring the Action is forthcoming to obviate the issue.

Discussion

26 The parties agree that the Receivership Order is to be interpreted in accordance with the approach as set out in *Yu v. Jordan*, *2012 BCCA 367*:

> [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an

> adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.

27 All of the aspects leading to and including the granting of the Receivership Order -- the pleadings, relevant circumstances and language of the order itself -- are considerably interrelated in this case. In my view, all aspects support the conclusion that the Receivership Order did not stay the Action against the directors and officers.

(i) Pleadings

28 The pleadings that are relevant here include the backdrop of the *CCAA* proceedings, the terms of the Initial Order and, later still, the Receivership Order and the Termination Order.

29 In the *CCAA* context, imposing a stay of proceedings is generally seen as a critical component of the relief sought by the debtor company in preserving the *status quo* while a company attempts to restructure. The need for a stay of proceedings against creditors of the debtor company seems evident enough; however, it is also well-recognized that a stay of proceedings against third parties could, in some cases and, indeed, often does, equally assist in achieving the objectives of the *CCAA*.

30 In addition, the need to cast a large net in terms of protecting the debtor's ownership and management of its assets pending reorganization is generally seen as justifying the typical broad definition of "Property", as is found in the Initial Order.

31 Early cases tended to rely on inherent jurisdiction as the jurisdictional basis for a stay as against third parties. In that regard, the comments of Tysoe J. (as he then was) in *Re Woodward's Ltd.*, *(1993) 79 B.C.L.R. (2d) 257* at 268 (S.C.) are instructive in that such a stay must be important to the reorganization process and the court must weigh the relative prejudice arising from the stay:

> Hence, it is my view that the inherent jurisdiction of the Court can be invoked for the purpose of imposing stays of proceedings against third parties. However, it is a power that should be used cautiously. In *Westar*, *[1992] B.C.J. No. 1360* Macdonald J. relied upon the Court's inherent jurisdiction to create a charge against Westar's assets because he was of the view that Westar would have no chance of completing a successful reorganization if he did not create the charge. I do not think that it is a prerequisite to the Court exercising its inherent jurisdiction that the insolvent company will not be able to complete a reorganization unless the inherent jurisdiction is exercised. But I do think that the exercise of the inherent jurisdiction must be shown to be important to the reorganization process.
>
> In deciding whether to exercise its inherent jurisdiction the Court should weigh the interests of the insolvent company against the interests of the parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the Court should decline to exercise its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the Court that it should not exercise its discretion under s. 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).
>
> [Emphasis added.]

32 Stays of proceedings in favour of former or current directors and officers of a debtor company in *CCAA* proceedings were and are common. Such a stay is seen as consistent in achieving the policy objective of furthering the debtor company's restructuring efforts. A stay of proceedings in favour of officers and directors affords some protection to those individuals, in that it acts as an inducement to remain involved in the restructuring, which is benefited by the directors' and officers' knowledge and expertise. Other benefits include avoiding the allocation of time and resources to defend such proceedings at the expense of and detriment to the restructuring itself.

33 In 2005, the *CCAA* was amended to provide the court with express statutory authority to stay proceedings against directors and officers with respect to pre-filing matters:

> 11.03(1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

34 It can be seen that the provision in the Initial Order staying actions against the directors and officers (paragraph 22) substantially tracks the language of s. 11.03(1).

35 The rationale of the court in *Re Woodward's* continues to be applied in *CCAA* proceedings and, in particular, to the consideration as to whether stays in favour of officers and directors will be continued or lifted.

36 In *Re Nortel Networks Corp.*, *(2009) 57 C.B.R. (5th) 232* at 239 (Ont. S.C.J.), Morawetz J. upheld a stay of proceedings in favour of certain directors and employees of Nortel:

> In my view, the Nortel restructuring is at a critical stage and the energies and activities of the Board should be directed towards the restructuring. I accept the argument of Mr. Barnes on this point. To permit the ERISA Litigation to continue at that time would, in my view, result in a significant distraction and diversion of resources at a time when that can be least afforded. It is necessary in considering whether to lift the stay, to weigh the interests of the Applicants against the interests of those who will be affected by the stay. Where the benefits to be achieved by the applicant outweighs the prejudice to affected parties, a stay will be granted. (See: *Woodwards Limited (Re)* *(1993) 17 C.B.R. (3d) 236* (B.C.S.C.).)

37 Importantly, the court in *Re Nortel* emphasized that the stay was intended only as a postponement of the claims being brought or continued: *Nortel* at 239. The postponement aspect is consistent with s. 11.03(1) of the *CCAA* and paragraph 22 of the Initial Order, which contemplate the continuation of the stay until such time as a compromise or arrangement is either accepted or refused by the creditors and the court.

38 As Dewar J. stated in ***Re Puratone*** *Corp.*, *2013 MBQB 171*, whether the stay will be lifted or continued is to be considered in the context of the nature and timing of the *CCAA* process before the court: para. 15. In that case, the court noted that the *CCAA* proceedings did not result in a restructuring but, rather, a liquidation of the assets with proceeds to be distributed. As such, the court, in considering relative prejudice, found that the balance of convenience favoured lifting the stay to allow the action against Puratone and the directors and officers to proceed "sooner rather than later": para. 38.

39 It is in this context that the Termination Order and Receivership Order must be considered. In a situation similar to that in ***Re Puratone***, by June 2013, much of the policy objectives underlying the stay in favour of Great Basin's directors and officers in the Initial Order had been spent. The receivership presented a sea change of sorts in the sense that a pure liquidation of the remaining assets was the focus and, importantly, the remaining liquidation efforts were to be handled by the Receiver and not by the directors and officers of Great Basin. In that regard, the focus of the Receivership Order was to protect the activities of the Receiver and the assets under its administration. The stay of proceedings found in paragraph 12 of the Receivership Order accomplished that, in part, along with the stay of proceedings in paragraph 13, and the specific stay as against the Receiver in paragraph 11.

40 It is not unheard of that *CCAA* proceedings simply segue into receivership proceedings with little regard to or change in the relief granted in court orders in terms of the effect of those orders on third parties. However, a receivership is a fundamentally different type of proceeding and the objectives to be achieved in each type of proceeding must be considered in terms of how third parties are to be affected. That is not to say that a stay of proceedings against third parties will never be appropriate in a receivership; rather, the court must be cognizant, as

was stated in *Re Woodward's*, that the stay power should be used cautiously, and there must be some cogent reason underlying the interference with the rights of those third parties in either a *CCAA* or receivership proceeding.

41 That brings me more specifically to the Termination Order which must be considered alongside the Receivership Order. What can be gleaned from both these orders, when considered in the context of the Initial Order, is that counsel did what was expected of them, in that they carefully considered what relief was appropriate going forward, with or without amendment, and what relief should be terminated. This was the substance of the hearing on June 28, 2013 when the two orders were granted.

42 It is significant that paragraph 15 of the Initial Order contained a broader stay protection for Great Basin than the stay in the Receivership Order since it provided for a stay "against or in respect of [Great Basin] or the Monitor, or affecting the Business or the Property" [emphasis added]. Even with this broader stay protection, the Initial Order contained a separate stay of proceedings against directors and officers at paragraph 22, which supports the interpretation that the broader stay did not provide this protection to the officers and directors.

43 In contrast, the Receivership Order included more limited stay protection for Great Basin's Property, which need only have been acquired for or used in relation to its business. It did not, as did the Initial Order, refer to the stay of proceeding in relation to any action that might affect Great Basin's "Business". This is understandable since it was expected that Great Basin would continue its "Business" in the *CCAA* proceedings: Initial Order at para. 4. This is also consistent with the evidence at the June 28, 2013 hearing that Great Basin had ceased to conduct any business by the time of the receivership.

44 Finally, it cannot be ignored that there was neither an application for nor an order for a separate stay of proceedings against the directors and officers in the Receivership Order as there was in the Initial Order. To the opposite effect, that provision was specifically terminated by the Termination Order. I agree with the Applicant Creditors that this change must be given some meaning. The directors and officers assert that they were not represented by counsel at the June 28, 2013 hearing. However, it must be inferred that they were well-aware of the protections afforded to them by reason of the *CCAA* proceedings (including the specific stay and the granting of the Directors' Charge), and that they either were or could have been, with some due diligence, aware of how matters were to be transitioned to the receivership.

45 At the very least, their knowledge of the expiry of the director and officer insurance policy, coupled with their resignations at the same time, would have highlighted to them that changes were afoot in terms of their participation in the proceedings and the protections that they had enjoyed to that time.

(ii) Language of the Receivership Order

46 It is clear enough that the Receivership Order does not include any express language imposing a stay of proceedings in favour of Great Basin's directors and officers. This is in contrast to paragraph 22 of the Initial Order.

47 Counsel for the directors and officers rely on the wording of paragraph 12 of the Receivership Order in arguing that there is a stay of proceedings "in respect of" both Great Basin and the Property, as defined. They contend that this wording is broad enough to include the Action now commenced by the Applicant Creditors.

48 In *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, *[1999] 1 S.C.R. 743* at 751, Major J. discussed the Court's earlier consideration of the phrase "in respect of":

> [A plain] reading is supported by Dickson J.'s interpretation of almost identical language in *Nowegijick v. The Queen*, *[1983] 1 S.C.R. 29*, at p. 39:
>
> > The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. [Emphasis added.]

49 The extent of the scope of that phrase was, however, tempered by the later comments of the Court in *Sarvanis v. Canada*, *2002 SCC 28*:

> [22] It is fair to say, at the minimum, that the phrase "in respect of" signals an intent to convey a broad set of connections. The phrase is not, however, of infinite reach. Although I do not depart from Dickson J.'s view that "in respect of" is among the widest possible phrases that can be used to express connection between two legislative facts or circumstances, the inquiry is not concluded merely on the basis that the phrase is very broad.

Further, the Court in *Sarvanis* discussed that the phrase "in respect of" must be considered by "looking to the context in which the words are found": see paras. 23-26.

50 What then is the connection between the terms of the Receivership Order, being Great Basin and its Property, and the Action?

51 Firstly, the directors and officers argue that the Action is "in respect of" Great Basin because the allegations concern the corporate actions of Great Basin, specifically as to the issuance of the 2009 prospectus by which the misrepresentations were said, at least in part, to have been made. As I have outlined above, the substance of the defences raised in the Action is that the directors and officers were acting in the course of their duties in those capacities and that, therefore, any misrepresentations are the misrepresentations of Great Basin and not of the directors and officers personally.

52 Specifically, the officers and directors contend that the officer and director defendants in the Action could easily be replaced by simply naming Great Basin as a defendant given the causes of action advanced. While that may be true, one might wonder about the utility of doing so since the Applicant Creditors obviously have a more direct cause of action against Great Basin given the creditor/debtor relationship that currently exists.

53 The reality is that Great Basin is not named as a defendant in the Action even though it could have been.

54 Further, I appreciate that the officers and directors have substantive defences to the Action. Those defences include that the directors and officers were only acting in the course of their duties and that they acted in a manner consistent with what the law requires. Negligence claims will be met with the contention that the business judgment rule applies; allegations of breach of fiduciary and statutory duties will be met with the contention that their duties are owed to Great Basin, not to the Applicant Creditors as creditors, or that the claims are statute-barred.

55 Even so, a plain reading of the pleadings in the Action supports the view that the allegation is that the directors and officers are *personally* liable for the actions or omissions by each of them. Accordingly, while many of the factual circumstances upon which those allegations are made involve Great Basin, that does not mean that the Action is "in respect of" Great Basin.

56 As the Applicant Creditors contend, if the language "in respect of" a corporate debtor is to be interpreted so broadly to encompass such claims against its directors and officers arising from their actions in that capacity, then a separate stay of proceedings against directors and officers (as was granted in the Initial Order) would never be required.

57 The argument of the directors and officers is also not assisted by the circumstances of the trust indenture issued by Great Basin that provided that there would be no recourse or personal liability against others, including directors and officers. Again, that document may form an important plank of the directors' and officers' defence against personal liability, but the fact that Great Basin issued that trust indenture does not mean that there is an inextricable connection between Great Basin and the Action.

58 Secondly, the directors and officers argue that their claim is "in respect of" Great Basin's Property, as defined in the Receivership Order. I would observe at the outset that the definition of Property in the Receivership Order is

considerably narrower than that found in the Initial Order. As I will discuss below, that is an important factor in many aspects, including in interpreting the scope of the stay of proceedings imposed in both the *CCAA* and receivership proceedings.

59 The directors and officers also argue that this claim is "in respect of" Great Basin's Property arising from the circumstances of the indemnity agreement that Great Basin executed in favour of the directors and officers. However, if the Applicant Creditors are successful in the Action, they will recover judgment against the directors and officers personally, not against Great Basin to the extent that it may recover from its Property. At best, the indemnity agreement forms an independent contractual basis upon which the directors and officers might seek recovery from Great Basin. I agree that a third-party action by the directors and officers against Great Basin would obviously engage the stay of proceedings found in the Receivership Order. It seems clear enough why no such claim has been advanced, given that the directors and officers would in any event be unlikely to recover any judgment obtained given the substantial losses of even the secured creditors.

60 The directors and officers argue that the Action is "in respect of" Great Basin's Property since the Directors' Charge was continued over the Property by the terms of the Termination Order and the Receivership Order. This represents a more substantial connection between the Action and Great Basin's Property than the above arguments, but is answered by the same points raised in relation to the indemnity. Again, this is an independent claim that might be advanced by the directors and officers against Great Basin and the Property. The fact that the directors and officers might in the future advance claims against the Property secured by the Directors' Charge, does not change the characterization of the claims of the Applicant Creditors which are not against Great Basin's Property.

61 In these circumstances, I cannot discern any connection or relationship between the relief sought in the Action and Great Basin and the Property, as defined in the Receivership Order. A plain reading of the Receivership Order evidences that the stay of proceedings was intended to maintain order in the realization proceedings that were then to be conducted by the Receiver in liquidating the assets of Great Basin. No issues are raised in the Action that directly affect the process by which that liquidation is to be accomplished by the Receiver.

(iii) Applicable Circumstances

62 Much of what I have discussed above includes the particular circumstances that were in existence leading up to the June 2013 hearing when the relief sought was granted in the Receivership Order.

63 To summarize, the *CCAA* proceedings had ceased to serve any purpose in that no restructuring was on the horizon. The only activities being conducted at the end were the sales of the gold-mining assets, and it was argued before the court that the proper person to conduct those later activities was a receiver. In that vein, the directors and officers were set to depart the scene in that their services were no longer required.

64 Indeed, upon the court order appointing the Receiver, the powers of the directors and officers ceased: see *Business Corporations Act*, *S.B.C. 2002, c. 57, s. 105*.

65 In that sense, the rationale behind continuing the stay of proceedings in favour of the directors and officers evaporated. There remained no useful purpose in continuing the stay in their favour. The matter of prejudice was not particularly argued before the court on June 28, 2013. However, in the main, the court would have intuitively recognized that a third party having a claim against the directors and officers would be prejudiced by the continuation of the stay and no corresponding prejudice was asserted by the directors and officers in terms of discontinuing the stay.

66 To put it another way, no evidence was presented upon which the court could have exercised its discretion in terms of continuing the extraordinary remedy of preventing actions being brought against Great Basin's directors and officers in the changed circumstances at play in June 2013.

67 The directors and officers place considerable reliance on the reasoning and results found in *Sutherland v. Reeves,* 2014 BCCA 222. The court in that case had appointed a receiver, not to liquidate assets to pay debt, but to wind down the business and affairs of Tangerine, a limited partnership. Mr. Sutherland and Mr. Reeves, the main participants in the limited partnership, had substantial disputes concerning Tangerine's affairs. A stay of proceedings was imposed "in respect of" Tangerine and its property (as defined). Later still, Mr. Sutherland filed an action against Mr. Reeves alleging fraud in relation to the cancellation of shares in the general partner company and termination of a management services agreement. The Court of Appeal found that the interpretation of the stay of proceedings found in the receivership order should have prevented the filing of the later action.

68 While the analysis of the Court of Appeal is of some assistance on this application, I consider that the unique circumstances found in *Sutherland* do not support a similar result here in that they provided an entirely different context in which to interpret a very different receivership order.

69 Firstly, the definition of "Property" in the receivership order in *Sutherland* was stated by the court to be "undeniably broad" in that it referred to the "business, affairs, undertaking and assets" of Tangerine, which appears to have been operating as a business: para. 35. This expansive definition was clearly intended to encompass the entire business activities of Tangerine which had become dysfunctional by reason of the relationship of Mr. Sutherland and Mr. Reeves. The broader terms of "business" and "affairs" at issue in *Sutherland* are not found in the Receivership Order, consistent with the lack of business activity of Great Basin and the intention to simply liquidate assets to pay debt.

70 Secondly, it was evident that, although Mr. Sutherland had not named Tangerine as a defendant in his later action, his allegations were, in substance, about the infighting that had led to the receivership order in the first instance. Further, the relief sought included that relating to the shareholdings in Tangerine. The court found that Mr. Sutherland's action inherently involved the affairs and business of Tangerine, or was "in respect of" Tangerine: para. 36.

71 Thirdly, the Court also found that Mr. Sutherland was obviously trying to do indirectly what he had been prevented from doing directly. His later action was the same as had been previously pled even before the receivership order and, as such, the order was characterized to capture such allegations: para. 37.

72 What can be inferred from the decision in *Sutherland* is that the court was attempting to bring order to a complex corporate situation which was chaotic and hamstrung by fighting between the parties. Mr. Sutherland was attempting to thwart that objective and his action had the potential to negatively affect the efforts of the receiver in dealing with the assets and business. In that sense, the objective behind the receivership order was more akin to the situation addressed by the Initial Order. Here, by the time of the Receivership Order, order had been achieved and the overall objective was to empower the Receiver, not the directors and officers, to continue the liquidation process.

73 What does resonate from the decision in *Sutherland*, but by way of distinction, is the court's conclusion that Mr. Sutherland's later action threatened to disturb the receivership process: para. 48. In contrast, there was no evidence at the time of the hearing on June 28, 2013 that the stay of proceedings in favour of the officers and directors was needed to protect the receivership process.

74 On a final note, the court in *Sutherland* noted that Mr. Sutherland was only being prevented from bringing his action until the end of the receivership process: para. 50. By that time, the salutary effect of the stay would have been achieved and there would have been no longer any need to prejudice Mr. Sutherland by its terms.

75 Similarly, here, the salutary effect of the stay in favour of Great Basin's directors and officers ended upon the granting of the Receivership Order.

Conclusion

76 I declare that the stay of proceedings in paragraph 12 of the Receivership Order does not apply to the Action for the above reasons. The Applicant Creditors are awarded their costs of the application as against the directors and officers on Scale B.

S.C. FITZPATRICK J.

TAB 10

CITATION: MPX International Corporation, 2022 ONSC 4348
COURT FILE NO.: CV-22-684542-00CL
DATE: 2022-08-03

SUPERIOR COURT OF JUSTICE - ONTARIO

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 MPX INTERNATIONAL CORPORATION, BIOCANNABIS PRODUCTS LTD., CANVEDA INC., THE CING-X CORPORATION, SPARTAN WELLNESS CORPORATION, MPXI ALBERTA CORPORATION, MCLN INC., AND SALUS BIOPHARMA CORPORATION

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Sean Zweig, Mike Shakra and Thomas Gray*, for the Applicant

Kyle Plunkett and Sam Babe, for the proposed Monitor, KSV Restructuring Inc.

Kenneth Kraft and Sara-Ann Wilson for the proposed DIP Lender

Alex Moore, for the Debenture Trustee

HEARD and DETERMINED: July 25, 2022

REASONS: August 3, 2022

ENDORSEMENT

INTRODUCTION

[1] At the conclusion of the hearing, the Applicants were granted relief under the CCAA with reasons to follow. These are the reasons.

[2] MPX International Corporation ("MPXI"), BioCannabis Products Ltd. ("BioCannabis"), Canveda Inc. ("Canveda"), The CinG-X Corporation ("CinG-X"), Spartan Wellness Corporation ("Spartan"), MPXI Alberta Corporation ("MPXI Alberta"), MCLN Inc. ("MCLN"), and Salus BioPharma Corporation ("Salus BioPharma") (each individually, an "Applicant", and collectively, the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") and the issuance of an order (the Initial Order")

[3] MPXI is a reporting issuer listed on the Canadian Securities Exchange. It wholly-owns each of the other Applicants, and wholly-owns or has an interest in several other non-Applicant affiliates (each subsidiary of MPXI individually a "Subsidiary" and together the "Subsidiaries",

and collectively with MPXI, the "Company"). Through its Subsidiaries, it is involved in cannabis production and resale, management consulting for cannabis companies, and cannabis education.

[4] The Applicants are in a liquidity crisis and are not able to meet their obligations as they become due. Absent the approval of the interim financing proposed to be made available under the DIP Loan (as defined below), the Company will not be able to fund its next payroll scheduled to be paid on July 29, 2022. The Applicants believe that this CCAA proceeding is in the best interests of their stakeholders.

[5] The Applicants submit that the relief sought in the Initial Order is limited to what is reasonably necessary to allow the Applicants to maintain the *status quo* and continue operations in the ordinary course during the initial 10-day stay of proceedings (the "Stay of Proceedings"). The Applicants intend to return to this Court for additional relief necessary to advance the CCAA proceedings at a hearing to be scheduled prior to the expiration of the Stay of Proceedings (the "Comeback Hearing").

FACTS

[6] The facts underlying this Application are more fully set out in the affidavit of Jeremy Blumer, sworn July 25, 2022 (the "Initial Affidavit"). All capitalized terms used but not defined herein have the meanings ascribed to them in the Initial Affidavit.

[7] All of the Applicants are Canadian companies. MPXI is the ultimate parent company, and all of the other Applicants are wholly-owned by MPXI. Each of the Applicants is incorporated under the *Business Corporations Act*, R.S.O. 1990, c. B.16 (Ontario) (the "OBCA"), the *Business Corporations Act* (Alberta), RSA 2000, c B-9 (the "ABCA") or the *Canada Business Corporations Act*, RSC 1985, c C-44 (the "CBCA").

[8] MPXI was incorporated under the OBCA by articles of incorporation dated October 17, 2018. At the time of its incorporation, MPXI was a subsidiary of MPX Bioceutical Corporation ("MPX Bio"). It was incorporated in order to effect a plan of arrangement (the "Arrangement") among MPXI, MPX Bio and iAnthus Capital Holdings Inc. under the *Business Corporations Act* (British Columbia), SBC 2002, c 57.

[9] The Canadian cannabis "plant-touching" operations of the Company are conducted through Canveda, which was incorporated under the CBCA. Canveda is a licensed cultivator, processor, and seller under the Cannabis Act, and maintains a fully constructed 12,000 square foot facility located in Peterborough, Ontario (the "Canveda Facility").

[10] Spartan, a CBCA company, and MCLN, an OBCA company, are both in the business of telehealth and cannabis education. Other than MPXI Alberta, which was incorporated under the ABCA, all of the remaining Applicants (BioCannabis, CinG-X, and Salus Biopharma) were incorporated under the OBCA. None of these Applicants currently have any material business, assets, or operations.

[11] Aside from the Applicants, MPXI has partial interests in certain Canadian entities. MPXI holds approximately 50% of the common shares and warrants of Salus International Management Ltd. ("Salus International"), an OBCA company. Salus International controls voting shares representing over 97% of the votes of a Thai corporation, Salus Bioceutical (Thailand) Co., Ltd. ("Salus Bioceutical"). The Applicants contend that Salus Bioceutical is a key and valuable asset for MPXI, and its continued operations will be important for the Applicants to successfully restructure their affairs and maximize value for their stakeholders.

[12] MPXI also holds a minority interest in Prime Pharmaceutical Corporation, which controls another subsidiary. Because MPXI is not involved in the business or operations of these companies, neither are Applicants or Non-Applicant Stay Parties.

[13] The other Non-Applicant Stay Parties are registered in Australia, Lesotho, Malta, Switzerland, South Africa, Thailand, and the United Kingdom. Notwithstanding that these parties are not Applicants, the Applicants believe that it is critical to the best interests of the Applicants and their stakeholders to extend the benefits of the Stay of Proceedings to the Non-Applicant Stay Parties.

[14] MPXI is a multinational diversified cannabis company in the business of developing and operating assets across the international cannabis industry with an emphasis on cultivating, manufacturing and marketing products which include cannabinoids as their primary active ingredient.

[15] Canveda is licensed to produce, sell, and export cannabis. The Canveda Facility produces high quality cannabis flower, and Canveda holds the following licenses:

(a) a license issued by Health Canada to produce, sell, and export all categories of authorized Canadian cannabis products, including topicals, extracts and edibles;

(b) a license issued by the Canada Revenue Agency authorizing Canveda to purchase excise stamps for the purposes of collecting and remitting excise duty on cannabis products;

(c) a license issued by the Alberta Gaming, Liquor & Cannabis Commission authorizing Canveda to market cannabis products in Alberta; and

(d) a license issued by the Saskatchewan Liquor and Gaming Authority authorizing Canveda to supply cannabis to Saskatchewan from its Peterborough location.

[16] MPXI owns several medicinal and recreational cannabis brands and products that are produced and distributed by Canveda across the Provinces of Alberta, British Columbia, Ontario, and Saskatchewan.

[17] Two of MPXI's Subsidiaries – Spartan and MCLN – focus on telehealth and cannabis education.

[18] The remainder of the Applicants do not have material assets or operations.

[19] Aside from the Applicants, the Company has material assets, including certain facilities and licenses, through the following businesses:

[20] Salus International, which is registered under the OBCA, provides design, planning, financing, training, and on-going operational support to cannabis initiatives, partnerships, and joint ventures in southeast Asia.

[21] Salus Bioceutical is a joint venture between Salus International and certain Thai investors, and Salus International controls over 97% of the votes of Salus Bioceutical. Salus Bioceutical is involved in the cultivation, processing and distribution of high-quality, EU-GMP compliant, medical-grade cannabis products such as CBD distillate, isolate powder, and water-soluble isolate for the medical community in Thailand.

[22] Salus Bioceutical is a Subsidiary with assets and operations into which the Company has invested financial and other resources. The Applicants contend that it is critical for the Company that Salus Bioceutical be able to continue its operations without disruption.

[23] The Company also has operations in Switzerland, South Africa, and Malta. In Switzerland, Holyworld SA is a wholly-owned Subsidiary that leases a laboratory that can produce up to 30kg of distillate per month. Holyworld SA has struggled with cash flow resulting in material unpaid liabilities.

[24] In South Africa, MPXI indirectly holds an 80% interest through another Subsidiary in First Growth Holdings (Pty) Ltd. ("First Growth"). First Growth is licensed to cultivate and export cannabis at a facility it leases, and it is expected that the biomass produced from the First Growth Facility will primarily support the Company's operations in Malta.

[25] The Company's operations in Malta are conducted mainly through MPXI Malta Operations Ltd. ("Malta Operations"), a company in which MPXI holds at least 75% of the voting shares, and Alphafarma Operations Ltd. ("Alphafarma"), a company wholly-owned by Malta Operations through MPXI Malta Property Limited. Alphafarma recently obtained EU-GMP Certification, as well as a License for the Production of Cannabis for Medicinal and Research Purposes.

[26] As at March 31, 2022, the Company had total consolidated assets with a book value of approximately $47,133,302, and liabilities with a book value of approximately $37,244,120. The Applicants expect to have only approximately $169,196 cash on hand at the close of business today, and are facing an urgent liquidity crisis.

[27] MPXI has closed multiple tranches of a private placement offering (the "Offering") of units (the "Units") of MPXI. Each Unit consists of one 12% secured convertible debenture of MPXI

(the "Debentures", and the holders of the Debentures the "Debentureholders") in the principal amount of US$1,000, as well as certain common share purchase warrants.

[28] MPXI has struggled to make interest payments under the Debenture Indenture. MPXI failed to make interest payments on the Coupon Date on: March 31, 2021; September 30, 2021; December 31, 2021; and March 31, 2022. After each of these dates, waivers of the event of default provision related to the payment of interest were granted by Debentureholders. In other cases, MPXI has satisfied the payment of interest through the issuance of additional Units.

[29] MPXI has also obtained short-term financing pursuant to a series of loans (the "Bridge Loans") through which the lenders converted the principal owing into Units in the Offering on terms favourable to the lenders. As of July 21, 2022, the total face value of the principal of outstanding convertible debentures is US$19,281,000. There are no outstanding Bridge Loans because they were all converted to Units.

[30] MPXI's obligations in respect of the Debentures are secured by the following:

(a) a general security agreement dated June 30, 2020 securing all of the present and after-acquired property of MPXI; and

(b) a pledge agreement dated June 30, 2020 by MPXI pledging all of the shares it holds of BioCannabis, Canveda, Holyworld SA, MCLN, MPX Australia Pty. Ltd., MPXI Alberta, MPXI Malta Holding Limited, MPXI Malta Operations Limited, MPXI UK Limited, Salus BioPharma, Spartan, CinG-X. MPXI also later deposited its shares in Salus International with the trustee of the Debenture Indenture.

[31] The Debenture Indenture is guaranteed by BioCannabis, Canveda, Holyworld SA, MCLN, MPX Australia Pty Ltd, MPXI Alberta, MPXI UK, MPXI Malta Operations Limited, Salus BioPharma, Spartan and CinG-X pursuant to a guarantee agreement dated June 30, 2020, as well as MPXI Malta Holding Limited pursuant to a separate guarantee agreement with the same date. Each of these parties other than Holyworld SA executed general security agreements in favour of the trustee of the Debenture Indenture.

[32] In addition to the obligations owing in relation to the Debentures, Canveda has also assigned a term deposit as security in favour of Alterna Savings and Credit Union Ltd. ("Alterna") in the amount of $40,000, which amount relates to a letter of credit issued by Alterna.

[33] As of July 20, 2022, Canveda had non-current accounts payable of $789,565.86, Spartan had non-current accounts payable of $126,409.49, and MPXI had non-current accounts payable of $799,635.98.

[34] The Applicants also have employee liabilities. The aggregate payroll for the Company is:

(a) MPXI – approximately $90,000/month;

(b) Canveda – approximately $92,000/month;

(c) Spartan – approximately $79,000/month; and

(d) International (Non-Applicant Stay Parties) – approximately $155,150/month.

[35] In addition, the Applicants are parties to several leases, including in respect of the head office of the Company in Toronto, an operational office in Ottawa, and the Canveda Facility, certain of which are not current.

[36] The Applicants are also in arrears in respect of certain tax obligations, including approximately $503,302 in excise tax arrears.

[37] The Company also engages in intercompany borrowing, through which parent companies lend funds to their subsidiaries, and MPXI has advanced unsecured loans to several of its Subsidiaries. Certain Non-Applicant Stay Parties have other material unsecured liabilities. This includes a promissory note pursuant to which First Growth is a borrower in the amount of up to US$500,000. This loan is now payable and has been put to MPXI, as permitted by its terms. Finally, certain of the Applicants are also defendants in ongoing litigation.

[38] The Applicants have struggled with cash flow since the onset of the COVID-19 pandemic, and their cash position is currently not sufficient to meet their obligations as they come due. They submit that the urgency of this application stems from the need for the Applicants to access financing to meet their ongoing and future payroll obligations and maintain business operations in order to preserve and maximize value while preventing enforcement action by certain contractual counterparties.

[39] Pursuant to a term sheet executed July 25, 2022 (the "DIP Term Sheet"), certain of the Debentureholders holding approximately 52% of the outstanding Debentures have agreed to provide the Applicants, as borrowers, with a super-priority, non-revolving credit facility up to a maximum principal amount of $2.67 million (the "DIP Loan"). The DIP Loan will bear interest at 12% per annum, and also includes a commitment fee equal to 2% of the overall value of the DIP Loan. The funds will be advanced by certain initial Debentureholders listed on Schedule D of the DIP Term Sheet, and all Debentureholders will have an opportunity to participate in the DIP Loan based on their pro-rata share of Debentures held (the Debentureholders that participate in the DIP Loan, the "DIP Lenders"). The DIP Loan will be guaranteed by many of the Non-Applicant Stay Parties.

[40] The DIP Loan is conditional, among other things, upon the granting of a priority charge in the amount of $1.2 million over the Property in favour of the DIP Lenders to secure the amounts borrowed under the DIP Loan.

[41] The Applicants contend that the amount of the DIP Loan to be funded during the Stay of Proceedings (up to $1.2 million) is only that portion that is necessary to ensure the continued operation of the Applicants' business in the ordinary course for the next 10 days.

[42] The rest of the DIP Loan is made up of US$500,000 that will be loaned by the Applicants to Salus International to fund the immediate operational needs of Salus Bioceutical. The Applicants contend that these proceeds are immediately necessary to ensure Salus Bioceutical's continued operations and will provide urgently required working capital to be used to pay for employee salaries, supplies, and raw goods for processing.

[43] It is a condition precedent to the first advance under the DIP Loan that all head office staff be terminated with the exception of those employee(s) who are retained with the DIP Lenders' consent on such terms as the DIP Lenders' consent to. The DIP Loan is subject to other customary covenants, conditions precedent, and representations and warranties made by the Applicants.

[44] It is proposed that KSV Restructuring Inc. will act as Monitor in these CCAA Proceedings (in such capacity, the "Proposed Monitor").

ISSUES

[45] The issue to be considered on this application is whether to grant the proposed form of Initial Order, specifically whether:

(a) each of the Applicants is a "debtor company" to which the CCAA applies;

(b) the Stay of Proceedings should be granted in favour of the Applicants;

(c) the Stay of Proceedings should be extended to the Non-Applicant Stay Parties;

(d) the Court should approve the proposed DIP Loan and grant the DIP Lenders' Charge (as defined below);

(e) the Administration Charge (as defined below) should be granted;

(f) the Directors' Charge (as defined below) should be granted;

(g) the Applicants should be entitled to make certain pre-filing payments with the consent of the Monitor and the DIP Lenders; and

(h) MPXI should be relieved of any obligation to call and hold its annual general meeting of shareholders (the "AGM") until further Order of this Court.

ANALYSIS AND LAW

[46] The CCAA applies in respect of a "debtor company or affiliated debtor companies" whose liabilities exceed $5 million.

[47] The Applicants collectively have over $5 million in debt. As of July 21, 2022, MPXI had indebtedness of approximately US$19,281,000 pursuant to the Debentures, and this debt is guaranteed by each of the other Applicants.

[48] I am satisfied that each of the Applicants is insolvent and is a "debtor company" as defined in the CCAA and that the CCAA applies to the Applicants.

[49] The Applicants contend that they require the Stay of Proceedings to prevent potential enforcement action by certain contractual counterparties.

[50] The Applicants submit that granting the Stay of Proceedings is in the best interests of the Applicants and their stakeholders, meets the statutory requirements, and is appropriate.

[51] I accept this submission.

[52] This Court has authority to extend the Stay of Proceedings to the Non-Applicant Stay Parties pursuant to s. 11 and 11.02(1) of the CCAA, which allow the court to make an initial order on any terms that the court may impose. In doing so, courts have looked at factors including whether the subsidiaries of the CCAA applicants had guaranteed the applicants' secured loans; whether the non-applicants were deeply integrated into the applicants' business operations; and whether the claims against the non-applicants are derivative of the primary liability of the applicants. (See: *Lydian International Limited (Re)*, 2019 ONSC 7473; *Sino-Forest Corporation (Re)*, 2012 ONSC 2063 at paras 5, 18, and 31; *Canwest Global Communications Corp. (Re)*, [2009] OJ No 4286 (Ont. Sup. Ct. J.) (Commercial List) (*Canwest Global*) at paras 28-29; and *Target*, supra at paras 49-50).

[53] In this case, I am satisfied that these factors weigh in favour of extending the Stay of Proceedings to the Non-Applicant Stay Parties. Many of the Non-Applicant Stay Parties are guarantors for the Debentures, the primary debt of the Applicants. Further, the Non-Applicant Stay Parties are highly integrated into the business of the Company, and are all either wholly-owned or controlled by the ultimate parent company, MPXI. In addition, an extension of the stay to the Non-Applicant Stay Parties will prevent uncoordinated realization and enforcement attempts from being made in different jurisdictions, and thereby prevent immediate loss of value for the Applicants' stakeholders. Therefore, in my view, it is reasonable to extend the Stay of Proceedings to the Non-Applicant Stay Parties.

[54] The Applicants intend to seek approval of a sales and investment solicitation process (the "SISP") at the Comeback Hearing. The extension of the Stay of Proceedings to the Non-Applicant Stay Parties, which the Applicants believe hold material value, is required in order to give comfort to potential bidders in the SISP that enforcement actions against the Non-Applicant Stay Parties will be stayed and that value in these entities will be preserved during the period in which the SISP is conducted. Without the benefit of the Stay of Proceedings, the Applicants' ability to market and sell their interests in the Non-Applicant Stay Parties and their respective assets would be compromised given the lack of stability that would exist.

[55] Subsection 11.2(5) requires that this Court be satisfied, after considering all of the facts and circumstances in the case before it, that the interim financing sought to be approved is "reasonably necessary" for continued operations in such circumstances.

[56] The Applicants submit that the DIP Loan is limited to what is strictly necessary for the continued operations of the Applicants until the Comeback Hearing; the requirement in subsection 11.2(5) is satisfied. Much of the total DIP Loan must be used during the 10 days before the Comeback Hearing. These amounts have been carefully scrutinized by the Proposed Monitor and the DIP Lenders, each of which agree that these amounts are required.

[57] The DIP Lenders' Charge will not secure obligations incurred prior to the CCAA Proceedings, and the amount proposed to be funded is limited to the amount necessary to continue ordinary course operations prior to the Comeback Hearing. The Applicants submit the DIP Lenders' Charge sought on this application is only for the amount to be accrued in the 10-day period preceding the Comeback Hearing.

[58] The Applicants submit that the following factors support approval of the DIP Loan and the DIP Lenders' Charge:

(a) the Applicants are facing an urgent liquidity crisis. The Company will be unable to fund its next payroll or meet its commitments to its suppliers. The only way in which these obligations can be met is through the proposed DIP Loan. Any loss of important contracts or employees would be devastating to the Applicants' business;

(b) the proposed DIP Loan is necessary to maintain the ongoing business and operations of the Applicants;

(c) the proposed DIP Loan will preserve the value and going concern operations of the Company's business by ensuring the continued operations of the key business segments, which is in the best interests of the Applicants and their stakeholders;

(d) the DIP Lenders require the DIP Lenders' Charge to provide the DIP Loan;

(e) the amount of the proposed DIP Loan is appropriate having regard to the Applicants' cash-flow statement and the amount that is proposed to be funded prior to the Comeback Hearing is only the portion necessary to keep the Applicants operating in the ordinary course of business during that time;

(f) the cash flow projections demonstrate that debtor-in-possession financing is urgently required to provide the Applicants with the required liquidity for continued business operations in the ordinary course;

(g) the Proposed Monitor believes the economic terms of the DIP Loan are consistent with comparable CCAA proceedings; and

(h) the Proposed Monitor is supportive of the proposed DIP Loan and creditors of the Applicants will not be prejudiced as a result of its approval.

[59] The Applicants submit that approval of the proposed DIP Loan and the DIP Lenders' Charge is appropriate in the circumstances, consistent with the terms of the CCAA, reasonably necessary in order to enable the continued operation of the Applicants' business in the ordinary course, and in the best interests of the Applicants and their stakeholders – including the employees of the Applicants who are intended to be paid in the ordinary course from the proposed DIP Loan.

[60] I am satisfied that the DIP Loan and the DIP Lenders' Charge are appropriate and they are approved.

[61] The Applicants also seek an Administration Charge in the amount of $300,000 (the "Administration Charge") to secure the professional fees and disbursements of the Proposed Monitor, along with its counsel and the Applicants' counsel, incurred prior to, on, or subsequent to the date of the Initial Order, incurred at their standard rates and charges.

[62] Section 11.52 of the CCAA expressly provides the Court with the jurisdiction to grant an administration charge.

[63] The Applicants submit that it is appropriate for this Court to exercise its jurisdiction and grant the Administration Charge, given that:

(a) the Applicants' business is highly regulated and subject to numerous statutory and regulatory restrictions and requirements;

(b) the beneficiaries of the Administration Charge have the requisite knowledge with respect to those regulations and have, and will continue to, contribute to these CCAA Proceedings and assist the Applicants with their business;

(c) each proposed beneficiary of the Administration Charge is performing distinct functions and there is no duplication of roles;

(d) the proposed beneficiaries of the Administration Charge have no retainers, either because none was ever provided or the small retainers have been exhausted;

(e) no amounts from the initial advance under the DIP Loan will be used to pay the proposed beneficiaries of the Administration Charge;

(f) the quantum of the proposed Administration Charge is fair and reasonable;

(g) the proposed DIP Lenders support the Administration Charge; and

(h) the Proposed Monitor is supportive of the Administration Charge.

[64] I am satisfied that the Administrative Charge should be granted.

[65] The Applicants are seeking a Directors' Charge in the amount of $145,000 (the "Directors' Charge") to secure the indemnity of their directors and officers for liabilities they may incur during the CCAA Proceedings.

[66] Section 11.51 of the CCAA affords the Court the jurisdiction to grant the Directors' Charge. This Court has held that the purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities that could be incurred during the restructuring.

[67] The Applicants submit it is appropriate in these circumstances for this Court to exercise its jurisdiction and grant the Directors' Charge, given that:

(a) the directors and officers have indicated their continued service and involvement in these CCAA Proceedings is conditional upon the granting of the Directors' Charge;

(b) applicable insurance policies available to the Directors and Officers may provide insufficient coverage, and is contemplated to be cancelled in any event in order to conserve cash;

(c) the Directors' Charge applies only to the extent that the directors and officers do not have coverage under another directors and officers' insurance policy;

(d) the Directors' Charge would only cover obligations and liabilities that the Directors and Officers may incur after the commencement of the CCAA Proceedings and does not cover wilful misconduct or gross negligence;

(e) the Applicants require the active and committed involvement of certain directors and officers in order to continue business operations in the ordinary course;

(f) the amount of the Directors' Charge is reasonable in the circumstances and is limited to the potential exposure during the initial 10-day period; and

(g) the Proposed Monitor is supportive of the Directors' Charge.

[68] I am satisfied that the Directors' Charge should be granted.

[69] To preserve normal course business operations, the Applicants are seeking authorization in the Initial Order to make certain pre-filing payments, including payments for pre-filing goods or services supplied to the Applicants if, with the consent of the Proposed Monitor and the DIP Lenders, such expenses were incurred in the ordinary course of business and consistent with existing policies and procedures.

[70] The Applicants submit that they require the continued supply of integral goods and services from their key vendors and service providers during these CCAA proceedings to maintain ordinary course operations. The Applicants' ability to operate their business in the normal course is dependent on their ability to obtain an uninterrupted supply of goods and services. The Applicants will require the consent of the Proposed Monitor and the DIP Lenders in connection with any payments on account of pre-filing obligations. Both the Proposed Monitor and the DIP Lenders are supportive of the relief. In these circumstances, I am satisfied that this specific relief is appropriate in the circumstances.

[71] MPXI's AGM was recently rescheduled to July 29, 2022, which is the last date that MPXI is permitted to hold the AGM under applicable corporate and securities laws. I am satisfied it is not in the best interests of the restructuring for the Applicants to hold the AGM as scheduled.

[72] This Court has the jurisdiction to order that an annual meeting need not be called until further order of the Court, and Courts have frequently exercised their jurisdiction under the CCAA to permit public debtor companies to postpone their annual meeting pending further order of the Court.

[73] The Applicants submit that it would be an unnecessary distraction and unwarranted expense for MPXI to hold an AGM in the circumstances where it is insolvent and the equity value of MPXI is suspect at best. (see: *Sears Canada Inc. et al*, Initial Order, Court File No. CV-17-11846-00CL, July 22, 2017 at para 54; *Canwest Global*, supra note 56*; Cline Mining Corporation (Re)*, 2014 ONSC 6998 (*Cline Mining*)).

[74] I am satisfied that the postponement of the AGM will not prejudice any stakeholder and it is just and appropriate to allow for the postponement of MPXI's AGM.

DISPOSITION

[75] In my view, it is appropriate to grant the Initial Order, which has been signed.

Chief Justice G.B. Morawetz

Date: August 3, 2022

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 MPX INTERNATIONAL CORPORATION, BIOCANNABIS PRODUCTS LTD., CANVEDA INC., THE CING-X CORPORATION, SPARTAN WELLNESS CORPORATION, MPXI ALBERTA CORPORATION, MCLN INC., AND SALUS BIOPHARMA CORPORATION

Court File No.: CV-22-00684542-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

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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 MPX INTERNATIONAL CORPORATION, BIOCANNABIS PRODUCTS LTD., CANVEDA INC., THE CING-X CORPORATION, SPARTAN WELLNESS CORPORATION, MPXI ALBERTA CORPORATION, MCLN INC., AND SALUS BIOPHARMA CORPORATION

Court File No. CV-22-00684542-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

MONITOR'S SECOND REPORT

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