Clerk's Stamp

COURT/ESTATE FILE NUMBER	24-2878531
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER SECTION 50.4(1) OF NILEX INC. AND IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3, AS AMENDED
APPLICANT	NILEX INC.
DOCUMENT	**BENCH BRIEF OF NILEX INC.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTIES FILING THIS DOCUMENT	BLAKE, CASSELS & GRAYDON LLP 3500, 855 – 2nd Street S.W. Calgary, AB T2P 4J8 Attention: Kelly Bourassa / Alexia Parente Telephone: 403-260-9697 Facsimile: 403-260-9700 E-mail: kelly.bourassa@blakes.com / alexia.parente@blakes.com File Ref.: 99580/8

PART I - INTRODUCTION

1. This bench brief is provided in support of an application (the "**Application**") filed by Nilex Inc. (the "**Company**") before the Court of King's Bench of Alberta (the "**Court**").

2. The Application is for an order, among other things:

    (a) extending the time by which the Company may file a proposal to its creditors pursuant to section 50.4(9) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (**BIA**);

    (b) granting an administration charge (the "**Administration Charge**") as security for the payment of professional fees and disbursements incurred and to be incurred by counsel for the Company, KSV Restructuring Inc. (the "**Proposal Trustee**") and the Proposal Trustee's counsel (collectively, the "**Administrative Professionals**");

    (c) approving the Company's ability to continue to use the Cash Management System (as defined below) currently in place or any similar alternative cash management system, and granting a lender priority charge (the "**Lender Priority Charge**") in respect of post-filing advances of credit by the Company's senior secured creditor, Canadian Imperial Bank of Commerce ("**CIBC**");

    (d) granting a charge in favour of the Company's directors and officers (the "**D&O Charge**") to secure the Company's obligations to indemnify them for obligations and liabilities they may be subject to in carrying out their duties in the NOI Proceeding (as defined below);

    (e) approving the key employee retention plan (the "**KERP**") as described in the First Report of the Proposal Trustee dated October 31, 2022 (the "**First Report**"), and granting a charge (the "**KERP Charge**") to secure all obligations owed to employees pursuant to the KERP;

    (f) approving the Company's ongoing sale process (the "**Sale Process**"), and authorizing and directing the Company to continue implementing and performing the Sale Process;

    (g) directing the Clerk of the Court to release to the Company certain funds which have been or may subsequently be deposited with the Clerk (the "**Garnished Funds**")

pursuant to actions taken by the judgment creditor in Court file no. 1903-07838 (the "**Watt Action**") and directing any person who has received a garnishee summons directing it to pay funds to the Clerk of the Court, to pay any such funds to the Company; and

(h) sealing confidential appendix "1" (the "**Confidential Appendix**") to the First Report,

3. Capitalized terms used and not otherwise defined herein have the meanings ascribed to them in the Affidavit of Jeff Allen, sworn October 31, 2022 (the "**First Allen Affidavit**").

PART II – FACTS

4. The facts relevant to the Application are set out in detail in the Allen Affidavit. A summary of the key facts as they relate to the relief requested in the Application is set out in the following section.

A. <u>Background</u>

5. The Company has been operating in the geosynthetics industry providing civil environmental products and technologies since 1977. The Company provides environmental solutions that are used in road building, erosion and sediment control, water management and containment.[1]

6. The Company's registered office is in Calgary, and it leases its head office premises in Edmonton. It also operates from four other leased premises located in Calgary, Saskatoon, Surrey and Toronto.[2]

7. Due to the COVID-19 pandemic, rising material costs, supply chain issues and slow downs in the western Canadian construction industry, the Company has incurred significant and recurring losses since fiscal year 2020.[3]

[1] First Report at para 1.0-1.
[2] First Report at para 1.0-2.
[3] First Report at para 2.1-1.

B. The Credit Agreement and Fulcrum Loan

8. The Company and Nilex USA, as borrowers, and CIBC, as lender, entered into a credit agreement dated June 1, 2018, whereby CIBC made available to the Company a revolving credit facility and term loan (as amended, the "**Credit Agreement**").[4] The Company's obligations under the Credit Agreement are secured pursuant to, among other things, a general security agreement among the Company, Nilex USA and CIBC dated June 1, 2018.[5]

9. The Company's primary bank account is CIBC. The Company manages a centralized cash management system wherein accounts receivable are paid into accounts, including blocked accounts, with CIBC and applied to the CIBC loan facilities (the "**Cash Management System**"). The Company anticipates continuing to use the existing Cash Management System, including the existing bank accounts and arrangements in place with CIBC throughout the NOI Proceeding.[6]

10. CIBC is presently owed approximately $17.85 million in principal and interest, plus costs and expenses pursuant to the Credit Agreement (the "**CIBC Debt**") and absent the Forbearance Agreement (defined below) is not required to continue to advance any further credit facilities to the Company.[7]

11. In addition to the Credit Agreement, the Company and its predecessor by amalgamation have granted certain promissory notes to PEF 2010 Nilex Investment Limited Partnership ("**Fulcrum**"), which obligations are secured by general security agreements in favour of Fulcrum.[8] As of September 30, 2022, the amount owing by the Company to Fulcrum was approximately $44,981,769 plus interest and costs which continue to accrue.[9]

12. The Company, Nilex USA, CIBC, and Fulcrum have entered into a subordination and postponement agreement dated June 1, 2018, whereby, among other things, Fulcrum agreed

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[4] First Allen Affidavit at para 24; Exhibit "D" to the First Allen Affidavit.
[5] *Ibid* at para 26; Exhibit "E" to the First Allen Affidavit.
[6] *Ibid* at para 25.
[7] *Ibid* at para 28.
[8] *Ibid* at para 29; Exhibits "J", "K" and "L" to the First Allen Affidavit.
[9] *Ibid* at paras 29-31; Exhibit "M" to the First Allen Affidavit.

to subordinate the priority of the secured indebtedness owing to it by the Company to the indebtedness owing to CIBC by the Company.[10]

C. Events Leading to the Filing of the NOI

13. The Credit Agreement provides that the CIBC Debt becomes immediately due and payable on the occurrence of an Event of Default (as defined in the Credit Agreement). The Company is in default under the Credit Agreement and, accordingly, on September 15, 2022, CIBC issued a Notice of Intention to Enforce Security pursuant to Section 244 of the BIA on the Company (the "**Demand Letter**").[11]

14. On October 17, 2022, CIBC and the Company entered into a forbearance agreement (the "**Forbearance Agreement**"), which among other things, allows the Company, subject to the terms and conditions of the Forbearance Agreement, to continue to access the credit facilities under the Credit Agreement and to continue to use the Cash Management System to meet its working capital requirements while the Company carries out the Sale Process and the NOI Proceeding. CIBC has also agreed to temporarily forbear from enforcing on its rights, subject to the terms and conditions of the Forbearance Agreement.[12]

15. Pursuant to the Forbearance Agreement, CIBC will apply the Company's post-filing receipts against the Company's pre-filing indebtedness and new advances by CIBC to the Company during the NOI Proceeding are to be secured by the Lender Priority Charge.[13]

16. On October 27, 2022, the Company filed a notice of intention to make a proposal ("**NOI**") under section 50.4(1) of the BIA. The NOI was filed in consultation with the Company's professional advisors in order to try to restructure or sell the Company as a going concern for the benefit of its stakeholders and after identifying no viable alternative process due to the Company's insolvency (the "**NOI Proceeding**").[14]

17. The statutory 10-day notice period under section 244 of the BIA, in respect of the Notice of Intention to Enforce Security issued by CIBC on September 15, 2022, expired prior to the filing

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[10] First Allen Affidavit at para 32.

[11] *Ibid* at para 35; Exhibit "N" to the First Allen Affidavit.

[12] *Ibid* at paras 39-40; Exhibit "O" to the First Allen Affidavit.

[13] First Report at para 9.2-2.

[14] First Allen Affidavit at para 4.

of the NOI. Therefore, in accordance with section 69(2)(b) of the BIA, the statutory stay of proceedings under section 69 of the BIA does not apply to CIBC.

D. Civil Enforcement Proceedings Against the Company

18. The Company is a judgment debtor in respect of two actions, including the Watt Action. The judgment creditor in the Watt Action issued garnishee summons to CIBC and to certain customers of the Company directing that any amounts owing to the Company be paid to the Clerk of the Court.[15]

19. On September 30, 2022, October 7, 2022 and October 21, 2022, the Court issued notices of proposed distributions of certain of the Garnished Funds, advising of the Court's intention to make distributions to the judgment creditor in the Watt Action and Wilson Action.[16] Counsel to CIBC has provided notices of objection to the proposed distributions of the Garnished Funds pursuant to section 101(1)(d) of the *Civil Enforcement Act*, RSA 2000, c C-1 ("**CEA**"), on the basis that the Garnished Funds were subject to CIBC's priority security interest. On October 26, 2022, CIBC filed an application in the Watt Action returnable November 18, 2022, in respect of these objections.[17]

E. The Sale Process

20. The Company has been conducting the Sale Process since January 2022 with the assistance of Valitas Capital Partners ("**Valitas**").[18] A summary of the Sale Process and its results to date is set out in the First Report. Ultimately, 16 out of 400 prospective purchasers were selected as strong acquisition candidates and nine of these parties confirmed an interest in the opportunity. These nine prospective purchasers together with three additional strategic parties have performed due diligence.[19]

21. Valitas has been re-engaging with prospective purchasers since August 2022 and facilitating due diligence. Several non-binding letters of intent were submitted in late September 2022.[20] On or around October 8, 2022, Valitas sent a letter to interested parties requiring them to

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[15] First Allen Affidavit at para 42.

[16] *Ibid* 45; Exhibits "Q", "R" and "S" to the First Allen Affidavit.

[17] *Ibid* at para 46; Exhibits "T" and "U" to the First Allen Affidavit.

[18] First Report at para 4.0-1.

[19] First Report at para 4.0-1.

[20] First Report at para 4.0-3.

submit binding offers by November 8, 2022, in the form of a template asset purchase agreement.[21] The prospective purchasers continue to perform further due diligence.[22]

22. The Sale Process milestones are:

Milestone	**Deadline**
Selection of Successful Bid/Bid Deadline	November 8, 2022
Execution of Purchase Agreement	November 15, 2022
Sale Approval Order	November 25, 2022
Closing	November 30, 2022

PART III - ISSUES

23. The following issues are before the Court:

(a) Should the Court extend the time to file a proposal?

(b) Should the Court grant the Administration Charge?

(c) Should the Court approve the ongoing use of the Cash Management System and grant the Lender Priority Charge?

(d) Should the Court grant the D&O Charge?

(e) Should the Court approve the KERP and grant the KERP Charge?

(f) Should the Court approve the Sale Process?

(g) Should the Court approve the release of the Garnished Funds and direct any person who has received a garnishee summons to pay any such funds to the Company?

(h) Should a sealing order be granted in respect of the Confidential Appendix?

[21] First Report at para 4.0-4.

[22] First Report at para 4.0-5.

PART IV - LAW AND ANALYSIS

A. The Court should extend the time to file a proposal

24. The Company filed its NOI on October 27, 2022. Pursuant to section 50.4(8) of the BIA, the Company is required to file a proposal with the official receiver within 30 days (the "**Proposal Period**") unless it otherwise obtains an extension of time from the Court.

25. Pursuant to section 50.4(9) of the BIA, before the expiry of the Proposal Period, a debtor in a proposal proceeding may apply to the Court for an order extending the time to file a proposal by a maximum of 45 days. The BIA provides that for a Court to grant an extension, the Court must be satisfied that:

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

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

    (c) no creditor would be materially prejudiced if the extension being applied for were granted.[23]

26. To advance a proposal to present to the Company's creditors, the Company is seeking a 45-day extension from the current deadline of November 26, 2022 (to and until January 10, 2023). The factors set out above are met in the circumstances of this case:

    (a) the Company is insolvent and acting in good faith and with due diligence in pursuing the Sale Process and the restructuring process;

    (b) the extension will enhance the Company's ability to make a viable proposal following the completion of the Sale Process; and

    (c) the extension should not adversely affect or prejudice any group of creditors as the Company is projected to have funding to pay post-filing service and supplies.[24]

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[23] *BIA, supra* note 1 at section 50.4(9); *Castle Rock Research Corp v AGC Investments Ltd*, 2012 ABQB 208 at para 8.

[24] First Allen Affidavit at para 61; First Report at para 10.0-1.

27. Based on the above considerations, the Company submits that the Court should extend the Proposal Period to and until January 10, 2023.

B. <u>The Administration Charge should be granted</u>

28. The Company seeks the Administration Charge to secure the fees of the Administrative Professionals in connection with the NOI Proceeding, in priority to existing creditors of the Company.

29. Section 64.2 of the BIA confers on this Court the statutory jurisdiction to grant the Administration Charge:

> ***64.2(1) Court may order security or charge to cover certain costs:*** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of
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> (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
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> (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division;
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> […]
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> **64.2(2) Priority:** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

30. Administration charges have been approved in BIA proposal proceedings, where, as in the present case, the participation of insolvency professionals is necessary to ensure a successful restructuring under the BIA.[25]

31. The Company submits that granting the Administration Charge to provide the Administration Professionals with security for payment of their services is necessary to effect the completion of the Sale Process and the restructuring of the Company as a going concern. The Proposal Trustee is supportive of the Administrative Charge.[26]

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[25] *Re Mustang GP Ltd,* 2015 ONSC 6562 at para 33 [*Mustang*].

[26] First Allen Affidavit at paras 63, 66.

C. The Cash Management System and Lender Priority Charge should be approved

32. The Company seeks a Lender Priority Charge in the principal amount of $20,000,000, plus interest, fees and expenses, in favour of CIBC, to secure post-filing advances under the CIBC credit facilities and approval to continue to use its existing Cash Management System.

33. Subsection 50.6(1) of the BIA provides this Court with the jurisdiction to order a charge to secure interim financing advanced to a debtor on notice to the secured creditors who are likely to be affected by the charge in an amount that the court considers appropriate.[27] Such a charge may not "secure an obligation that exists before this order is made."[28] Pursuant to subsection 50.6(3), the charge may "rank in priority over the claim of any secured creditor."[29]

34. When determining whether to grant a charge securing interim financing, subsection 50.6(5) of the BIA requires the Court to consider, among other things:

    (a) the period during which the debtor is expected to be subject to proceedings under this Act;
    (b) how the debtor's business and financial affairs are to be managed during the proceedings;
    (c) whether the debtor's management has the confidence of its major creditors;
    (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
    (e) the nature and value of the debtor's property;
    (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
    (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.[30]

35. The circumstances in which courts have granted interim financing and a charge securing the same reflect the remedial purposes of the BIA's proposal provisions – to "avoid the social and economic losses resulting from liquation of an insolvent company" and create conditions for

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[27] *BIA, supra* note 1 at section 50.6(1).

[28] *Ibid.*

[29] *Ibid* at section 50.6(1), s.50.6(3).

[30] *Ibid* at section 50.6(5); *Re Eureka 93 Inc at al,* 2020 ONSC 1482 at para 16 [*Eureka*]; *Re PJ Wallbank Manufacturing Co*, 2011 ONSC 7641.

preserving the *status quo* while an insolvent company has the opportunity to establish a proposal.[31]

36. Absent the Lender Priority Charge, CIBC is not willing to permit the Company continued access to the existing credit facilities or to continue to use the Cash Management System for its liquidity needs.[32]

37. The Proposal Trustee is in favour of this Court granting the Lender Priority Charge as the Company would not be able to continue to operate without access to the CIBC credit facilities and no commercially reasonable lender can be expected to provide the financing urgently required by the Company on a subordinate basis to existing obligations.[33]

38. There is precedent for the relief sought by the Company in respect of the Lender Priority Charge. Specifically, in *Re Comark Inc,* the Court approved an interim financing facility pursuant to which the company was required to deposit all cash from operations into a blocked account to pay down the pre-filing revolver facility.[34] The Court recognized that it was cash generated from Comark's post-filing operations that was being used to reduce the pre-filing indebtedness, not the post-filing advances of the interim lender. Accordingly, the interim financing charge was found not to be securing any pre-filing obligations.[35]

39. In *Re Performance Sports Group Ltd,* the Ontario court noted that:

> Section 11.2(1) of the [*Companies' Creditors Arrangement Act* ("**CCAA**")] provides that security for a DIP facility may not secure an obligation that existed before the order authorizing the security was made. *The effect of this provision is that advances under a DIP facility may not be used to repay pre-filing obligations*. In this case, the ABL DIP Facility is a revolving facility. Under its terms, receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility. The applicants submit that in this case, the ABL DIP Facility preserves the pre-filing status quo by upholding the relative pre-stay priority position of each secured creditor. By requiring that the PSG Entities only use post-filing cash receipts to pay down the accrued balance under the revolving credit facility, the ABL DIP Lenders are in no better position with respect to the priority of their pre-filing debt relative to other

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[31] *Re Ted Leroy Trucking Ltd,* 2010 SCC 60, (*sub nom Century Services Inc v AG of Canada)* at paras 15 and 60 [*Century Services*]. *Mustang*, *supra* note 25 at para 28; *Eureka, supra* note 30 at para 24.

[32] First Allen Affidavit at para 70.

[33] First Report at para 9.2(3).

[34] *Re Comark Inc,* 2015 ONSC 2010 at para 19.

[35] *Ibid* at para 28.

> creditors. I accept that no advances under the ABL DIP Facility will be used to pay pre-filing obligations [emphasis added].[36]

40. While these cases are in the context of CCAA proceedings, the Supreme Court of Canada has noted that "[w]hile insolvency proceedings may be governed by different statutory schemes, they share some commonalities."[37] The Supreme Court of Canada has further noted that Canadian commercial insolvency law is not codified in one exhaustive statute; instead, the BIA and CCAA restructuring schemes exist in parallel and are part of an integrated whole.[38] The provisions of the BIA relating to interim financing are sufficiently similar to the CCAA provisions; therefore, the Applicant submits that it is appropriate for this Court to rely on these authorities to approve the ongoing use of the Cash Management System and grant the Lender Priority Charge.

41. In this case, the Lender Priority Charge is particularly appropriate given that CIBC is not subject to the stay of proceedings pursuant to section 69(2)(b) of the BIA and, absent the Forbearance Agreement, CIBC is entitled to enforce on its security. Without the continued access to the CIBC credit facilities and use of the Cash Management System, the Company will not be able to complete the Sale Process for the benefit of all stakeholders. The Proposal Trustee is supportive of the Lender Priority Charge and its proposed quantum.[39]

D. <u>The D&O Charge should be granted</u>

42. Section 64.1 of the BIA confers on the Court the statutory jurisdiction to grant the D&O Charge during proposal proceedings:

> ***64.1(1) Security or charge relating to director's indemnification:*** On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.
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> [...]

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[36] *Re Performance Sports Group Ltd,* 2016 ONSC 6800 at para 22.

[37] *Century Services, supra* note 31 at para 22.

[38] *Ibid* at paras 13, 24.

[39] First Allen Affidavit at para 72.

> ***64.1(2) Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

43. The purpose of the D&O Charge is to:

    (a) keep directors and officers in place during the restructuring by providing them with protection against liabilities they incur during the process, and in addition avoid a potential destabilization of the business;[40] and

    (b) enable a debtor company to benefit from an experienced board of directors and senior management.[41]

44. In *Colossus*, Justice Wilton-Siegel approved the request for a charge to indemnify directors and officers pursuant to section 64.1 of the BIA, and in so doing, highlighted the fact that the continued involvement of the remaining directors and officers was critical to the operations of the company during its proposal proceedings. Additionally, Justice Wilton-Siegel noted that a D&O Charge was appropriate given that limitations and exclusions of the directors' and officers' insurance policies which created uncertainty as to coverage of all potential claims.[42]

45. Similarly, in *Mustang,* Justice Rady approved a D&O charge, and determined it was warranted for the following reasons:

    (a) the D&O charge is available only to the extent that the directors and officers do not have coverage under existing policies or to the extent that those policies are insufficient;

    (b) it is required only in the event that a sale is not concluded and a wind-down of the facility is required;

    (c) there is a possibility that the directors and officers whose participation in the process is critical, may not continue their involvement if the relief were not granted;

    (d) the proposal trustee and the proposed DIP lender are supportive.[43]

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[40] *Re Northstar Aerospace Inc,* 2013 ONSC 1780 at para 29 [*Northstar*]; *Re Canwest Global Communications Corp,* 2009 CarswellOnt 6184 at para 48.

[41] *Northstar, supra* note 40 at para 92.

[42] *Re Colossus Minerals Inc,* 2014 ONSC 514 at paras 16-21.

[43] *Mustang, supra* note 25 at para 35.

46. In the present case, the directors and officers of the Company have the benefit of insurance policies in respect of their potential liabilities; however, coverage under such insurance policies is subject to several exclusions and limitations and there is a potential for insufficient coverage in respect of potential director and officer liabilities. The D&O Charge will provide certainty to the directors and officers with respect to potential personal liability if they continue in their current capacities in the context of the NOI Proceeding.[44]

47. The D&O Charge would only be in respect of the amounts not covered by the Company's directors' and officers' insurance policy and is necessary to ensure to ongoing involvement of the directors and officers. The Proposal Trustee is supportive of the proposed amount of the D&O Charge.[45]

E. <u>The KERP should be approved</u>

48. Key employee retention plans are designed to retain employees that are crucial to the management and operations of the debtor company, keeping them employed at a time when they are likely to seek alternative employment due to the company's financial distress.[46]

49. Although neither the BIA nor the CCAA specifically contemplate priority charges to secure employee retention plans, approvals of the same have routinely been sought and granted in both CCAA and BIA proceedings. The factors to be considered when determining whether to approve an employee retention plan and the associated priority charge have been expressed as follows:

    (a) whether the proposal trustee supports the employee retention plan;

    (b) whether the employees who are the subject of the employee retention plan are likely to pursue other employment opportunities in its absence;

    (c) whether the subject employees are truly "key employees" whose continued employment is critical to the successful restructuring of the debtor;

    (d) whether the quantum of the proposed retention payments is reasonable; and

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[44] First Allen Affidavit at para 75.

[45] *Ibid* at paras 76, 78.

[46] *Re Danier Leather Inc,* 2016 ONSC 1044 at para 72 [*Danier*].

(e) the business judgment of the board of directors regarding the necessity of the employee retention plan.[47]

50. The factors set out above are met in the circumstances of this case:

(a) The Proposal Trustee supports the KERP and the KERP Charge and the Company's senior secured lenders, CIBC and Fulcrum do not oppose the terms of the KERP;

(b) The terms of the KERP are reasonable and critical to ensuring that certain of the Company's key employees continue in their employment with the Company and to incentivize executives as they continue with the Sale Process and a restructuring in the NOI Proceeding.[48]

Priority of BIA Charges

51. The Company requests that the priorities of the Administration Charge, the Lender Priority Charge, the D&O Charge and the KERP Charge (collectively, the "**BIA Charges**"), as among them, be as follows:

(a) First – the Administration Charge;

(b) Second – the Lender Priority Charge;

(c) Third – the D&O Charge; and

(d) Fourth – the KERP Charge.

52. The Court may order, pursuant to section 50.6(3), 64.1(2), and 64.2(2) of the BIA, that the charges rank in priority over the claim of any secured creditor of the debtor.

F. The Sale Process should be approved

53. When considering approval of a sale process under the proposal provisions of the BIA, this Court has stated the following four factors should be considered:

(a) Is a sale transaction warranted at this time?

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[47] *Danier, supra note 46* at paras 72-78.

[48] First Allen Affidavit at para 80; First Report at para 7.0-5.

(b) Will the sale benefit the whole "economic community"?

(c) Do any of the debtor's creditors have a bona fide reason to object to a sale of the business?

(d) Is there a better viable alternative?[49]

54. The Court is authorized to approve a sale in a proposal proceeding under section 65.13 of the BIA, which sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business.

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the proposal trustee approved the process leading to the proposed sale or disposition;

(c) whether the proposal trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.[50]

55. Having regard to the above considerations, the Applicant submits that the Sale Process should be approved because:

(a) it is in the best interests of the Company and its stakeholders to complete the Sale Process;

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[49] *Danier, supra* note 46 at paras 23-25; *Mutsang, supra* note 25 at paras 37-38.

[50] *BIA, supra* note 1 at section 65.13; *Danier, supra note* at paras 34-35.

(b) there is a strong likelihood that a value maximizing transaction can be completed in the near term as a result of the Sale Process, and the transaction will provide the opportunity to preserve the jobs for a significant number of the Company's employees;[51] and

(c) the Sale Process is designed to be flexible, such that any proposed transaction structure will be considered, whether it be for shares or assets of the Company, or any combination of these transactions.[52]

56. The Company submits that preserving the going concern value of the Company's business through the NOI Proceeding will likely achieve a better long-term result for the Company's stakeholders as compared to a forced liquidation of the Company's assets, and the Company has the support of the Proposal Trustee and its primary secured lenders.

G. <u>The Garnished Funds should be released to the Company</u>

57. The Company seeks an order of the Court directing the Clerk of the Court to distribute the Garnished Funds to the Company and allowing the Company to apply such funds in accordance with the provisions of the Credit Agreement and the Cash Management System. Further, the Company seeks an order directing any person who has received a garnishee summons to pay any such funds to the Company.

58. The Garnished Funds are subject to the security granted in favour of CIBC and Fulcrum, in priority to the judgment creditors in the Watt Action.[53]

59. In Alberta, the Clerk of the Court distributes funds paid into Court pursuant to a garnishee summons according to the priorities outlined in Part 11 of the CEA. Sections 96(3) and (4) of the CEA state:

> ***96(3)*** Nothing in this Part other than section 102 shall be construed so as to prejudice any right to money that is based on an interest, including a security interest or an encumbrance,
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> (a) in the money, or

[51] First Report at para 4.0-7.

[52] First Allen Affidavit at para 49.

[53] First Allen Affidavit at para 87; First Report at para 6.0(5).

(b) in the property from which the money is derived,

where that interest has priority over the relevant writs.

96(4) Where a distributing authority receives money in which a person has a security interest or other interest that has priority over the claims of enforcement creditors, the distributing authority must pay to that person the money to which the person is entitled, and any money paid under this section does not form part of a distributable fund.

60. This Court has determined that pursuant to section 96(4) of the CEA, garnished funds subject to a registered security agreement with a charging clause, like the Garnished Funds, do not constitute distributable funds and must be returned by the Clerk to the priority creditor.[54]

61. It is a "general principle of law that a garnishee summons can only attach moneys due or accruing due to a debtor subject to all such charges, liens and equities as the same was subject to in the hands of the debtor."[55] In other words, CIBC, as the senior secured creditor with a perfected security interest, has distribution priority to the Garnished Funds.

62. In this case, notice of CIBC's priority security interest in the Garnished Funds was given to the Clerk of the Court and the judgment creditors in the Watt Action.[56] The Garnished Funds continue to be held by the Clerk of the Court and CIBC's security interest takes priority over any distributions to unsecured judgment creditors.

63. A direction to the Clerk of the Court for the Garnished Funds to be distributed to the Company to be applied in accordance with the provisions of the Credit Agreement and the Cash Management System is consistent with the distribution scheme in the CEA, as the Garnished Funds are ultimately applied to reduce the amounts outstanding to CIBC as first priority secured creditor, and it is beneficial to the Company and its stakeholders, as it will reduce the overall interest charges payable by the Company to CIBC.

64. CIBC's counsel provided legal opinions to CIBC and Fulcrum with respect to the validity and enforceability of their security interests. Subject to customary qualifications, assumptions and limitations included therein, CIBC's counsel is of the opinion that CIBC and Fulcrum hold a valid charge and security interest against the CIBC Debt[57]. Both CIBC and Fulcrum and have

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[54] *600500 Alberta Ltd v Oil Sands One Ltd*, 2015 ABQB 772 at para 19; *Stone Sapphire Ltd v Transglobal Communications Group Inc*, 2008 ABQB 575 at paras 18, 34 and 36.

[55] *Yorkshire Trust Co v 304231 Alberta Ltd*, 1986 CarswellAlta 137 (Alta QB) at para 9. [56] First Allen Affidav it at para 46; Exhibits "T" and "U" to the First Allen Affidavit.

[57] First Report at 2.3.1-4 and 2.3.2-2

agreed to support the distribution of the Garnished Funds to the Company to be applied as set out above[58].

H. <u>The Sealing Order Should be Granted in Respect of the Confidential Appendix</u>

65. In *Sierra Club of Canada v Canada (Minister of Finance)* ("**Sierra Club**"), the Supreme Court of Canada (the "**SCC**") held that courts should exercise their discretion to grant sealing orders where (i) the order is necessary to prevent a serious risk to an important interest, including a commercial interest; and (ii) the salutary effects of the order outweigh its deleterious effects.[59]

66. In *Sherman Estate v Donovan* ("**Sherman Estate**"), the SCC applied the test from *Sierra Club* differently, without altering its essence. As provided in *Sherman Estate*, an applicant requesting a court to exercise discretion in a way that limits the open court presumption must establish that:

    (a) court openness poses a serious risk to an important public interest;

    (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

    (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.[60]

67. Although the SCC was considering issues of personal privacy in *Sherman Estate*, it noted in citing *Sierra Club* that the term "important interest" can capture a broad array of public objectives including commercial interests.[61]

68. The Confidential Appendix contains a summary of the KERP which includes private, personal information about the Company's employees' compensation.

69. The Company has provided the Notice to Media of Application to Restrict Access in accordance with the Notice to the Profession issued May 9, 2018.

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[58] The First Allen *Affidavit* at para 92.

[59] *Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 41 at para 53.

[60] *Sherman Estate v Donovan,* 2021 SCC 25 at para 38.

[61] *Ibid* at para 41.

70. In the circumstances, the sealing of the Confidential Appendix is the least restrictive means to maintain the confidentiality of this commercially sensitive and confidential information and is unlikely that any stakeholder will be prejudiced if the KERP information is sealed.[62]

PART V - CONCLUSION

71. For the reasons set out above, the Company requests that this Honourable Court grant the relief sought in the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7th day of November, 2022

Blake, Cassels & Graydon LLP
Lawyers for the Applicant

[62] The First Report at para 7.1-2.

LIST OF AUTHORITIES

LEGISLATION	
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended
2.	*Civil Enforcement Act*, RSA 2000, c C-1
CASE LAW	
3.	*600500 Alberta Ltd v Oil Sands One Ltd*, 2015 ABQB 772
4.	*Castle Rock Research Corp v AGC Investments Ltd*, 2012 ABQB 208
5.	*Re Canwest Global Communications Corp,* 2009 CarswellOnt 6184
6.	*Re Colossus Minerals Inc,* 2014 ONSC 514
7.	*Re Comark Inc,* 2015 ONSC 2010
8.	*Re Danier Leather Inc,* 2016 ONSC 1044
9.	*Re Eureka 93 Inc at al,* 2020 ONSC 1482
10.	*Re Mustang GP Ltd,* 2015 ONSC 6562
11.	*Re Northstar Aerospace Inc,* 2013 ONSC 1780

12.	*Re Performance Sports Group Ltd,* 2016 ONSC 6800
13.	*Re PJ Wallbank Manufacturing Co,* 2011 ONSC 7641
14.	*Re Ted Leroy Trucking Ltd,* 2010 SCC 60, (*sub nom Century Services Inc v AG of Canada)*
15.	*Sherman Estate v Donovan,* 2021 SCC 25
16.	*Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 41
17.	*Stone Sapphire Ltd. v. Transglobal Communications Group Inc., 2008 ABQB 575*
18.	*Yorkshire Trust Co v 304231 Alberta Ltd*, 1986 CarswellAlta 137 (Alta QB)

TAB 1

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

s 50.4

Currency

50.4

50.4(1)Notice of intention

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

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

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

50.4(2)Certain things to be filed

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

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

50.4(3)Creditors may obtain statement

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

50.4(4)Exception

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

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

50.4(5)Trustee protected

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

50.4(6)Trustee to notify creditors
Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

50.4(7)Trustee to monitor and report
Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

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

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

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

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

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

50.4(8)Where assignment deemed to have been made
Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

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

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

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

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

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

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

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

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

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

50.4(11)Court may terminate period for making proposal
The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

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

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

Judicial Consideration (1)

Currency
Federal English Statutes reflect amendments current to June 22, 2022
Federal English Regulations Current to Gazette Vol. 156:13 (June 22, 2022)

End of Document

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

R.S.C. 1985, c. B-3, s. 50.6

s 50.6

Currency

50.6

50.6(1)Order — interim financing

On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) 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 debtor'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 debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

50.6(2)Individuals

In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

50.6(3)Priority

The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

50.6(4)Priority — previous orders

The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

50.6(5)Factors to be considered

In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the debtor is expected to be subject to proceedings under this Act;

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

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

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

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

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

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

Amendment History
2005, c. 47, s. 36; 2007, c. 36, s. 18

Currency
Federal English Statutes reflect amendments current to June 22, 2022
Federal English Regulations Current to Gazette Vol. 156:13 (June 22, 2022)

End of Document

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

R.S.C. 1985, c. B-3, s. 64.1

s 64.1

Currency

64.1

64.1(1)Security or charge relating to director's indemnification

On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

64.1(2)Priority

The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

64.1(3)Restriction — indemnification insurance

The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

64.1(4)Negligence, misconduct or fault

The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Amendment History

2005, c. 47, s. 42; 2007, c. 36, s. 24

Currency

Federal English Statutes reflect amendments current to June 22, 2022
Federal English Regulations Current to Gazette Vol. 156:13 (June 22, 2022)

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

R.S.C. 1985, c. B-3, s. 64.2

s 64.2

Currency

64.2

64.2(1)Court may order security or charge to cover certain costs

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

64.2(2)Priority

The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

64.2(3)Individual

In the case of an individual,

(a) the court may not make the order unless the individual is carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

Amendment History

2005, c. 47, s. 42; 2007, c. 36, s. 24

Currency

Federal English Statutes reflect amendments current to June 22, 2022
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Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

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

s 65.13

Currency

65.13

65.13(1)Restriction on disposition of assets

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

65.13(2)Individuals

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

65.13(3)Notice to secured creditors

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

65.13(4)Factors to be considered

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

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

65.13(5)Additional factors — related persons

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

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

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

65.13(6)Related persons
For the purpose of subsection (5), a person who is related to the insolvent person includes

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

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

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

65.13(7)Assets may be disposed of free and clear
The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

65.13(8)Restriction — employers
The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

65.13(9)Restriction — intellectual property
If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

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

Currency
Federal English Statutes reflect amendments current to June 22, 2022
Federal English Regulations Current to Gazette Vol. 156:13 (June 22, 2022)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part IV — Property of the Bankrupt (ss. 67-101.2)
Stay of Proceedings

R.S.C. 1985, c. B-3, s. 69

s 69.

Currency

69.

69(1)Stay of proceedings — notice of intention

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

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

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

(i) the insolvent person's insolvency,

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

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

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

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

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

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

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

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

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

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

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

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

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

69(2)Limitation

The stays provided by subsection (1) do not apply

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

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

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

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

69(3)Limitation

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

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

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

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

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

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

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

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

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

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

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

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

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

Note:

S.C. 2000, c. 30, s. 145(3), provides as follows:

(3) Subsections (1) [which replaced s. 69(1)(c) and added s. 69(1)(d)] and (2) [which replaced s. 69(3)] are deemed to have come into force on November 30, 1992 except that, before June 30, 1996, the references in subparagraphs 69(1)(c)(ii) and (3)(a)(ii) and (b)(ii) of the Act, as enacted by subsections (1) and (2), to the Employment Insurance Act *shall be read as references to the* Unemployment Insurance Act.

Note:

S.C. 1997, c. 12, s. 62(2), provides as follows:

(2) Application
Subsection (1) [S.C. 1997, c. 12, s. 62(1), which re-enacted s. 69(2)(b) and added (c)] applies to proceedings under Part III that are commenced after that subsection comes into force [September 30, 1997].

Amendment History
1992, c. 27, s. 36(1); 1997, c. 12, s. 62(1); 2000, c. 30, s. 145; 2005, c. 3, s. 12; 2005, c. 47, s. 60; 2007, c. 36, s. 34; 2009, c. 33, s. 23; 2012, c. 31, s. 416

Judicial Consideration (4)

Currency
Federal English Statutes reflect amendments current to June 22, 2022
Federal English Regulations Current to Gazette Vol. 156:13 (June 22, 2022)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part XI — Secured Creditors and Receivers (ss. 243-252)

R.S.C. 1985, c. B-3, s. 244

s 244.

Currency

244.

244(1)Advance notice

A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

244(2)Period of notice

Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

244(2.1)No advance consent

For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

244(3)Exception

This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

244(4)Idem

This section does not apply where there is a receiver in respect of the insolvent person.

Amendment History

1992, c. 27, s. 89(1); 1994, c. 26, s. 9

Currency

Federal English Statutes reflect amendments current to June 22, 2022
Federal English Regulations Current to Gazette Vol. 156:13 (June 22, 2022)

End of Document

TAB 2

Alberta Statutes
Civil Enforcement Act
Part 11 — Distributions (ss. 94-103)

R.S.A. 2000, c. C-15, s. 96

s 96. Applies to all distributions

Currency

96.Applies to all distributions
96(1) All money that

(a) is realized through writ proceedings, or

(b) is otherwise received by an agency as a result of the existence of an enforcement debt,

must be dealt with in accordance with this Part.

96(2) Where property that is bound by a writ is sold in distress proceedings under a landlord's right of distraint or in proceedings to enforce a security interest or encumbrance that has priority over the writ,

(a) if the property is sold by a distributing authority, this Part applies to any portion of the proceeds that exceeds the amount

(i) for which the landlord is entitled to distrain, or

(ii) that is necessary to discharge the security interest or encumbrance,

and

(b) if the property is sold pursuant to a judicial sale or by a person other than a distributing authority, any portion of the proceeds in excess of the amount necessary to discharge the security interest or encumbrance shall be paid to an agency.

96(3) Nothing in this Part other than section 102 shall be construed so as to prejudice any right to money that is based on an interest, including a security interest or an encumbrance,

(a) in the money, or

(b) in the property from which the money is derived,

where that interest has priority over the relevant writs.

96(4) Where a distributing authority receives money in which a person has a security interest or other interest that has priority over the claims of enforcement creditors, the distributing authority must pay to that person the money to which the person is entitled, and any money paid under this section does not form part of a distributable fund.

Amendment History
2002, c. 17, s. 1(17)

Currency
Alberta Current to Gazette Vol. 118:11 (June 15, 2022)

End of Document

Alberta Statutes
Civil Enforcement Act
Part 11 — Distributions (ss. 94-103)

R.S.A. 2000, c. C-15, s. 101

s 101. Claims exceed a distributable fund

Currency

101.Claims exceed a distributable fund

101(1) Subject to subsections (1.1) and (1.2), where the amount of the distributable fund is less than the total amount of all eligible claims but is greater than the total amount distributable under section 99(3)(a) to (f), the following applies:

(a) the distributing authority must serve a statement setting out the proposed distribution on the enforcement debtor and on each of the enforcement creditors who have related writs at the time that the statement is given;

(b) if a person on whom a statement was served under clause (a) wishes to object to the proposed distribution of the distributable fund, that person must within 15 days from the day of being served with that statement serve on the distributing authority a written notice of the objection to the distribution;

(c) if an objection has not been made in accordance with clause (b) or any objection that is made is withdrawn,

(i) the statement of proposed distribution is final and conclusive as between all persons on whom the statement was served and the distributing authority, and

(ii) the distributing authority must distribute the fund in accordance with the statement of proposed distribution;

(d) a person who has made an objection in accordance with clause (b) is deemed to have withdrawn the objection unless, within 15 days from the day of serving the notice of objection on the distributing authority, that person

(i) files with the Court, and

(ii) serves on the distributing authority,

an application, returnable not more than 30 days from the day that the application is filed, for an order determining the matter in respect of which the objection was made;

(d.1) a person who has made an objection must, in accordance with the regulations and the *Alberta Rules of Court*, serve the application referred to in clause (d) on the persons interested in the matter;

(e) where an objection has been made in accordance with clause (b), the distributing authority must distribute in accordance with the proposed distribution as much of the fund as will not prejudice the effect of the objection if the objection is upheld by the Court.

101(1.1) Where subsection (1) applies but there is only one eligible claim to which section 99(3)(g) would apply, the distributing authority must immediately distribute the fund in accordance with section 99(3).

101(1.2) Where subsection (1) applies to a distributable fund that consists of money paid under a garnishee summons, the following applies:

(a) a statement of the proposed distribution that is served in accordance with subsection (1)(a) must set out

(i) the proposed distribution of the distributable fund, and

(ii) the method of determining the proportion of any distributable fund produced by the garnishee summons in the future that is to be paid to the instructing creditor and to other enforcement creditors;

(b) a distributing authority that has served a statement of proposed distribution in accordance with clause (a) is not required to serve another statement of proposed distribution in respect of a distributable fund produced by the garnishee summons in the future unless, at the time that the distributable fund is constituted, there are enforcement creditors with related writs who have not previously been served with that statement;

(c) if pursuant to clause (b) a distributing authority does not serve another statement of proposed distribution in respect of a distributable fund, the distributing authority must

(i) distribute the distributable fund as soon as possible after the fund is constituted, and

(ii) send to the enforcement debtor and to each person who receives a portion of the distributable fund a statement showing how the fund has been distributed.

101(2) Where the amount of the distributable fund does not exceed the total amount distributable under section 99(3)(a) to (f), the distributing authority must as soon as possible distribute the fund in accordance with section 99(3).

101(3) Notwithstanding subsections (1.1), (1.2) and (2), where a distributing authority has any doubt regarding the validity or priority of a claim, whether it is a claim of an enforcement creditor or otherwise, against money received by the distributing authority, the following applies:

(a) the distributing authority

(i) must serve a notice to that effect on the person asserting the claim, and

(ii) may serve that notice on any other persons as the distributing authority considers appropriate;

(b) the notice referred to in clause (a) must set out how the distributing authority proposes to distribute the money;

(c) subsection (1)(b) to (e) apply to a notice served under clause (a) as if that notice were a statement served under subsection (1).

Amendment History
2002, c. 17, s. 1(21); 2009, c. 53, s. 2(8)

Currency
Alberta Current to Gazette Vol. 118:11 (June 15, 2022)

End of Document

TAB 3

2015 ABQB 772
Alberta Court of Queen's Bench

600500 Alberta Ltd. v. Oil Sands One Ltd.

2015 CarswellAlta 2259, 2015 ABQB 772, [2016] A.W.L.D. 408, [2016] A.W.L.D. 479, [2016] A.W.L.D. 543, 261 A.C.W.S. (3d) 342, 51 B.L.R. (5th) 126, 85 C.P.C. (7th) 413

600500 Alberta Limited, Plaintiff and Oil Sands One Limited, Defendant

Master J. Farrington, In Chambers

Heard: November 27, 2015
Judgment: December 7, 2015
Docket: Calgary 1401-13958

Proceedings: additional reasons to *600500 Alberta Ltd. v. Oil Sands One Ltd.* (2015), 2015 CarswellAlta 1031, 2015 ABQB 352, J. Farrington, In Chambers Master (Alta. Q.B.)

Counsel: Peter T. Linder, Q.C., for Plaintiff, 600500 Alberta Limited
Allan L. Holme, for Claimant, Charterhouse Capital Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

ADDITIONAL REASONS to decision reported at *600500 Alberta Ltd. v. Oil Sands One Ltd.* (2015), 2015 ABQB 352, 2015 CarswellAlta 1031 (Alta. Q.B.).

***Master J. Farrington, In Chambers*:**

1 This matter was returned to the ordinary chambers list before me on November 27, 2015. It is a continuation of *600500 Alberta Limited v. Oil Sands One Limited*, 2015 ABQB 352 in which I issued a set of preliminary reasons on June 3, 2015. The general background of the application is contained in those reasons. These reasons deal with the merits of the priority dispute.

2 On June 3, 2015 I indicated that further material was necessary in order to have a proper factual background for determination of entitlement to the funds. An affidavit of Sam Hirji was filed June 19, 2015 in accordance with my earlier reasons, and it addresses the outstanding issues.

The Funds

3 600500 Alberta Limited ("600500") obtained a judgment in the amount of $105,996.48 against Oil Sands One Limited ("Oil Sands") on February 13, 2015. It filed a writ of enforcement on February 19, 2015, and it then filed an amended writ of enforcement claiming the $105,996.48 that was owing on February 23, 2015. Pursuant to that amended writ of enforcement, garnishee proceedings were initiated and $105,996.48 was paid into Court to the credit of this action by Canadian Western Bank.

4 A further $39,872.67 was paid into Court by Acme Energy Marketing Limited. No proposed distribution appears to have been issued on the latter funds as there is a note on the Court file indicating that there was no proof of service upon the debtor. These reasons relate to the payment in by Canadian Western Bank.

5 A Consent Order was presented by 600500 and Oil Sands to Master Hanebury for her approval on March 25, 2015 and that Order was granted. 600500 and Oil Sands agreed to open up the default judgment which had been entered against Oil Sands, and they further agreed that the Clerk was to pay to 600500's counsel $87,000 out of the monies held in Court, with the balance of the funds to be paid to Oil Sands' counsel. Upon completion of the payments, the action was said to be discontinued without

costs. I have listened to the recording of the appearance before Master Hanebury, QC and it does not appear that the possibility that there might be other interested creditors was brought to her attention. It was presented as a typical application without notice at the beginning of a morning chambers list.

6 The Clerk proposed a draft distribution in reliance upon the Consent Order. The distribution required objections to be made within 15 days in accordance with section 101(1) (b) of the *Civil Enforcement Act* RSA 2000, c. C-15.

The Objection

7 When the matter came to the attention of Charterhouse Capital Inc. ("Charterhouse") it raised an objection and brought an application before me seeking a declaration that the funds did not form a "distributable fund" under the *Civil Enforcement Act* and that it has priority to the funds.

8 The objection of Charterhouse is based upon section 96(4) of the *Civil Enforcement Act* which provides:

> 96(4) Where a distributing authority receives money in which a person has a security interest or other interest that has priority over the claims of enforcement creditors, the distributing authority must pay to that person the money to which the person is entitled, and any money paid under this section does not form part of a distributable fund.

9 The security agreement is a demand debenture. It has a charging clause and the materials and evidence show proper registration. No argument was made to the effect that the security of Charterhouse was in any way defective or improperly registered. Without more, s. 96(4) of the *Civil Enforcement Act* applies and Charterhouse is entitled to priority to the funds.

The Forbearance Argument

10 600500 raises two arguments in opposition. The first argument is based upon a forbearance agreement between Charterhouse and Oil Sands. The forbearance agreement is in evidence and it declares Oil Sands to have defaulted under its security arrangements with Charterhouse in its preamble. Paragraphs 1 and 3 of the forbearance agreement provide in part:

> 1. For good and valuable consideration, and subject to Section 2 of this Forbearance, Forbearance (sic) and Consent, Charterhouse agrees to: (a) forbear from demanding payment of...the OS1 Indebtedness and in taking any steps to realize upon its Security until May 31, 2015 (the "Payment Date") at which time...the OS1 Indebtedness shall automatically become due and payable...(b) permit...OS1... to continue to operate in the ordinary course of business between the date hereof and the Payment Date...
>
> . . .
>
> 3. This Forbearance and Consent shall not constitute an agreement, waiver or consent to any other event, circumstance, matter or thing and is without prejudice to any of the rights or remedies of Charterhouse...

11 As the Forbearance Agreement also involves other related debtors, only the portions pertinent to this debtor are set out. "OS1" in the forbearance agreement is, of course, Oil Sands.

12 600500 submits that a payment out of Court by agreement with Oil Sands would be a payment in the ordinary course of business to it by Oil Sands that is permitted under the forbearance agreement. It further argues that as Oil Sands was not in default under the forbearance arrangements, it was not in default under its security agreement with Charterhouse.

13 While the forbearance arrangements may well have affected the ability of Charterhouse to commence its own enforcement proceedings as against Oil Sands, they did not operate as a postponement or waiver of the rights of Charterhouse under its security. 600500 is not a party to the forbearance agreement, and it is not entitled to be elevated to a priority position to which it is not otherwise entitled by relying upon the forbearance agreement and any accommodations that Charterhouse may have made toward Oil Sands. Charterhouse wished to give time to Oil Sands to resolve its payment issues and the forbearance arrangements

allowed that to happen. There is nothing in the forbearance agreement to suggest that Charterhouse was waiving its security position in relation to third parties other than for payments in the ordinary course of business.

14 In that regard, it is difficult to conceive as to how a payment to 600500 out of Court funds could be regarded as a payment in the "ordinary course of business". 600500 commenced an action because it was not paid. It then obtained judgement and commenced garnishee proceedings. It then participated in a Court application to obtain payout of the funds. In my view, commencing actions and pursuing enforcement steps are things that one does when payment is not happening in the ordinary course of business. I find that a payment out of the garnishee funds would not be a payment in the ordinary course of business as contemplated by the forbearance agreement.

The Trust Argument

15 600500 also argues that its claim is in fact a trust claim, and that it ought to prevail on that basis. While its Statement of Claim does plead trust obligations on the part of Oil Sands, the judgment that it obtained makes no mention of declarations of trust as against a particular piece of property, or with respect to a particular fund or account such as the Canadian Western Bank account. With respect to the Canadian Western Bank garnishee summons, there is no evidence of tracing, or anything connecting the Canadian Western Bank funds to a specific trust interest held by 600500 in those funds. The garnishee summons indicates an intent on the part of the creditor to attach deposit accounts of Oil Sands at Canadian Western Bank. Deposit accounts would typically hold comingled funds and there is no evidence to the contrary in this case. In addition, the writ of enforcement under which the garnishee monies were attached is a typical unsecured writ of enforcement and the remedy of garnishee proceedings is an unsecured creditor's remedy.

16 While a royalty claim may certainly constitute a trust claim against a particular fund or property when proven, in this case an unsecured remedy was pursued against a deposit account on the basis of a writ of enforcement. With respect, the trust reference is an afterthought. As between a writ of enforcement and properly registered and enforceable security, the security interest prevails by virtue of s. 35 and s. 96(4) of the *Civil Enforcement Act*.

Re-characterization of the Funds

17 Finally, I will address one argument that was not made orally, but was made in Exhibit E to the affidavit of Sam Hirji filed June 19, 2015. It was formulated by counsel for Oil Sands although Oil Sands took no position at the hearing of this application. An argument was made to the effect that since Master Hanebury's Order set aside the default judgement, the funds were no longer writ and enforcement related funds, and instead it was simply a matter of parties settling their differences by paying funds out of Court. The difficulty with that argument is that the funds came into Court as writ related enforcement funds. The rights of parties crystallized insofar as priorities are concerned, and the priorities must be determined based upon what the funds are, not based upon what the parties seeking to make the settlement wish that they were. In fact, if the 600500 judgement is set aside, it is questionable what status it would have to receive funds in Court in the face of registered competing claims in any event. At the very least, any attempt to re-characterize the funds partway through the enforcement process would need to be done upon notice to affected third parties.

Conclusion

18 While no specific application under Rule 9.15 was made to set aside or vary Master Hanebury's Order, I find that the objection process under s. 101 of the *Civil Enforcement Act* is sufficient for me to review the matter and determine priorities. I also believe that had Master Hanebury been made aware of the fact that there was a security interest registered against Oil Sands, she likely would have required that notice be given to the secured party before releasing enforcement funds to an enforcement creditor and the debtor.

19 In all of the circumstances, I grant the relief sought by Charterhouse, namely a declaration that the funds held by the Clerk of the Court in the amount $105,996.48 plus any interest accrued thereon do not form part of a distributable fund. Those funds shall be paid to counsel for Charterhouse. I make no findings on any other funds held in Court to the credit of this action.

20 If the parties wish to speak to costs they may do so at the end of one of my normal morning chambers lists within a reasonable period of time.

Order accordingly.

End of Document

TAB 4

2012 ABQB 208
Alberta Court of Queen's Bench

Castle Rock Research Corp. v. A.G.C. Investments Ltd.

2012 CarswellAlta 576, 2012 ABQB 208, [2012] A.W.L.D. 2139, 217 A.C.W.S. (3d) 17, 94 C.B.R. (5th) 34

In the Matter of the Notice of Intention to make a proposal filed by Castle Rock Research Corporation Under the provisions of the Bankruptcy and Insolvency Act, R.S.C. 1985 c. B-3 as amended

Castle Rock Research Corporation, Applicant and A.G.C. Investments Ltd. And Osman Auction Inc., Respondents

A.G.C. Investments Ltd., Applicants (Cross-Application) and Castle Rock Research Corporations and BDO Canada Limited in its capacity as Trustee under the Notice of Intention to make a proposal, Respondents (Cross-Application)

R. Paul Belzil J.

Heard: March 22, 2012
Judgment: March 28, 2012
Docket: Edmonton BK03 115587

Counsel: Michael McCabe, Q.C. for Applicant
Darren Bieganek, Q.C. for Respondent
Rick Reeson, Q.C. for BDO

Subject: Insolvency

APPLICATION by debtor for extension of time to file proposal to creditors; CROSS-APPLICATION by creditor for declaration that time to file proposal had expired.

***R. Paul Belzil J.*:**

The Applications

1 Castle Rock Research Corporation seeks an order for extending the time within which it must file a Proposal to Creditors. Its main creditor A.G.C. Investments Ltd. has filed a cross-application seeking an order declaring that the time for Castle Rock to file a Proposal to Creditors has expired.

Factual Background

2 Castle Rock filed a Notice of Intention (NOI) to make a proposal to its creditors on February 15, 2012 pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 as amended (*BIA*).

3 On February 28, 2012 Burrows, J. issued an order naming BDO Canada Ltd. as the Interim Receiver of Castle Rock.

4 Pursuant to section 50.4(8) Castle Rock is required to file a proposal to its creditors within 30 days of the filing of a Notice of Intention to make a proposal unless this time is extended pursuant to section 50.4(9). On March 16, 2012 Veit, J. issued a Consent Order extending the deadline for filing of the proposal to March 23, 2012.

5 On March 20, 2012 the Interim Receiver filed a Second Report. Paragraphs 6 to 10 of which read as follows:

6. That since filing the Trustee's Report of March 9, 2012, the Trustee has been provided weekly Monitoring Reports in adherence with the Monitoring Program initiated by the Trustee;

7. That the Debtor and management have been co-operative in addressing queries in relation to the Monitoring Reports which have satisfied the Trustee;

8. That while the Trustee has expressed to the Debtor concerns over the financial reporting system utilized by the Debtor, management indicates that they are prepared to take the necessary steps to implement a suitable financial reporting system;

9. That since filing of the Trustee's Report on March 9, 2012, the Trustee is in receipt of a Business Plan dated March 6, 2012 which provides detailed information about the Company Plan including Profile, Products and Services, Marketing Plan and the Future Direction of the Company. The Trustee has not had an opportunity to review and assess that Business Plan; and

10. That it is the Trustee's opinion that the Debtor is acting in good faith and with due diligence and that the Debtor will be able to make a viable Proposal if an additional extension were granted.

6 The application and cross-application were heard by me on March 22, 2012. Counsel for BDO confirmed that its opinion contained in the Second Report remains unchanged. Counsel for Osman Auction Inc. supports the Castle Rock Application.

7 I undertook to render a decision on March 28 and with the consent of all parties, extended the deadline for filing of the proposal to 4:30 p.m. that day.

Discussion

8 It is common ground that the Court may grant an extension for the filing of a Proposal to Creditors not exceeding 45 days if three requirements outlined in section 50.4(9) are satisfied:

a. The insolvent person has acted, and is acting, in good faith and with due diligence;

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

c. No creditor would be materially prejudice if the extension being applied for were granted.

9 It is also common ground that Castle Rock bears the burden of establishing its entitlement to an extension.

10 As part of its Application, Gautam Rao, President and CEO of Castle Rock swore an affidavit on March 9, 2012 in which he deposed that since the filing of Castle Rock's NOI, it has continued to operate in the ordinary course of business without the necessity for debtor in possession financing.

11 He further deposed that Castle Rock does not anticipate the need for further financing in the course of the proposal proceedings.

12 In the course of argument, counsel for Castle Rock provided two License Agreements both dated February 24, 2012. The first provides for payments to Castle Rock of $600,000.00 together with royalty payments and the second 1.5 million dollars together with royalty payments.

13 In his affidavit Rao also deposed to other pending business opportunities which were not specified and that senior staff within the company are supportive.

14 Finally, he deposed that the company is proceeding in good faith, with due diligence and that no creditor will be prejudiced if an extension were granted.

15 Andrew Clark, the President of A.G.C., deposed in an affidavit that Castle Rock is being mismanaged and that funds are being transferred to a related company in India. He also deposed that no proposal would be acceptable to A.G.C.

16 Clark was questioned on his affidavit and acknowledged that the existence of the related company in India was known to him and indeed the India company is referred to in Castle Rock's financial statements.

17 It is highly significant that the Trustee supports this request for the extension. BDO was appointed by Court Order and as such is acting as an Officer of the Court.

18 It has expressed no concern that Castle Rock is acting in bad faith or without due diligence and if it is suspected that this was the case, it would be duty bound to report this to the Court. The Second Report asserts that Castle Rock will make a proposal.

19 A.G.C. argues that it is suffering material prejudice because Castle Rock is transferring funds to its related company in India.

20 As noted above, this was well known to Clark before he invested in Castle Rock and therefore this cannot constitute material prejudice.

Conclusion

21 I find that Castle Rock has met the burden of establishing that an extension of time for the filing of the proposal to creditors should be granted. The cross-application by A.G.C. is dismissed. Counsel may speak to the terms of the Order granting the extension, including costs.

Application granted; cross-application dismissed.

TAB 5

2009 CarswellOnt 6184
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 6184, [2009] O.J. No. 4286, 181 A.C.W.S. (3d) 853, 59 C.B.R. (5th) 72

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Pepall J.

Judgment: October 13, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Edward Sellers, Jeremy Dacks for Applicants
Alan Merskey for Special Committee of the Board of Directors
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.
Benjamin Zarnett, Robert Chadwick for Ad Hoc Committee of Noteholders
Edmond Lamek for Asper Family
Peter H. Griffin, Peter J. Osborne for Management Directors, Royal Bank of Canada
Hilary Clarke for Bank of Nova Scotia
Steve Weisz for CIT Business Credit Canada Inc.

Subject: Insolvency

APPLICATION for relief pursuant to *Companies' Creditors Arrangement Act.*

***Pepall J.*:**

1 Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act.* [1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

2 The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

3 No one appearing opposed the relief requested.

Backround Facts

4 Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

5 As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

6 Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

7 Canwest Global is a public company continued under the *Canada Business Corporations Act*[2] . It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

8 The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

9 Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

10 In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six occasions. On March 15, 2009, it failed to make an interest payment of US$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to $75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

11 Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of $4.855 billion and total consolidated liabilities of $5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling $2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately $954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by $272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by $253 million or 47%. It reported a consolidated net loss of $1.578 billion compared to $22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by $8 million or 4% in the third quarter of 2009 and operating profit was $21 million compared to $39 million in the same period in 2008.

12 The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

13 On September 15, 2009, CMI failed to pay US$30.4 million in interest payments due on the 8% senior subordinated notes.

14 On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of $75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to $23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of $100 million.

15 Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

16 The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately $634 million were realized. The proceeds were applied to fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of $10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US$393.25 million.

17 In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of $187.3 million and an unsecured promissory note in the principal amount of $430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

18 Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

19 The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a support agreement and term sheet. The recapitalization transaction

contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

20 CMI has agreed to maintain not more than $2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

21 The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of $13.3 million as at the last valuation date and a wind up deficiency of $32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

22 The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

23 I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

24 This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

(a) Threshhold Issues

25 Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*[3] definition and under the more expansive definition of insolvency used in *Stelco Inc., Re*[4]. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

26 Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

27 Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

28 The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

29 While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example *Lehndorff General Partner Ltd., Re* [5] ; *Smurfit-Stone Container Canada Inc., Re* [6] ; and *Calpine Canada Energy Ltd., Re* [7] . In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

30 Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Cadillac Fairview Inc., Re* [8] and *Global Light Telecommunications Inc., Re* [9]

(C) DIP Financing

31 Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;

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

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

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

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

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

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

32 In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

33 Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to $100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately $10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

34 Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is $10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

35 Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

36 For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

37 While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

> (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

38 I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

39 As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to $15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

40 Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

41 The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

42 Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

43 In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

44 The applicants also seek a directors' and officers' ("D &O") charge in the amount of $20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank pari passu with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first $85 million payable under the secured intercompany note.

45 Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

46 I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

47 The proposed Monitor reports that the amount of $20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for $30 million in coverage and $10 million in excess coverage for a total of $40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

48 The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *General Publishing Co., Re* [10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

49 Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of $5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them

50 Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of Canwest Global and the Ad Hoc Committee. The factors enumerated in *Grant Forest Products Inc., Re* [11] have all been met and I am persuaded that the relief in this regard should be granted.

51 The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act*

provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)* [12] provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

52 In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

53 The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

54 CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

55 The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

56 Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

57 Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from $1000 to $5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other meritorious adjustments were also made to the notice provisions.

58 This is a "pre-packaged" restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

59 I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum

is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor's report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

60 Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

Application granted.

Footnotes

1 R.S.C. 1985, c. C. 36, as amended

2 R.S.C. 1985, c.C.44.

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

4 (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal refused 2004 CarswellOnt 2936 (Ont. C.A.).

5 (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]).

6 [2009] O.J. No. 349 (Ont. S.C.J. [Commercial List]).

7 (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.).

8 (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]).

9 (2004), 33 B.C.L.R. (4th) 155 (B.C. S.C.).

10 (2003), 39 C.B.R. (4th) 216 (Ont. S.C.J.).

11 [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]). That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.

12 [2002] 2 S.C.R. 522 (S.C.C.).

End of Document

TAB 6

2014 ONSC 514
Ontario Superior Court of Justice

Colossus Minerals Inc., Re

2014 CarswellOnt 1517, 2014 ONSC 514, 14 C.B.R. (6th) 261, 237 A.C.W.S. (3d) 584

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, As Amended

In the Matter of the Notice of Intention of Colossus Minerals Inc., of the City of Toronto in the Province of Ontario

H.J. Wilton-Siegel J.

Heard: January 16, 2014
Judgment: February 7, 2014
Docket: CV-14-10401-00CL

Counsel: S. Brotman, D. Chochla for Applicant, Colossus Minerals Inc.
L. Rogers, A. Shalviri for DIP Agent, Sandstorm Gold Inc.
H. Chaiton for Proposal Trustee
S. Zweig for Ad Hoc Group of Noteholders and Certain Lenders

Subject: Insolvency

APPLICATION by debtor for various orders under *Bankruptcy and insolvency.*

***H.J. Wilton-Siegel J.*:**

1 The applicant, Colossus Minerals Inc. (the "applicant" or "Colossus"), seeks an order granting various relief under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). The principal secured creditors of Colossus were served and no objections were received regarding the relief sought. In view of the liquidity position of Colossus, the applicant was heard on an urgent basis and an order was issued on January 16, 2014 granting the relief sought. This endorsement sets out the Court's reasons for granting the order.

Background

2 The applicant filed a notice of intention to make a proposal under s. 50.4(1) of the BIA on January 13, 2014. Duff & Phelps Canada Restructuring Inc. (the "Proposal Trustee") has been named the Proposal Trustee in these proceedings. The Proposal Trustee has filed its first report dated January 14, 2014 addressing this application, among other things. The main asset of Colossus is a 75% interest in a gold and platinum project in Brazil (the "Project"), which is held by a subsidiary. The Project is nearly complete. However, there is a serious water control issue that urgently requires additional de-watering facilities to preserve the applicant's interest in the Project. As none of the applicant's mining interests, including the Project, are producing, it has no revenue and has been accumulating losses. To date, the applicant has been unable to obtain the financing necessary to fund its cash flow requirements through to the commencement of production and it has exhausted its liquidity.

DIP Loan and DIP Charge

3 The applicant seeks approval of a Debtor-in-Possession Loan (the "DIP Loan") and DIP Charge dated January 13, 2014 with Sandstorm Gold Inc. ("Sandstorm") and certain holders of the applicant's outstanding gold-linked notes (the "Notes") in an amount up to $4 million, subject to a first-ranking charge on the property of Colossus, being the DIP Charge. The Court has the authority under section 50.6(1) of the BIA to authorize the DIP Loan and DIP Charge, subject to a consideration of the factors under section 50.6(5). In this regard, the following matters are relevant.

4 First, the DIP Loan is to last during the currency of the sale and investor solicitation process ("SISP") discussed below and the applicant has sought an extension of the stay of proceedings under the BIA until March 7, 2014. The applicant's cash flow statements show that the DIP Loan is necessary and sufficient to fund the applicant's cash requirements until that time.

5 Second, current management will continue to operate Colossus during the stay period to assist in the SISP. Because Sandstorm has significant rights under a product purchase agreement pertaining to the Project and the Notes represent the applicant's largest debt obligation, the DIP Loan reflects the confidence of significant creditors in the applicant and its management.

6 Third, the terms of the DIP Loan are consistent with the terms of DIP financing facilities in similar proceedings.

7 Fourth, Colossus is facing an imminent liquidity crisis. It will need to cease operations if it does not receive funding. In such circumstances, there will be little likelihood of a viable proposal.

8 Fifth, the DIP Loan is required to permit the SISP to proceed, which is necessary for any assessment of the options of a sale and a proposal under the BIA. It will also fund the care and maintenance of the Project without which the asset will deteriorate thereby seriously jeopardizing the applicant's ability to make a proposal. This latter consideration also justifies the necessary adverse effect on creditors' positions. The DIP Charge will, however, be subordinate to the secured interests of Dell Financial Services Canada Limited Partnership ("Dell") and GE VFS Canada Limited Partnership ("GE") who have received notice of this application and have not objected.

9 Lastly, the Proposal Trustee has recommended that the Court approve the relief sought and supports the DIP Loan and DIP Charge.

10 For the foregoing reasons, I am satisfied that the Court should authorize the DIP Loan and the DIP Charge pursuant to s. 50.6(1) of the BIA.

Administration Charge

11 Colossus seeks approval of a first-priority administration charge in the maximum amount of $300,000 to secure the fees and disbursements of the Proposal Trustee, the counsel to the Proposal Trustee, and the counsel to the applicant in respect of these BIA proceedings.

12 Section 64.2 of the BIA provides jurisdiction to grant a super-priority for such purposes. The Court is satisfied that such a charge is appropriate for the following reasons.

13 First, the proposed services are essential both to a successful proceeding under the BIA as well as for the conduct of the SISP.

14 Second, the quantum of the proposed charge is appropriate given the complexity of the applicant's business and of the SISP, both of which will require the supervision of the Proposal Trustee.

15 Third, the proposed charge will be subordinate to the secured interests of GE and Dell.

Directors' and Officers' Charge

16 Colossus seeks approval of an indemnity and priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the Notice of Intention (the "D&O Charge"). It is proposed that the D&O Charge be in the amount of $200,000 and rank after the Administration Charge and prior to the DIP Charge.

17 The Court has authority to grant such a charge under s. 64.1 of the BIA. I am satisfied that it is appropriate to grant such relief in the present circumstances for the following reasons.

18 First, the Court has been advised that the existing directors' and officers' insurance policies contain certain limits and exclusions that create uncertainty as to coverage of all potential claims. The order sought provides that the benefit of the D&O Charge will be available only to the extent that the directors and officers do not have coverage under such insurance or such coverage is insufficient to pay the amounts indemnified.

19 Second, the applicant's remaining directors and officers have advised that they are unwilling to continue their services and involvement with the applicant without the protection of the D&O Charge.

20 Third, the continued involvement of the remaining directors and officers is critical to a successful SISP or any proposal under the BIA.

21 Fourth, the Proposal Trustee has stated that the D&O Charge is reasonable and supports the D&O Charge.

The SISP

22 The Court has the authority to approve any proposed sale under s. 65.13(1) of the BIA subject to consideration of the factors in s. 65.13(4). At this time, Colossus seeks approval of its proposed sales process, being the SISP. In this regard, the following considerations are relevant.

23 First, the SISP is necessary to permit the applicant to determine whether a sale transaction is available that would be more advantageous to the applicant and its stakeholders than a proposal under the BIA. It is also a condition of the DIP Loan. In these circumstances, a sales process is not only reasonable but also necessary.

24 Second, it is not possible at this time to assess whether a sale under the SISP would be more beneficial to the creditors than a sale under a bankruptcy. However, the conduct of the SISP will allow that assessment without any obligation on the part of the applicant to accept any offer under the SISP.

25 Third, the Court retains the authority to approve any sale under s. 65.13 of the BIA.

26 Lastly, the Proposal Trustee supports the proposed SISP.

27 Accordingly, I am satisfied that the SISP should be approved at this time.

Engagement Letter with the Financial Advisor

28 The applicant seeks approval of an engagement letter dated November 27, 2013 with Dundee Securities Limited ("Dundee") (the "Engagement Letter"). Dundee was engaged at that time by the special committee of the board of directors of the applicant as its financial advisor for the purpose of identifying financing and/or merger and acquisition opportunities available to the applicant. It is proposed that Dundee will continue to be engaged pursuant to the Engagement Letter to run the SISP together with the applicant under the supervision of the Proposal Trustee.

29 Under the Engagement Letter, Dundee will receive certain compensation including a success fee. The Engagement Letter also provides that amounts payable thereunder are claims that cannot be compromised in any proposal under the BIA or any plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

30 Courts have approved success fees in the context of restructurings under the CCAA. The reasoning in such cases is equally applicable in respect of restructurings conducted by means of proposal proceedings under the BIA. As the applicant notes, a success fee is both appropriate and necessary where the debtor lacks the financial resources to pay advisory fees on any other basis.

31 For the following reasons, I am satisfied that the Engagement Letter, including the success fee arrangement, should be approved by the Court and that the applicant should be authorized to continue to engage Dundee as its financial advisor in respect of the SISP.

32 Dundee has considerable industry experience as well as familiarity with Colossus, based on its involvement with the company prior to the filing of the Notice of Intention.

33 As mentioned, the SISP is necessary to permit an assessment of the best option for stakeholders.

34 In addition, the success fee is necessary to incentivize Dundee but is reasonable in the circumstances and consistent with success fees in similar circumstances.

35 Importantly, the success fee is only payable in the event of a successful outcome of the SISP.

36 Lastly, the Proposal Trustee supports the Engagement Letter, including the success fee arrangement.

Extension of the Stay

37 The applicant seeks an extension for the time to file a proposal under the BIA from the thirty-day period provided for in s. 50.4(8). The applicant seeks an extension to March 7, 2014 to permit it to pursue the SISP and assess whether a sale or a proposal under the BIA would be most beneficial to the applicant's stakeholders.

38 The Court has authority to grant such relief under section 50.4(9) of the BIA. I am satisfied that such relief is appropriate in the present circumstances for the following reasons.

39 First, the applicant is acting in good faith and with due diligence, with a view to maximizing value for the stakeholders, in seeking authorization for the SISP.

40 Second, the applicant requires additional time to determine whether it could make a viable proposal to stakeholders. The extension of the stay will increase the likelihood of a feasible sale transaction or a proposal.

41 Third, there is no material prejudice likely to result to creditors from the extension of the stay itself. Any adverse effect flowing from the DIP Loan and DIP Charge has been addressed above.

42 Fourth, the applicant's cash flows indicate that it will be able to meet its financial obligations, including care and maintenance of the Project, during the extended period with the inclusion of the proceeds of the DIP Loan.

43 Lastly, the Proposal Trustee supports the requested relief.

Application granted.

TAB 7

2015 ONSC 2010
Ontario Superior Court of Justice

Comark Inc., Re

2015 CarswellOnt 20810, 2015 ONSC 2010, 266 A.C.W.S. (3d) 541

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

In the Matter of a Proposed Plan of Compromise or Arrangement of Comark Inc.

G.B. Morawetz R.S.J.

Heard: March 26, 2015
Judgment: March 26, 2015
Docket: CV-15-10920-00CL

Counsel: Marc Wasserman, Caitlin Fell, for Applicant
Brian Empey, Ryan Baulke, for Proposed Monitor, Alvarez & Marsal Canada Inc.
Sam Babe, for Salus Capital Partners, LLC (DIP Lender)

Subject: Insolvency

APPLICATION by company for initial order under Companies' Creditors Arrangements Act.

***G.B. Morawetz R.S.J.*:**

1 The Applicant, Comark Inc. ("Comark"), brings this application for relief under the *Companies' Creditors Arrangement Act* ("CCAA").

2 Comark operates 343 retail stores across Canada under three distinct divisions: Ricki's, Bootlegger and Cleo (together, the "Banners"). Comark sells predominantly exclusive private label merchandise. Comark employs approximately 3,400 people.

3 Comark is a privately held corporation that is a portfolio company of an investment fund managed by KarpReilly LLC ("KarpReilly"). Comark's corporate headquarters are in Mississauga, Ontario (the "Corporate Headquarters") and employ 83 full time employees. Comark operates an essential distribution centre in Laval, Quebec, which employs approximately 200 people and processes approximately 9.3 million and 2 million units of merchandise each year for stores and online sales, respectively.

4 Comark has over 300 product suppliers, primarily located in Asia and North America. Approximately 80% of Comark's unit purchases were sourced from foreign manufacturers and the remaining 20% were sourced in North America. Purchases are typically made in US dollars.

5 Comark transports all products to its stores through third party transportation companies. Purolator is Comark's primary third party transportation provider. The Applicant is of the view that Purolator's continued services are critical to the company's ongoing operations. Approximately 90% of Comark's products are transported using Purolator.

6 Comark has over 60 third party landlords from which it leases all of its retail and distribution locations. As part of its restructuring under these proceedings, Comark anticipates that it will disclaim certain leases in respect of Comark stores.

7 Comark participates in co-brand community events and cause marketing with charitable organizations. Comark customers have donated amounts intended for various charities, and these donated funds are currently comingled with Comark's other

funds. As of March 17, 2015, Ricki's has (Cdn.) $40,057, Bootlegger has (Cdn.) $108 and Cleo has (Cdn.) $107,917 in funds received from customers in respect of donations to various charitable organizations.

8 Comark has experienced declining financial results over the past two years.

9 As of February 28, 2015, Comark had total assets of (Cdn.) $112.4 million and its total indebtedness was approximately (Cdn.) $126.1 million.

10 Comark is financed primarily through a term loan and revolving credit facilities under a credit agreement dated as of October 31, 2014 between Comark, as the lead borrower, and Salus, as administrative collateral agent and lender thereto (the "Salus Credit Agreement").

11 As of March 17, 2015, the Applicant reports that there was approximately U.S.$43.1 million outstanding under the term loan facility and (Cdn.) $24.8 million outstanding under the revolving credit facility (the "Revolving Credit Facility"). The Salus Credit Agreement has a maturity date of October 31, 2018. All of the obligations of Comark under the Salus Credit Agreement are secured by all of Comark's assets.

12 Comark has been noted in default of the Agreement and Salus has made a demand for repayment. Comark advises that it is not able to repay its debt obligations to Salus.

13 Comark reports that its adjusted EBITDA fell to approximately (Cdn.) $16.5 million for the year end February 28, 2015. Comark acknowledges that this constitutes an event of default under the Salus Credit Agreement. On the occurrence of an event of default, Salus has the right to terminate the Salus Credit Agreement and declare that all obligations under it are due and payable with presentment, demand, protest or other notice of any kind.

14 Salus delivered a Reservation of Rights Letter on March 5, 2015. On March 25, 2015, Salus made a demand for repayment for all amounts owing under the Salus Credit Agreement. Comark acknowledges that it is not able to pay the full amount owing under the Salus Credit Agreement, which has become immediately due and payable as a result of the event of default and the demand made by Salus. Comark acknowledges that it is insolvent.

15 The Applicant seeks the granting of an initial order. With the benefit of the protection of the stay of proceedings, Comark is of the view that it will be provided with the necessary "breathing space" in order to allow it to develop a plan to restructure and reorganize the business and preserve enterprise of value.

16 Comark is of the view that it requires interim financing for working capital and general corporate purposes and for post-filing expenses and costs during the CCAA proceedings.

17 Salus has agreed to act as DIP lender (the "DIP Lender") and provide an interim financing facility (the "DIP Facility") under an amended and restated credit agreement with Salus (the "DIP Agreement"). It is a condition of the DIP Agreement that advances made to Comark be secured by a court ordered security interest, lien and charge over all of the assets and undertakings of Comark (the "DIP Lender's Charge").

18 The Applicant advises that under the draft initial order, the charges, including the DIP Lender's Charge, do not prime TD Bank and creditors with a purchase money security interest, which are Comark's only secured creditors. Further, the company advises that it is also an express term of the DIP Agreement that advances made thereunder may not be used to satisfy pre-filing obligations under the Salus Credit Agreement. Further, the company states that the DIP Lender's Charge will not secure any obligation that exists before the date of the initial order.

19 It is anticipated that the proceeds from Comark's operations will be used to reduce pre-filing obligations outstanding under the Salus Revolver Facility in order to free-up availability under the DIP Facility. In accordance with the DIP Facility and the current cash management system in effect, Comark's cash from business operations will be deposited into the blocked account and swept by Salus in order to reduce amounts outstanding under the Salus Revolver Facility prior to the commencement of these proceedings.

20 In his supplementary affidavit, Mr. Bachynski states that Comark requires $15 million during the week ending April 11, 2015 and as such, Comark is proposing a maximum DIP Charge of (Cdn.) $28 in the draft initial order with a restriction on borrowing of (Cdn.) $15 million prior to the proposed comeback hearing scheduled for April 7, 2015.

21 Mr. Bachynski goes on to state that Comark will not be able to satisfy its ordinary course obligations in the CCAA proceedings without the DIP Facility.

22 In its pre-filing report, the Monitor reports at length on the debtor-in-possession financing. In its report, the Monitor states that Salus has exercised cash dominion pursuant to the Blocked Account Agreement and the Salus Credit Agreement and has made demand under the Salus Credit Agreement. As a consequence, the Monitor states that Comark does not have access to liquidity to discharge its financial obligations. Further, given the deterioration in the Applicant's financial position and its current liquidity crisis, the Monitor states that the Applicant cannot continue to operate without the DIP Facility.

23 The Monitor also advises that senior management and the Applicant's advisors believe that the DIP Facility is the only realistic source of funding available, given the urgency of the proposed filing, the position of the lender in the capital structure of the Applicant and the minimal level of Comark's existing cash on hand.

24 At section 9.5 of this report, the Monitor summarizes the DIP Facility Terms. This chart is reproduced below.

Comark
Summary of DIP Facility Terms

Total Availability	• The lesser of: (a) the Maximum Amount of $32 million, (b) the Borrowing Base, or (c) extensions of credit required under and set out in the Budget, plus outstanding principal amount of pre-filing Revolving Credit Facility.
Effective Date	• Date of the Initial Order
Purpose/Permitted Payments	• Limited to amounts set out in the Restructuring Plan and the Budget approved by Salus.
Significant Terms	• Initial Order must be granted and issued and provide for a DIP Lender's Charge; • The establishment of a cash flow budget and a restructuring plan that is satisfactory to the DIP Lender; • The DIP Lender shall have received control agreements with respect to the deposit accounts of the Borrower which effectively provides for a sweeping of the Borrower's gross receipts, such collections are to be applied to reduce pre-filing Revolving Credit Facility; and • Other covenants which appear customary under the circumstances.
Fees and Interest	• Interest Rate per annum: LIBOR + 5.75 (as at March 24, 2015 LIBOR was approximately 0.25%; however, the DP Facility contains a LIBOR floor of 1.00%) • Exit fee of 4% of total outstanding borrowing at exit under the DIP, the pre-filing Revolving Credit Facility and the pre-filing Term Loan Facility • Collateral monitoring fee of US$7,000 per month
Security	• All assets and property of the Borrower and DIP Lender's Charge.
Maturity	• The earliest of: (i) completion of a transaction in compliance with the SISP; and (ii) a default.
DIP Lender's Charge	• DIP Lender's Charge to rank subordinate only to the Administration Charge and the Directors' Charge (all further defined herein). DIP Lender's Charge in amount of $32 million to ensure fees, costs and expenses are covered.

25 The DIP Facility contains various affirmative covenants, negative covenants, events of default and conditions that, in the proposed Monitor's view, are reasonable and customary for this type of financing.

26 The Monitor further comments that the DIP Facility is not a new facility layered on top of the pre-filing credit facilities, rather it is an amended version of the pre-filing Salus Credit Agreement pursuant to which Salus would be prepared to commence to provide liquidity, despite the prior default. Importantly, the Monitor comments that ultimately, the DIP Facility will not result in a greater level of secured debt than was contemplated under the pre-filing facilities (absent the default that occurred). Furthermore, the Monitor reports that as there is no indication of any deficiencies with Salus' security package, and the Applicant

has advised that it does not intend that the DIP Lender's Charge prime any other secured party's purchase money security interests or statutory deemed trusts, the fact that the DIP Lender's Charge will increase while the pre-filing Revolving Credit Facility would be paid down, should have no negative impact on the other stakeholders.

27 The proposed Monitor recommends that the Court approve the DIP Facility. In arriving at this recommendation, the proposed Monitor considered:

(i) the facts and circumstances of the Applicant;

(ii) section 11.2(4) of the CCAA;

(iii) the financial terms of the DIP Facility relative to comparable facilities and the fact that it is the only realistic source of funding available given the urgency of the proposed filing, the prominent position of the Lender in the capital structure of the Applicant and the minimal level of Comark's existing cash on hand;

(iv) the stability and flexibility of the DIP Facility will provide to ensure there is sufficient liquidity to facilitate the CCAA proceedings and a Sale and Investment Facilitation Process ("SISP"), to maximize realization; and

(v) the interests of the Applicant's stakeholders.

28 In providing its recommendation, the proposed Monitor specifically stated that it has considered the provisions of section 11.2(1) of the CCAA which prohibit the DIP Lender's Charge from securing an obligation that exists before the requested order is made. The Monitor reports that having consulted with its counsel, it is of the view that since the pre-filing Revolving Credit Facility is being reduced by the use of the Applicant's cash generated from its business, the DIP Lender's Charge is only securing advances made post-filing under the DIP Facility.

29 For the purposes of this application, I accept the foregoing submissions and recommendation of the Monitor and, specifically, its view that the form of DIP Facility being proposed, does not contravene the provisions of section 11.2(1) of the CCAA.

30 Comark proposes a key employee retention plan (the "KERP") for certain employees (the "Key Employees") which Comark considers critical to a successful proceeding under the CCAA. Key Employees include certain key senior management employees, both at the Corporate Headquarters and Banner level that possess unique professional skills and experience with Comark's business and operations.

31 The proposed Monitor agrees that the KERP is reasonable in the circumstances.

32 The Applicant has retained Houlihan Lokey Capital, Inc. as financial advisor (the "Financial Advisor") to advise on a possible restructuring, refinancing or sale for Comark.

33 The Applicant also reports that it has worked with the Financial Advisor, in consultation with the proposed Monitor and Salus, to develop the Sale and Investor Solicitation Process ("SISP"). The purpose of the SISP is to solicit and assess available opportunities for the acquisition of or investment in Comark's business and property.

34 In its factum, the Applicant submits that the application addresses the following issues:

(a) the Applicant's entitlement to seek protection under the CCAA;

(b) the Applicant's entitlement to a stay of proceedings;

(c) the granting of the DIP Lender's Charge on a priority basis over the property and approval of the DIP Facility;

(d) the approval of the KERP and KERP Charge;

(e) the sealing of the KERP Schedule;

(f) the granting of the Director's Charge on a priority basis over the property;

(g) the approval of pre-filing payments to "critical" suppliers and to certain charitable organizations to which Comark's customers donated funds; and

(h) the approval of the SISP.

35 I am satisfied that Comark meets the definition of "debtor company" under the CCAA. It is a corporation incorporated under the *Canada Business Corporations Act*.

36 I am also satisfied that the total claims against Comark far exceed $5 million and that Comark is insolvent.

37 In arriving at the conclusion that Comark is insolvent, I have taken into account that, as a result of the event of default and the acceleration of all amounts due under the Salus Credit Agreement, it is apparent that Comark does not have sufficient liquidity to satisfy its liabilities as they become due.

38 The required financial statements and cash-flow statements are included in the record.

39 I am also satisfied that the Applicant is entitled to a stay of proceedings pursuant to section 11.02 of the CCAA.

40 With respect to the request to approve the DIP Facility and to grant a DIP Financing Charge on a priority basis, the authority to approve same is found in section 11.2 of the CCAA. In its factum, the Applicant specifically references section 11.2(1) and submits that it is clear on the facts that the DIP Lender's Charge meets this requirement. Counsel submits that the DIP Facility expressly provides that Comark may not use any advances under the DIP Facility to repay pre-filing obligations. Counsel goes on to state that to the extent that Salus is repaid pre-filing amounts owing to it, this repayment will be made from operational receipts as a result of lending, security and enforcement arrangements in place prior to the CCAA filing. Further, the repayment is not made out of proceeds of the DIP Facility. Rather, the payments to Salus simply maintain the status quo as of the CCAA filing date under the existing Salus asset-based lending credit facility.

41 For the purposes of this application, I accept the submissions of the Applicant and recommendations of the Monitor and have concluded that the DIP Facility should be approved and the Court should grant the DIP Lender's Charge to a maximum DIP Charge of (Cdn.) $28 million with a restriction on borrowing of (Cdn.) $15 million up to April 7, 2015.

42 Counsel to the Applicant requests approval of the KERP and the KERP Charge. Submissions in support of this request are made at paragraphs 26 - 32 of the Amended Factum. I accept these submissions and approve the KERP and the granting of the KERP Charge.

43 Insofar as the KERP Schedule contains confidential personal information, the Applicant seeks a sealing of the KERP Schedule. The Applicant references *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.), in support of its request to seal the Schedule.

44 I am satisfied, having considered the *Sierra Club* principles, that it is appropriate to seal the confidential KERP Schedule.

45 The Applicant also seeks a Directors Charge in the amount of up to (Cdn.) $3 million, to act as security for indemnification obligations for Comark's directors' potential liabilities. It is contemplated that the Directors Charge would stand in priority to the proposed DIP Charge, but subordinate to the proposed Administration Charge.

46 Pursuant to section 11.51 of the CCAA, the Court has authority to grant a "super priority" charge to the Directors and Officers as security for the indemnity. The factors to be considered on such a request were set out by Pepall J. (as she then was) in *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]).

47 Comark has estimated the potential exposure of the Directors and Officers for unpaid statutory amounts, including wages, unremitted source deductions, vacation pay, sales and service taxes, termination pay, employee health tax and unpaid workers' compensation to be approximately (Cdn.) $7.15 million.

48 I accept the submissions of the Applicant and have concluded that the Directors Charge is necessary and appropriate and is granted in the requested amount.

49 The Applicant also requests authorization to make certain pre-filing payments, specifically to critical suppliers.

50 The argument in support of the granting of this request is set out in the Amended Factum at paragraphs 44 - 52. I accept these submissions and concluded that it is appropriate to authorize Comark to make the pre-filing payments. 1 note that the Monitor will be involved in this process and that the consent of the Monitor to make such payments is required.

51 I have also been persuaded that it is appropriate for the Court to exercise its jurisdiction to authorize Comark to pay certain amounts that were donated by Comark's customers to the charitable organizations for which the amounts were intended. This authorization is made notwithstanding that the donated amounts are currently comingled with Comark's other funds.

52 The Applicant also requests approval of the SISP for the reasons set out at paragraphs 54 - 59 of the Amended Factum. I accept these submissions and authorize and approve the SISP.

53 This application was brought without notice to the creditors of Comark, with the exception of Salus. As such, I treat it as an *ex parte* application.

54 The requested relief is granted and the order has been signed to reflect the foregoing.

55 A come-back hearing has been scheduled for April 7, 2015. A further hearing has been scheduled for April 21, 2015.

56 The come-back hearing is to be neutral in all respects.

57 The stay of proceedings is in effect up to and including April 24, 2015, or such later date as the Court may order.

Application granted.

TAB 8

2016 ONSC 1044
Ontario Superior Court of Justice

Danier Leather Inc., Re

2016 CarswellOnt 2414, 2016 ONSC 1044, 262 A.C.W.S. (3d) 573, 33 C.B.R. (6th) 221

In the Matter of Intention to Make a Proposal of Danier Leather Inc.

Penny J.

Heard: February 8, 2016
Judgment: February 10, 2016
Docket: 31-CL-2084381

Counsel: Jay Swartz, Natalie Renner, for Danier
Sean Zweig, for Proposal Trustee
Harvey Chaiton, for Directors and Officers
Jeffrey Levine, for GA Retail Canada
David Bish, for Cadillac Fairview
Linda Galessiere, for Morguard Investment, 20 ULC Management, SmartReit and Ivanhoe Cambridge
Clifton Prophet, for CIBC

Subject: Civil Practice and Procedure; Estates and Trusts; Insolvency

MOTION to, inter alia, approve stalking horse agreement and SISP.

***Penny J.*:**

The Motion

1 On February 8, 2016 I granted an order approving a SISP in respect of Danier Leather Inc., with reasons to follow. These are those reasons.

2 Danier filed a Notice of Intention to make a proposal under the BIA on February 4, 2016. This is a motion to:

(a) approve a stalking horse agreement and SISP;

(b) approve the payment of a break fee, expense reimbursement and signage costs obligations in connection with the stalking horse agreement;

(c) authorize Danier to perform its obligations under engagement letters with its financial advisors and a charge to secure success fees;

(d) approve an Administration Charge;

(e) approve a D&O Charge;

(f) approve a KERP and KERP Charge; and

(g) grant a sealing order in respect of the KERP and a stalking horse offer summary.

Background

3 Danier is an integrated designer, manufacturer and retailer of leather and suede apparel and accessories. Danier primarily operates its retail business from 84 stores located throughout Canada. It does not own any real property. Danier employs approximately 1,293 employees. There is no union or pension plan.

4 Danier has suffered declining revenues and profitability over the last two years resulting primarily from problems implementing its strategic plan. The accelerated pace of change in both personnel and systems resulting from the strategic plan contributed to fashion and inventory miscues which have been further exacerbated by unusual extremes in the weather and increased competition from U.S. and international retailers in the Canadian retail space and the depreciation of the Canadian dollar relative to the American dollar.

5 In late 2014, Danier implemented a series of operational and cost reduction initiatives in an attempt to return Danier to profitability. These initiatives included reductions to headcount, marketing costs, procurement costs and capital expenditures, renegotiating supply terms, rationalizing Danier's operations, improving branding, growing online sales and improving price management and inventory mark downs. In addition, Danier engaged a financial advisor and formed a special committee comprised of independent members of its board of directors to explore strategic alternatives to improve Danier's financial circumstances, including soliciting an acquisition transaction for Danier.

6 As part of its mandate, the financial advisor conducted a seven month marketing process to solicit offers from interested parties to acquire Danier. The financial advisor contacted approximately 189 parties and provided 33 parties with a confidential information memorandum describing Danier and its business. Over the course of this process, the financial advisor had meaningful conversations with several interested parties but did not receive any formal offers to provide capital and/or to acquire the shares of Danier. One of the principal reasons that this process was unsuccessful is that it focused on soliciting an acquisition transaction, which ultimately proved unappealing to interested parties as Danier's risk profile was too great. An acquisition transaction did not afford prospective purchasers the ability to restructure Danier's affairs without incurring significant costs.

7 Despite Danier's efforts to restructure its financial affairs and turn around its operations, Danier has experienced significant net losses in each of its most recently completed fiscal years and in each of the two most recently completed fiscal quarters in the 2016 fiscal year. Danier currently has approximately $9.6 million in cash on hand but is projected to be cash flow negative every month until at least September 2016. Danier anticipated that it would need to borrow under its loan facility with CIBC by July 2016. CIBC has served a notice of default and indicate no funds will be advanced under its loan facility. In addition, for the 12 months ending December 31, 2015, 30 of Danier's 84 store locations were unprofitable. If Danier elects to close those store locations, it will be required to terminate the corresponding leases and will face substantial landlord claims which it will not be able to satisfy in the normal course.

8 Danier would not have had the financial resources to implement a restructuring of its affairs if it had delayed a filing under the BIA until it had entirely used up its cash resources. Accordingly, on February 4, 2016, Danier commenced these proceedings for the purpose of entering into a stalking horse agreement and implementing the second phase of the SISP.

The Stalking Horse Agreement

9 The SISP is comprised of two phases. In the first phase, Danier engaged the services of its financial advisor to find a stalking horse bidder. The financial advisor corresponded with 22 parties, 19 of whom had participated in the 2015 solicitation process and were therefore familiar with Danier. In response, Danier received three offers and, with the assistance of the financial advisor and the Proposal Trustee, selected GA Retail Canada or an affiliate (the "Agent") as the successful bid. The Agent is an affiliate of Great American Group, which has extensive experience in conducting retail store liquidations.

10 On February 4, 2016, Danier and the Agent entered into the stalking horse agreement, subject to Court approval. Pursuant to the stalking horse agreement, the Agent will serve as the stalking horse bid in the SISP and the exclusive liquidator for the purpose of disposing of Danier's inventory. The Agent will dispose of the merchandise by conducting a "store closing" or similar sale at the stores.

11 The stalking horse agreement provides that Danier will receive a net minimum amount equal to 94.6% of the aggregate value of the merchandise, provided that the value of the merchandise is no less than $22 million and no more than $25 million. After payment of this amount and the expenses of the sale, the Agent is entitled to retain a 5% commission. Any additional proceeds of the sale after payment of the commission are divided equally between the Agent and Danier.

12 The stalking horse agreement also provides that the Agent is entitled to (a) a break fee in the amount of $250,000; (b) an expense reimbursement for its reasonable and documented out-of-pocket expenses in an amount not to exceed $100,000; and (c) the reasonable costs, fees and expenses actually incurred and paid by the Agent in acquiring signage or other advertising and promotional material in connection with the sale in an amount not to exceed $175,000, each payable if another bid is selected and the transaction contemplated by the other bid is completed. Collectively, the break fee, the maximum amount payable under the expense reimbursement and the signage costs obligations represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. Another liquidator submitting a successful bid in the course of the SISP will be required to purchaser the signage from the Agent at its cost.

13 The stalking horse agreement is structured to allow Danier to proceed with the second phase of the SISP and that process is designed to test the market to ascertain whether a higher or better offer can be obtained from other parties. While the stalking horse agreement contemplates liquidating Danier's inventory, it also establishes a floor price that is intended to encourage bidders to participate in the SISP who may be interested in going concern acquisitions as well.

The SISP

14 Danier, in consultation with the Proposal Trustee and financial advisor, have established the procedures which are to be followed in conducting the second phase of the SISP.

15 Under the SISP, interested parties may make a binding proposal to acquire the business or all or any part of Danier's assets, to make an investment in Danier or to liquidate Danier's inventory and furniture, fixtures and equipment.

16 Danier, in consultation with the Proposal Trustee and its financial advisors, will evaluate the bids and may (a) accept, subject to Court approval, one or more bids, (b) conditionally accept, subject to Court approval, one or more backup bids (conditional upon the failure of the transactions contemplated by the successful bid to close, or (c) pursue an auction in accordance with the procedures set out in the SISP.

17 The key dates of the second phase of the SISP are as follows:

(1) The second phase of the SISP will commence upon approval by the Court

(2) Bid deadline: February 22, 2016

(3) Advising interested parties whether bids constitute "qualified bids": No later than two business days after bid deadline

(4) Determining successful bid and back-up bid (if there is no auction): No later than five business days after bid deadline

(5) Advising qualified bidders of auction date and location (if applicable): No later than five business days after bid deadline

(6) Auction (if applicable): No later than seven business days after bid deadline

(7) Bringing motion for approval: Within five business days following determination by Danier of the successful bid (at auction or otherwise)

(8) Back-Up bid expiration date: No later than 15 business days after the bid deadline, unless otherwise agreed

(9) Outside date: No later than 15 business days after the bid deadline

18 The timelines in the SISP have been designed with regard to the seasonal nature of the business and the fact that inventory values will depreciate significantly as the spring season approaches. The timelines also ensure that any purchaser of the business as a going concern has the opportunity to make business decisions well in advance of Danier's busiest season, being fall/winter. These timelines are necessary to generate maximum value for Danier's stakeholders and are sufficient to permit prospective bidders to conduct their due diligence, particularly in light of the fact that is expected that many of the parties who will participate in the SISP also participated in the 2015 solicitation process and were given access to a data room containing non-public information about Danier at that time.

19 Danier does not believe that there is a better viable alternative to the proposed SISP and stalking horse agreement.

20 The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties, *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]) at para. 7.

21 The Court's power to approve a sale of assets in a proposal proceeding is codified in section 65.13 of the BIA, which sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business. This Court has considered section 65.13 of the BIA when approving a stalking horse sale process under the BIA, *Colossus Minerals Inc., Re*, 2014 CarswellOnt 1517 (Ont. S.C.J.) at paras. 22-26.

22 A distinction has been drawn, however, between the approval of a sale process and the approval of an actual sale. Section 65.13 is engaged when the Court determines whether to approve a sale transaction arising as a result of a sale process, it does not necessarily address the factors a court should consider when deciding whether to approve the sale process itself.

23 In *Brainhunter Inc., Re*, the Court considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring proceeding under the *Companies' Creditors Arrangement Act*. Citing his decision in *Nortel*, Justice Morawetz (as he then was) confirmed that the following four factors should be considered by the Court in the exercise of its discretion to determine if the proposed sale process should be approved:

(1) Is a sale transaction warranted at this time?

(2) Will the sale benefit the whole "economic community"?

(3) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

(4) Is there a better viable alternative?

Brainhunter Inc., Re, 2009 CarswellOnt 8207 (Ont. S.C.J. [Commercial List]) at paras. 13-17); *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List]) at para. 49.

24 While *Brainhunter* and *Nortel* both dealt with a sale process under the CCAA, the Court has recognized that the CCAA is an analogous restructuring statute to the proposal provisions of the BIA, *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 24; *Indalex Ltd., Re*, [2013] 1 S.C.R. 271 (S.C.C.) at paras. 50-51.

25 Furthermore, in *Mustang*, this Court applied the *Nortel* criteria on a motion to approve a sale process backstopped by a stalking horse bid in a proposal proceeding under the BIA, *Mustang GP Ltd., Re*, 2015 CarswellOnt 16398 (Ont. S.C.J.) at paras. 37-38.

26 These proceedings are premised on the implementation of a sale process using the stalking horse agreement as the minimum bid intended to maximize value and act as a baseline for offers received in the SISP. In the present case, Danier is seeking approval of the stalking horse agreement for purposes of conducting the SISP only.

27 The SISP is warranted at this time for a number of reasons.

28 First, Danier has made reasonable efforts in search of alternate financing or an acquisition transaction and has attempted to restructure its operations and financial affairs since 2014, all of which has been unsuccessful. At this juncture, Danier has exhausted all of the remedies available to it outside of a Court-supervised sale process. The SISP will result in the most viable alternative for Danier, whether it be a sale of assets or the business (through an auction or otherwise) or an investment in Danier.

29 Second, Danier projects that it will be cash flow negative for the next six months and it is clear that Danier will be unable to borrow under the CIBC loan facility to finance its operations (CIBC gave notice of default upon Danier's filing of the NOI). If the SISP is not implemented in the immediate future, Danier's revenues will continue to decline, it will incur significant costs and the value of the business will erode, thereby decreasing recoveries for Danier's stakeholders.

30 Third, the market for Danier's assets as a going concern will be significantly reduced if the SISP is not implemented at this time because the business is seasonal in nature. Any purchaser of the business as a going concern will need to make decisions about the raw materials it wishes to acquire and the product lines it wishes to carry by March 2016 in order to be sufficiently prepared for the fall/winter season, which has historically been Danier's busiest.

31 Danier and the Proposal Trustee concur that the SISP and the stalking horse agreement will benefit the whole of the economic community. In particular:

(a) the stalking horse agreement will establish the floor price for Danier's inventory, thereby maximizing recoveries;

(b) the SISP will subject the assets to a public marketing process and permit higher and better offers to replace the Stalking horse agreement; and

(c) should the SISP result in a sale transaction for all or substantially all of Danier's assets, this may result in the continuation of employment, the assumption of lease and other obligations and the sale of raw materials and inventory owned by Danier.

32 There have been no expressed creditor concerns with the SISP as such. The SISP is an open and transparent process. Absent the stalking horse agreement, the SISP could potentially result in substantially less consideration for Danier's business and/or assets.

33 Given the indications of value obtained through the 2015 solicitation process, the stalking horse agreement represents the highest and best value to be obtained for Danier's assets at this time, subject to a higher offer being identified through the SISP.

34 Section 65.13 of the BIA is also indirectly relevant to approval of the SISP. In deciding whether to grant authorization for a sale, the court is to consider, among other things:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

35 In the present case, in addition to satisfying the *Nortel* criteria, the SISP will result in a transaction that is at least capable of satisfying the 65.13 criteria. I say this for the following reasons.

36 The SISP is reasonable in the circumstances as it is designed to be flexible and allows parties to submit an offer for some or all of Danier's assets, make an investment in Danier or acquire the business as a going concern. This is all with the goal of improving upon the terms of the stalking horse agreement. The SISP also gives Danier and the Proposal Trustee the right to extend or amend the SISP to better promote a robust sale process.

37 The Proposal Trustee and the financial advisor support the SISP and view it as reasonable and appropriate in the circumstances.

38 The duration of the SISP is reasonable and appropriate in the circumstances having regard to Danier's financial situation, the seasonal nature of its business and the fact that many potentially interested parties are familiar with Danier and its business given their participation in the 2015 solicitation process and/or the stalking horse process.

39 A sale process which allows Danier to be sold as a going concern would likely be more beneficial than a sale under a bankruptcy, which does not allow for the going concern option.

40 Finally, the consideration to be received for the assets under the stalking horse agreement appears at this point, to be *prima facie* fair and reasonable and represents a fair and reasonable benchmark for all other bids in the SISP.

The Break Fee

41 Break fees and expense and costs reimbursements in favour of a stalking horse bidder are frequently approved in insolvency proceedings. Break fees do not merely reflect the cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected, Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1 at 4.

42 Break fees in the range of 3% and expense reimbursements in the range of 2% have recently been approved by this Court, *Nortel Networks Corp., Re*, [2009] O.J. No. 4293 (Ont. S.C.J. [Commercial List]) at paras. 12 and 26; *W.C. Wood Corp., Re*, [2009] O.J. No. 4808 (Ont. S.C.J. [Commercial List]) at para. 3, where a 4% break fee was approved.

43 The break fee, the expense reimbursement and the signage costs obligations in the stalking horse agreement fall within the range of reasonableness. Collectively, these charges represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. In addition, if a liquidation proposal (other than the stalking horse agreement) is the successful bid, Danier is not required to pay the signage costs obligations to the Agent. Instead, the successful bidder will be required to buy the signage and advertising material from the Agent at cost.

44 In the exercise of its business judgment, the Board unanimously approved the break fee, the expense reimbursement and the signage costs obligations. The Proposal Trustee and the financial advisor have both reviewed the break fee, the expense reimbursement and the signage costs obligations and concluded that each is appropriate and reasonable in the circumstances. In reaching this conclusion, the Proposal Trustee noted, among other things, that:

(i) the maximum amount of the break fee, expense reimbursement and signage costs obligations represent, in the aggregate 2.5% of the imputed value of the consideration under the stalking horse agreement, which is within the normal range for transactions of this nature;

(ii) each stalking horse bidder required a break fee and expense reimbursement as part of their proposal in the stalking horse process;

(iii) without these protections, a party would have little incentive to act as the stalking horse bidder; and

(iv) the quantum of the break fee, expense reimbursement and signage costs obligations are unlikely to discourage a third party from submitting an offer in the SISP.

45 I find the break fee to be reasonable and appropriate in the circumstances.

Financial Advisor Success Fee and Charge

46 Danier is seeking a charge in the amount of US$500,000 to cover its principal financial advisor's (Concensus) maximum success fees payable under its engagement letter. The Consensus Charge would rank behind the existing security, *pari passu* with the Administration Charge and ahead of the D&O Charge and KERP Charge.

47 Orders approving agreements with financial advisors have frequently been made in insolvency proceedings, including CCAA proceedings and proposal proceedings under the BIA. In determining whether to approve such agreements and the fees payable thereunder, courts have considered the following factors, among others:

(a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;

(b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and

(c) whether the success fee is necessary to incentivize the financial advisor.

Sino-Forest Corp., Re, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]) at paras. 46-47; *Colossus Minerals Inc., Re*, *supra*.

48 The SISP contemplates that the financial advisor will continue to be intimately involved in administering the SISP.

49 The financial advisor has considerable experience working with distressed companies in the retail sector that are in the process of restructuring, including seeking strategic partners and/or selling their assets. In the present case, the financial advisor has assisted Danier in its restructuring efforts to date and has gained a thorough and intimate understanding of the business. The continued involvement of the financial advisor is essential to the completion of a successful transaction under the SISP and to ensuring a wide-ranging canvass of prospective bidders and investors.

50 In light of the foregoing, Danier and the Proposal Trustee are in support of incentivizing the financial advisor to carry out the SISP and are of the view that the quantum and nature of the remuneration provided for in the financial advisor's engagement letter are reasonable in the circumstances and will incentivize the Financial advisor.

51 Danier has also engaged OCI to help implement the SISP in certain international markets in the belief that OCI has expertise that warrants this engagement. OCI may be able to identify a purchaser or strategic investor in overseas markets which would result in a more competitive sales process. OCI will only be compensated if a transaction is originated by OCI or OCI introduces the ultimate purchaser and/or investor to Danier.

52 Danier and the Proposal Trustee believe that the quantum and nature of the success fee payable under the OCI engagement letter is reasonable in the circumstances. Specifically, because the fees payable to OCI are dependent on the success of transaction or purchaser or investor originated by OCI, the approval of this fee is necessary to incentivize OCI.

53 Accordingly, an order approving the financial advisor and OCI engagement letters is appropriate.

54 A charge ensuring payment of the success fee is also appropriate in the circumstances, as noted below.

Administration Charge

55 In order to protect the fees and expenses of each of the Proposal Trustee, its counsel, counsel to Danier, the directors of Danier and their counsel, Danier seeks a charge on its property and assets in the amount of $600,000. The Administration Charge would rank behind the existing security, *pari passu* with the Consensus Charge and ahead of the D&O Charge and KERP Charge. It is supported by the Proposal Trustee.

56 Section 64.2 of the BIA confers on the Court the authority to grant a charge in favour of financial, legal or other professionals involved in proposal proceedings under the BIA.

57 Administration and financial advisor charges have been previously approved in insolvency proposal proceedings, where, as in the present case, the participation of the parties whose fees are secured by the charge is necessary to ensure a successful proceeding under the BIA and for the conduct of a sale process, *Colossus Minerals Inc., Re*, 2014 CarswellOnt 1517 (Ont. S.C.J.) at paras. 11-15.

58 This is an appropriate circumstance for the Court to grant the Administration Charge. The quantum of the proposed Administration Charge is fair and reasonable given the nature of the SISP. Each of the parties whose fees are to be secured by the Administration Charge has played (and will continue to play) a critical role in these proposal proceedings and in the SI. The Administration Charge is necessary to secure the full and complete payment of these fees. Finally, the Administration Charge will be subordinate to the existing security and does not prejudice any known secured creditor of Danier.

D&O Charge

59 The directors and officers have been actively involved in the attempts to address Danier's financial circumstances, including through exploring strategic alternatives, implementing a turnaround plan, devising the SISP and the commencement of these proceedings. The directors and officers are not prepared to remain in office without certainty with respect to coverage for potential personal liability if they continue in their current capacities.

60 Danier maintains directors and officers insurance with various insurers. There are exclusions in the event there is a change in risk and there is potential for there to be insufficient funds to cover the scope of obligations for which the directors and officers may be found personally liable (especially given the significant size of the Danier workforce).

61 Danier has agreed, subject to certain exceptions, to indemnify the directors and officers to the extent that the insurance coverage is insufficient. Danier does not anticipate it will have sufficient funds to satisfy those indemnities if they were ever called upon.

62 Danier seeks approval of a priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the NOI. It is proposed that the D&O Charge be in an amount not to exceed $4.9 million and rank behind the existing security, the Administration Charge and the Consensus Charge but ahead of the KERP Charge.

63 The amount of the D&O Charge is based on payroll obligations, vacation pay obligations, employee source deduction obligations and sales tax obligations that may arise during these proposal proceedings. It is expected that all of these amounts will be paid in the normal course as Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

64 The Court has the authority to grant a directors' and officers' charge under section 64.1 of the BIA.

65 In *Colossus Minerals* and *Mustang*, *supra*, this Court approved a directors' and officers' charge in circumstances similar to the present case where there was uncertainty that the existing insurance was sufficient to cover all potential claims, the directors and officers would not continue to provide their services without the protection of the charge and the continued involvement of the directors and officers was critical to a successful sales process under the BIA.

66 I approve the D&O Charge for the following reasons.

67 The D&O Charge will only apply to the extent that the directors and officers do not have coverage under the existing policy or Danier is unable to satisfy its indemnity obligations.

68 The directors and officers of Danier have indicated they will not continue their involvement with Danier without the protection of the D&O Charge yet their continued involvement is critical to the successful implementation of the SISP.

69 The D&O Charge applies only to claims or liabilities that the directors and officers may incur after the date of the NOI and does not cover misconduct or gross negligence.

70 The Proposal Trustee supports the D&O Charge, indicating that the D&O Charge is reasonable in the circumstances.

71 Finally, the amount of the D&O Charge takes into account a number of statutory obligations for which directors and officers are liable if Danier fails to meet these obligations. However, it is expected that all of these amounts will be paid in the normal course. Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

Key Employee Retention Plan and Charge

72 Danier developed a key employee retention plan (the "KERP") that applies to 11 of Danier's employees, an executive of Danier and Danier's consultant, all of whom have been determined to be critical to ensuring a successful sale or investment transaction. The KERP was reviewed and approved by the Board.

73 Under the KERP, the key employees will be eligible to receive a retention payment if these employees remain actively employed with Danier until the earlier of the completion of the SISP, the date upon which the liquidation of Danier's inventory is complete, the date upon which Danier ceases to carry on business, or the effective date that Danier terminates the services of these employees.

74 Danier is requesting approval of the KERP and a charge for up to $524,000 (the "KERP Charge") to secure the amounts payable thereunder. The KERP Charge will rank in priority to all claims and encumbrances other than the existing security, the Administration Charge, the Consensus Charge and the D&O Charge.

75 Key employee retention plans are approved in insolvency proceedings where the continued employment of key employees is deemed critical to restructuring efforts, *Nortel Networks Corp., Re* *supra.*

76 In *Grant Forest Products Inc., Re*, Newbould J. set out a non-exhaustive list of factors that the court should consider in determining whether to approve a key employee retention plan, including the following:

> (a) whether the court appointed officer supports the retention plan;
>
> (b) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the retention plan;
>
> (c) whether the employees who are the subject of the retention plan are truly "key employees" whose continued employment is critical to the successful restructuring of Danier;
>
> (d) whether the quantum of the proposed retention payments is reasonable; and
>
> (e) the business judgment of the board of directors regarding the necessity of the retention payments.

Grant Forest Products Inc., Re, [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]) at paras. 8-22.

77 While *Grant Forest Products Inc., Re* involved a proceeding under the CCAA, key employee retention plans have frequently been approved in proposal proceedings under the BIA, see, for example, *In the Matter of the Notice of Intention of Starfield Resources Inc.*, Court File No. CV-13-10034-00CL, Order dated March 15, 2013 at para. 10.

78 The KERP and the KERP Charge are approved for the following reasons:

(i) the Proposal Trustee supports the granting of the KERP and the KERP Charge;

(ii) absent approval of the KERP and the KERP Charge, the key employees who are the subject of the KERP will have no incentive to remain with Danier throughout the SISP and are therefore likely to pursue other employment opportunities;

(iii) Danier has determined that the employees who are the subject of the KERP are critical to the implementation of the SISP and a completion of a successful sale or investment transaction in respect of Danier;

(iv) the Proposal Trustee is of the view that the KERP and the quantum of the proposed retention payments is reasonable and that the KERP Charge will provide security for the individuals entitled to the KERP, which will add stability to the business during these proceedings and will assist in maximizing realizations; and

(v) the KERP was reviewed and approved by the Board.

Sealing Order

79 There are two documents which are sought to be sealed: 1) the details about the KERP; and 2) the stalking horse offer summary.

80 Section 137(2) of the *Courts of Justice Act* provides the court with discretion to order that any document filed in a civil proceeding can be treated as confidential, sealed, and not form part of the public record.

81 In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:

(1) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and

(2) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.

[2002] S.C.J. No. 42 (S.C.C.) at para. 53.

82 In the insolvency context, courts have applied this test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders, *Stelco Inc., Re*, [2006] O.J. No. 275 (Ont. S.C.J. [Commercial List]) at paras. 2-5; *Nortel Networks Corp., Re*, *supra*.

83 It would be detrimental to the operations of Danier to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated. Further, the KERP evidence involves matters of a private, personal nature.

84 The offer summary contains highly sensitive commercial information about Danier, the business and what some parties, confidentially, were willing to bid for Danier's assets. Disclosure of this information could undermine the integrity of the SISP. The disclosure of the offer summary prior to the completion of a final transaction under the SISP would pose a serious risk to the SISP in the event that the transaction does not close. Disclosure prior to the completion of a SISP would jeopardize value-maximizing dealings with any future prospective purchasers or liquidators of Danier's assets. There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.

85 The sealing order is necessary to protect the important commercial interests of Danier and other stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the KERPs and the offer summary, namely the lack of immediate public access to a limited number of documents filed in these proceedings.

86 As a result, the *Sierra Club* test for a sealing order has been met. The material about the KERP and the offer summary shall not form part of the public record pending completion of these proposal proceedings.

Order accordingly.

TAB 9

2020 ONSC 1482
Ontario Superior Court of Justice

Eureka 93 Inc. et. al. (Re)

2020 CarswellOnt 3482, 2020 ONSC 1482, 316 A.C.W.S. (3d) 611, 77 C.B.R. (6th) 289

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

AND IN THE MATTER OF THREE RELATED INTENEDED PROPOSALS (LIVEWELL FOODS CANADA INC., ARTIVA INC., and VITALITY CBD NATURAL HEALTH PRODUCTS INC.)

Calum MacLeod J.

Heard: March 6, 2020
Judgment: March 9, 2020
Docket: 33-2618511

Counsel: E. Patrick Shea, for Debtors
Sean Zweig, for Dominion Capital LLC
Lou Brzezinski, for Proposal Trustee

Subject: Insolvency

MOTION by debtors for relief pursuant to *Companies' Creditors Arrangement Act*.

***Calum MacLeod J.*:**

1 The debtors (the NOI Companies) move to have four related matters consolidated, to extend the time for making proposals, and for approval of proposed interim priority financing arrangements ("DIP financing").

2 Four related corporations have served notice of intention to make a proposal pursuant to s. 50.4 (1) of the *Bankruptcy and Insolvency Actt* [1] . Three of the corporations are subsidiaries of Eureka 93, the publicly traded parent company. Only one of these corporations has any significant asset. That is Artiva Inc. which owns a 100 acre parcel of land containing a largely completed, licenced, but not yet operational, cannabis facility. The purpose of the proposed financing is to complete the facility and to generate sales so that there is cash flow.

3 The temporary financing and extension of time to make a proposal is actively supported by the secured creditor holding the first mortgage. Other creditors are either in support of the plan or are neutral but the motion is strongly opposed by Dominion Capital on behalf of a group of three secured creditors ("the noteholders"). Dominion takes the view that "there is no business to rehabilitate, no air of reality to the NOI Companies' business plan, no significant assets apart from the Ottawa facility, and no hope of satisfying the claims of creditors through the Proposal Proceedings."

4 If an extension of time is not granted, then pursuant to s. 50.1 (8) of the *BIA* the NOI companies will be deemed to have made an assignment in bankruptcy on March 15 th , 2020. If the interim financing is not granted then it is likely there will be a receivership and a liquidation of the assets. In that case there will be no recovery for the unsecured creditors. The total debt at this point in time appears to be in excess of $28 million although that is inclusive of intercompany debt.

5 If the plan is approved it is possible but not guaranteed that the value of the business as a going concern will be higher than the "as is" value of the land, it is possible the debtors will put forward an acceptable proposal and possible there will be full

recovery for the secured creditors and something for those that are unsecured. On the other hand, the plan may fail, the proposal may be voted down but there will be another $2.3 million in debt in priority to all other creditors.

6 The court must decide if it is reasonable to authorize this additional debt while continuing to protect the debtors from their existing creditors in the hope that this will generate a better outcome. The noteholders urge the court not to do so.

Background

7 Eureka 93 Inc. is the parent company of a corporate group that was intended to be a vertically integrated hemp and cannabis company. Livewell and Vitality are subsidiaries of Eureka and Artiva is a subsidiary of Livewell. Eureka is or was publicly traded until a cease trading order was issued by the Ontario Securities Commission (OSC) in September of last year when it ran into significant financial difficulty and was unable to meet its obligations as an issuer of securities.

8 Eureka is a holding company and currently has five employees. Artiva owns a farm equipped with greenhouses and has a cannabis cultivation licence from Health Canada. This facility (the Ottawa facility) is not yet completed and it requires a further significant capital investment to begin production. None of the other corporations are operational at this time. The focus of the motion and of the intended proposal is to salvage the Ottawa facility and to generate positive cash flow through Artiva.

9 Dominion describes the business of Artiva as more of an idea than a reality. They say that Artiva owns the land and the Ottawa facility but does not have a business. Despite the significant funds raised to date, the Ottawa facility remains incomplete and inoperable. The noteholders take the view that permitting the NOI companies to raise more funds in priority to the existing secured creditors is futile and will only result in further erosion of their collateral and any potential recovery for the existing creditors. Essentially, the moving party has no faith in Eureka's remaining management nor in the business plan the proponents now seek to put forward.

10 I have reviewed the First Report of the Proposal Trustee (Deloittes). The Proposal Trustee has not audited the financial statements or verified any of the representations made by management. The trustee has reviewed the proposed cash flow and is satisfied that the interim financing would provide sufficient liquidity to bring the facility to completion and to begin. The Proposal Trustee recommends the plan. It believes it is a better option than either an immediate bankruptcy or uncontrolled efforts by secured creditors to realize on their security. The facility is largely completed to Health Canada standards. It was successful in obtaining the licence to grow and sell cannabis in September of last year. No crop could have been legally grown before that date. It requires roughly $650,000.00 to complete the construction and $160,000.00 to purchase inventory.

11 The interim financing plan is expensive and would add $2.3 million in debt to the burden already in place. A large potion of the cost is the cost of professional fees to work through the insolvency and restructuring and the cost of high risk borrowing. The plan involves at least three significant assumptions which cannot be tested and carry significant risks. There is the risk that the remaining construction will not be completed on time, to specification and within budget. There is the risk that production of cannabis will not ramp up as smoothly as predicted. There is the risk that buyers of the product will not be found in sufficient time or numbers to meet the cash flow predictions.

12 In addition, there is always the risk that even if all of this falls into place, the proposal or proposals will prove unacceptable to the creditors and an insolvency or a receivership will still result. The debtors have reason to believe that if the facility is completed, they will be able to refinance the project or to sell it as a going concern. On the evidence before me, those are not empty hopes, but they are by no means guaranteed.

Analysis

13 All parties agree to administrative consolidation of the four intended proposals. This makes sense. It is necessary for each corporation to make a proposal because of the ownership structure. All shares of the subsidiaries are owned by Eureka. There is no benefit to having four separate court files. [2]

14 All parties are in agreement with the proposed sealing. It is not in the public interest to have sensitive financial information such as appraisals of the land or the identity of potential purchasers in the public domain at this time. The documents contained in the "confidential document brief" will be sealed until further order. [3]

15 This is not a plan of rearrangement under the *Companies' Creditors Arrangement Act* [4] nor is it even a proposal at this point. It is a notice of intention to make a proposal under s. 50.4 (1) of the *BIA*. This procedure permits the debtor to gain the statutory protection of a stay of proceedings without initial court approval while, subject to compliance with the terms of the Act, it attempts to put itself in the position to make a proposal. But the Act only permits this for 30 days within which time it is necessary to either put together a proposal or to obtain further approval and protection from the court. [5]

16 The court may extend the time to make a proposal and during that time the court may approve interim financing pursuant to s. 50.6 (1) of the Act. In making that decision and in exercising its discretion, the court is mandated to consider all relevant factors including those set out in subsection (5). That subsection reads as follows:

> **Factors to be considered**
>
> (5) In deciding whether to make an order, the court is to consider, among other things,
>
> • (a) the period during which the debtor is expected to be subject to proceedings under this Act;
>
> • (b) how the debtor's business and financial affairs are to be managed during the proceedings;
>
> • (c) whether the debtor's management has the confidence of its major creditors;
>
> • (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
>
> • (e) the nature and value of the debtor's property;
>
> • (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> • (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

17 It is the position of the noteholders that the proposed interim financing would materially prejudice the noteholders by placing another $2.3 million in debt in priority to its security. This of course is inherent in approving DIP financing and is not the only consideration. [6] Still it is part of the analysis. $2.3 million in additional debt over the next month is significant. It is also the position of the noteholders that they have no confidence in management or the ability of that management to successfully bring the project to fruition and generate positive cash flow.

18 I appreciate the concerns of the noteholders. I share the concern that there is a significant risk inherent in cultivating a first crop of cannabis and finding buyers. This is an industry in its infancy and the struggles of some of the established companies in this area are public knowledge. In fact, on the day of the hearing Canopy Growth Corp. announced it was closing two greenhouse facilities in British Columbia and cancelling a project planned for Ontario. [7]

19 Counsel for the debtor submitted that this was not an appropriate area for judicial notice particularly in light of the specific evidence before me. The affidavit evidence filed on behalf of the debtors indicated a different business strategy focused on seedlings or "clones" and painted an optimistic picture of quickly generating positive cash flow. I agree that a news report should not be taken as evidence, but it is useful background. There is no doubt that there is significant risk for any new business particularly in an evolving and volatile sector such as legal cannabis production.

20 The question is whether this is a risk worth taking despite the misgivings of the noteholders and the potential prejudice to their position. I am encouraged by the First Report of the Proposal Trustee and the support for the plan set out therein. I am also impressed by the support for the plan voiced by the representative of the first mortgagee and the interim lenders.

21 I appreciate that both the interim lender and the first mortgagee are fully secured against the value of the land but the willingness to lend the additional funds is supported by their analysis of the plan as viable. Mr. Martin deposes that he has been working with Mr. Poli since September of 2019 and has full confidence in the plan. It is his position that the interim financing plan and proposal proceedings based on a completed and operational facility is likely to generate greater value for all stakeholders than would be the case in a liquidation.

22 There are other stakeholders, not the least of which are two lien claimants and the unsecured creditors. There is at least $15 million in secured debt and over $9 million in unsecured debt. As noted, the other secured creditors support the motion and neither the lien holders nor the unsecured creditors appeared to oppose it.

23 There are five current employees but perhaps 20 other employees who were laid off from the various companies. The completion of the project and the start of cannabis production would involve calling some of those employees back to work.

24 I am persuaded that immediate liquidation would have dire effects whereas the brief extension of time and the interim financing hold at least the prospect of increased value and a successful proposal. [8]

Conclusion & Order

25 I am granting the proposed order substantially in the form proposed although I have simplified the title of the proceedings in paragraph 2 of the draft order as shown at the top of these reasons. I am also imposing an additional term.

26 During the extension period, the court will require a bi-weekly status report confirming the interim funding is in place, verifying progress of construction, the continued validity of the cultivation licence and progress towards production of a first crop.

27 In the event that there is a significant deviation from the plan as proposed or if any of the assumptions built into the interim financing plan fail to materialize or require significant readjustment, the noteholders or any other creditor may move to lift the stay or for amendment of the order.

28 I may be spoken to for further direction if required or if there is any dispute as to the form of the order.

29 The parties may also arrange to speak to the matter if any party seeks costs.

Motion granted.

Footnotes

1 RSC 1985, C. B-3 as amended

2 See *Electro Sonic Inc., Re*, 2014 ONSC 942 (Ont. S.C.J. [Commercial List])

3 See *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) @ paras 63 - 65

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

5 See *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List])

6 See *OVG Inc., Re*, 2013 ONSC 1794 (Ont. S.C.J.)

7 See: *https://business.financialpost.com/cannabis/canopy-growth-lays-off-500-workers-shuts-massive-b-c-greenhouse-facilities*

8 See *Mustang GP Ltd., Re*, 2015 ONSC 6562 (Ont. S.C.J.)

TAB 10

2015 ONSC 6562
Ontario Superior Court of Justice

Mustang GP Ltd., Re

2015 CarswellOnt 16398, 2015 ONSC 6562, 259 A.C.W.S. (3d) 623, 31 C.B.R. (6th) 130

In the Matter of the Notice of Intention to Make a Proposal of Mustang GP Ltd.

In the Matter of the Notice of Intention to Make a Proposal of Harvest Ontario Partners Limited Partnership

In the Matter of the Notice of Intention to Make a Proposal of Harvest Power Mustang Generation Ltd.

H.A. Rady J.

Heard: October 19, 2015
Judgment: October 28, 2015
Docket: 35-2041153, 35-2041155, 35-2041157

Counsel: Harvey Chaiton, for Mustang GP Ltd., Harvest Ontario Partners Limited Partnership and Harvest Power Mustang Generation Ltd.
Joseph Latham, for Harvest Power Inc.
Jeremy Forrest, for Proposal Trustee, Deloitte Restructuring Inc.
Robert Choi, for Badger Daylighting Limited Partnership
Curtis Cleaver, for StormFisher Ltd.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

MOTION by debtors for approval of proposal.

***H.A. Rady J.*:**

Introduction

1 This matter came before me as a time sensitive motion for the following relief:

(a) abridging the time for service of the debtors' motion record so that the motion was properly returnable on October 19, 2015;

(b) administratively consolidating the debtors' proposal proceeding;

(c) authorizing the debtors to enter into an interim financing term sheet (the DIP term sheet) with StormFisher Environmental Ltd. (in this capacity, the DIP lender), approving the DIP term sheet and granting the DIP lender a super priority charge to secure all of the debtors' obligations to the DIP lender under the DIP term sheet;

(d) granting a charge in an amount not to exceed $150,000 in favour of the debtors' legal counsel, the proposal trustee and its legal counsel to secure payment of their reasonable fees and disbursements;

(e) granting a charge in an amount not to exceed $2,000,000 in favour of the debtors' directors and officers;

(f) approving the process described herein for the sale and marketing of the debtors' business and assets;

(g) approving the agreement of purchase and sale between StormFisher Environmental Ltd. and the debtors; and

(h) granting the debtors an extension of time to make a proposal to their creditors.

Preliminary Matter

2 As a preliminary matter, Mr. Choi, who acts for a creditor of the debtors, Badger Daylighting Limited Partnership, requested an adjournment to permit him an opportunity to review and consider the material, which was late served on October 15, 2015. He sought only a brief adjournment and I was initially inclined to grant one. However, having heard counsel's submissions and considered the material, I was concerned that even a brief adjournment had the potential to cause mischief as the debtors attempt to come to terms with their debt. Any delay might ultimately cause prejudice to the debtors and their stakeholders. Both Mr. Chaiton and Mr. Latham expressed concern about adverse environmental consequences if the case were delayed. No other stakeholders appeared to voice any objection. As a result, the request was denied and the motion proceeded.

3 Following submissions, I reserved my decision. On October 20, 2015, I released an endorsement granting the relief with reasons to follow.

Background

4 The evidence is contained in the affidavit of Wayne Davis, the chief executive officer of Harvest Mustang GP Ltd. dated October 13, 2015. He sets out in considerable detail the background to the motion and what has led the debtors to seek the above described relief. The following is a summary of his evidence.

5 On September 29, 2015, the moving parties, which are referred to collectively as the debtors, each filed a Notice of Intention to Make a Proposal pursuant to s. 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended. Deloitte Restructuring Inc. was named proposal trustee.

6 The debtors are indirect subsidiaries of Harvest Power Inc., a privately owned Delaware corporation that develops, builds, owns and operates facilities that generate renewable energy, as well as soil and mulch products from waste organic materials.

7 Harvest Power Mustang Generation Ltd. was established in July 2010 in order to acquire assets related to a development opportunity in London. In October 2010, it purchased a property located at 1087 Green Valley Road from London Biogas Generation Inc., a subsidiary of StormFisher Ltd. The intent was to design, build, own and operate a biogas electricity production facility.

8 In November 2011, a limited partnership was formed between Harvest Power Canada Ltd., Harvest Power Mustang GP Ltd. and Waste Management of Canada Corporation, referred to as Harvest Ontario Partners Limited Partnership or Harvest Ontario Partners. It was formed to permit the plant to accept organic waste to be used to generate renewable electricity. After the partnership was formed, Harvest Power Mustang Generation Ltd. became a 100 percent owned subsidiary of the partnership. In June 2012, its personal property was transferred to the partnership. It remains the registered owner of 1087 Green Valley Road.

9 The plant employs twelve part and full time employees.

10 The debtors began operating the biogas electrical facility in London in April 2013. Unfortunately, the plant has never met its production expectations, had negative EBITDA from the outset and could not reach profitability without new investment. The debtors had experienced significant "launch challenges" due to construction delays, lower than expected feedstock acquisition, higher than anticipated labour costs, and delays in securing a necessary approval from the Canadian Food Inspection Agency for the marketing and sale of fertilizer produced at the facility.

11 Its difficulties were compounded by litigation with its general contractor, arising from the earlier construction of the facility. The lawsuit was ultimately resolved with the debtors paying $1 million from a holdback held by Harvest Ontario Partners as well as a 24 percent limited partnership interest in the partnership. The litigation was costly and "caused a substantial drain on the debtors' working capital resources".

12 The debtors' working capital and operating losses had been funded by its parent company, Harvest Power Inc. However, in early 2015 Harvest Power Inc. advised the debtors that it would not continue to do so. By the year ended September 2015, the debtors had an operating loss of approximately $4.8 million.

13 In January 2015, the debtors defaulted on their obligations to Farm Credit Canada, its senior secured creditor, which had extended a demand credit facility to secure up to $11 million in construction financing for the plant. The credit facility was converted to a twelve year term loan, secured by a mortgage, a first security interest and various guarantees. In February 2015, FCC began a process to locate a party to acquire its debt and security, with the cooperation of the debtors. FCC also advised the debtors that it would not fund any restructuring process or provide further financing. The marketing process failed to garner any offers from third parties that FCC found acceptable.

14 On July 9, 2015, FCC demanded payment of its term loan from Harvest Ontario Partners and served a Notice of Intention to Enforce Security pursuant to s. 244(1) of the *BIA*. In August 2015, an indirect subsidiary of Harvest Power Inc. — 2478223 Ontario Limited — purchased and took an assignment of FCC's debt and security at a substantial discount.

15 Shortly thereafter, StormFisher Ltd., which is a competitor of Harvest Power Inc., advised 2478223 that it was interested in purchasing the FCC debt and security in the hopes of acquiring the debtors' business. It was prepared to participate in the sale process as a stalking horse bidder and a DIP lender.

16 On September 25, 2015, 2478223 assigned the debt and security to StormFisher Environmental Ltd., a subsidiary of StormFisher Ltd., incorporated for the purpose of purchasing the debtors' assets. The debt and security were purchased at a substantial discount from what 2478223 had paid and included cash, a promissory note and a minority equity interest. StormFisher Ltd. is described as having remained close to the Harvest Power group of companies in the time following its subsidiary's sale of the property to Harvest Power Generation Ltd. Some of its employees worked under contract for Harvest Power Inc. It was aware of the debtors' financial difficulties and had participated in FCC's earlier attempted sale process.

17 On September 29, 2015, the debtors commenced these proceedings under the *BIA*, in order to carry out the sale of the debtors' business as a going concern to StormFisher Environmental Ltd. as a stalking horse bidder or another purchaser. Given the lack of success in the sale process earlier initiated by FCC, and concerns respecting the difficulties facing the renewable energy industry in general and for the debtors specifically, the debtors believe that a stalking horse process is appropriate and necessary.

18 In consultation with the proposal trustee, the debtors developed a process for the marketing and sale of their business and assets. The following summary of the process is described by Mr. Davis in his affidavit:

> i. the sale process will be commenced immediately following the date of the order approving it;
>
> ii. starting immediately after the sale process approval date, the debtors and the proposal trustee will contact prospective purchasers and will provide a teaser summary of the debtors' business in order to solicit interest. The proposal trustee will obtain a non-disclosure agreement from interested parties who wish to receive a confidential information memorandum and undertake due diligence. Following the execution of a non-disclosure agreement, the proposal trustee will provide access to an electronic data room to prospective purchasers;
>
> iii. at the request of interested parties, the proposal trustee will facilitate plant tours and management meetings;
>
> iv. shortly following the sale process approval date, the proposal trustee will advertise the opportunity in the national edition of the Globe and Mail;
>
> v. the bid deadline for prospective purchasers will be 35 days following the sale process approval date. Any qualified bid must be accompanied by a cash deposit of 10% of the purchase price;

vi. the debtors and the proposal trustee will review all superior bids received to determine which bid it considers to be the most favourable and will then notify the successful party that its bid has been selected as the winning bid. Upon the selection of the winning bidder, there shall be a binding agreement of purchase and sale between the winning bidder and the debtors;

vii. if one or more superior bids is received, the debtors shall bring a motion to the Court within seven business days following the selection of the winning bidder for an order approving the agreement of purchase and sale between the winning bidder and the debtors and to vest the assets in the winning bidder;

viii. the closing of the sale transaction will take place within one business day from the sale approval date;

ix. in the event that a superior bid is not received by the bid deadline, the debtors will bring a motion as soon as possible following the bid deadline for an order approving the stalking horse agreement of purchase and sale.

19 StormFisher Environmental Ltd. is prepared to purchase the business and assets of the debtors on a going-concern basis on the following terms:

A partial credit bid for a purchase price equal to: (i) $250,000 of the debtors' total secured obligations to StormFisher Environmental Ltd. (plus the DIP loan described below); (ii) any amounts ranking in priority to StormFisher Environmental Ltd.'s security, including the amounts secured by: (a) the administration charge; (b) the D&O charge (both described below); and (c) the amount estimated by the proposal trustee to be the aggregate fees, disbursements and expenses for the period from and after closing of the transaction for the sale the debtors' business to the completion of the *BIA* proceedings and the discharge of Deloitte Restructuring Inc. as trustee in bankruptcy of estate of the debtors.

20 The debtors and the proposal trustee prepared a cash flow forecast for September 25, 2015 to December 25, 2015. It shows that the debtors will require additional funds in order to see them through this process, while still carrying on business.

21 StormFisher Environmental Ltd. has offered to make a DIP loan of up to $1 million to fund the projected shortfall in cash flow. In return, the DIP lender requires a charge that ranks in priority to all other claims and encumbrances, except the administration and D&O charges. The administration charge protects the reasonable fees and expenses of the debtors' professional advisors. The D&O charge is to indemnify the debtors for possible liabilities such as wages, vacation pay, source deductions and environmental remedy issues. The latter may arise in the event of a wind-down or shut down of the plant and for which existing insurance policies may be inadequate. According to Mr. Davis, the risk if such a charge is not granted is that the debtors' directors and officers might resign, thereby jeopardizing the proceedings.

22 The debtors have other creditors. Harvest Power Partners had arranged for an irrevocable standby letter of credit, issued by the Bank of Montreal to fund the payment that might be required to the Ministry of Environment arising from any environment clean up that might become necessary.

23 Searches of the *PPSA* registry disclosed the following registrations:

(a) *Harvest Ontario Partners:*

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts.

(b) *Harvest Power Mustang Generation Ltd.*

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts; and

(iii) Roynat Inc. in respect of certain equipment.

24 There are two registrations on title to 1087 Green Valley Road. The first is for $11 million in favour of FCC dated February 28, 2012 and transferred to 2478223 on October 8, 2015. The second is a construction lien registered by Badger Daylighting Limited Partnership on July 2, 2015 for $239,191. The validity and priority of the lien claim is disputed by the debtors and 2478223.

Analysis

a) the administrative consolidation

25 The administration order, consolidating the debtors' notice of intention proceedings is appropriate for a variety of reasons. First, it avoids a multiplicity of proceedings, the associated costs and the need to file three sets of motion materials. There is no substantive merger of the bankruptcy estates but rather it provides a mechanism to achieve the just, most expeditious and least expensive determination mandated by the *BIA General Rules*. The three debtors are closely aligned and share accounting, administration, human resources and financial functions. The sale process contemplates that the debtors' assets will be marketed together and form a single purchase and sale transaction. Harvest Ontario Partners and Harvest Power Mustang Generation Ltd. have substantially the same secured creditors and obligations. Finally, no prejudice is apparent. A similar order was granted in *Electro Sonic Inc., Re*, 2014 ONSC 942 (Ont. S.C.J. [Commercial List]).

b) the DIP agreement and charge

26 S. 50.6 of the *BIA* gives the court jurisdiction to grant a DIP financing charge and to grant it a super priority. It provides as follows:

> **50.6(1)** ***Interim Financing:*** On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) 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 debtor'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 debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(b)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.
>
> **50.6(3)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

27 S. 50.6(5) enumerates a list of factors to guide the court's decision whether to grant DIP financing:

> **50.6(5)** ***Factors to be considered:*** In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the debtor is expected to be subject to proceedings under this Act;
>
> (b) how the debtor's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the debtor's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
>
> (e) the nature and value of the debtor's property
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

28 This case bears some similarity to *P.J. Wallbank Manufacturing Co., Re*, 2011 ONSC 7641 (Ont. S.C.J.). The court granted the DIP charge and approved the agreement where, as here, the evidence was that the debtors would cease operations if the relief were not granted. And, as here, the DIP facility is supported by the proposal trustee. The evidence is that the DIP lender will not participate otherwise.

29 The Court in *Wallbank* also considered any prejudice to existing creditors. While it is true that the DIP loan and charge may affect creditors to a degree, it seems to me that any prejudice is outweighed by the benefit to all stakeholders in a sale of the business as a going concern. I would have thought that the potential for creditor recovery would be enhanced rather than diminshed.

30 In *Comstock Canada Ltd., Re*, 2013 ONSC 4756 (Ont. S.C.J.), Justice Morawetz was asked to grant a super priority DIP charge in the context of a *Companies' Creditors Arrangement Act* proceeding. He referred to the moving party's factum, which quoted from *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.) as follows:

> [I]t is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:
>
> > ...the purpose of the *CCAA*... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.
>
> In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):
>
> > 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.
> >
> > . . .
> >
> > Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the CCAA judge's findings of fact, but 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" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The 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. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate".
> >
> > [Emphasis in original]

31 I recognize that in the *Comstock* decision, the court was dealing with a *CCAA* proceeding. However, the comments quoted above seem quite apposite to this case. After all, the *CCAA* is an analogous restructuring statute to the proposal provisions of the *BIA*.

c) administration charge

32 The authority to grant this relief is found in s. 64.2 of the *BIA*.

64.2 (1) ***Court may order security or charge to cover certain costs:*** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

64.2 (2) ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

33 In this case, notice was given although it may have been short. There can be no question that the involvement of professional advisors is critical to a successful restructuring. This process is reasonably complex and their assistance is self evidently necessary to navigate to completion. The debtors have limited means to obtain this professional assistance. See also *Colossus Minerals Inc., Re*, 2014 ONSC 514 (Ont. S.C.J.) and the discussion in it.

d) the D & O charge

34 The *BIA* confers the jurisdiction to grant such a charge at s. 64.1, which provides as follows:

64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 property of the person is subject to a security or charge — in an amount that the court considers appropriate in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

(3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional default.

35 I am satisfied that such an order is warranted in this case for the following reasons:

• the D & O charge is available only to the extent that the directors and officers do not have coverage under existing policies or to the extent that those policies are insufficient;

• it is required only in the event that a sale is not concluded and a wind down of the facility is required;

• there is a possibility that the directors and officers whose participation in the process is critical, may not continue their involvement if the relief were not granted;

• the proposal trustee and the proposed DIP lender are supportive;

e) the sale process and the stalking horse agreement of purchaser sale

36 The court's power to approve a sale of assets in the context of a proposal is set out in s. 65.13 of the *BIA*. However, the section does not speak to the approval of a sale process.

37 In *Brainhunter Inc., Re* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), Justice Morawetz considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring application under the *CCAA* and in particular s. 36, which parallels s. 65.13 of the *BIA*. He observed:

> 13. The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Nortel Networks Corp., Re*, [2009] O.J. No. 3169(Ont. S.C.J. [Commercial List]), I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:
>
> (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?
>
> 14. The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.
>
> 15. Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.
>
> 16. Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.
>
> 17. I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

38 It occurs to me that the Nortel Criteria are of assistance in circumstances such as this — namely on a motion to approve a sale process in proposal proceedings under the *BIA*.

39 In *Meta Energy Inc. v. Algatec Solarwerke Brandenberg GmbH*, 2012 ONSC 175 (Ont. S.C.J.) the Court was asked to approve a sales process and bidding procedures, which included the use of a stalking horse credit bid. The court reasoned as follows:

> 6. Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp.*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which

offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

(i) the fairness, transparency and integrity of the proposed process;

(ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,

(iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

7. The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, BIA proposals, and CCAA proceedings.

40 I am satisfied that the sale process and stalking horse agreement should be approved. It permits the sale of the debtors' business as a going concern, with obvious benefit to them and it also maintains jobs, contracts and business relationships. The stalking horse bid establishes a floor price for the debtors' assets. It does not contain any compensation to StormFisher Environmental Ltd. in the event a superior bid is received, and as a result, a superior bid necessarily benefits the debtors' stakeholders rather than the stalking horse bidder. The process seems fair and transparent and there seems no viable alternative, particularly in light of FCC's earlier lack of success. Finally, the proposal trustee supports the process and agreement.

f) Extension of time to file a proposal

41 It is desirable that an extension be granted under s. 50.4 (9) of the *BIA*. It appears the debtors are acting in good faith and with due diligence. Such an extension is necessary so the sale process can be carried out. Otherwise, the debtors would be unable to formulate a proposal to their creditors and bankruptcy would follow.

42 For these reasons, the relief sought is granted.

Motion granted.

TAB 11

2013 ONSC 1780
Ontario Superior Court of Justice [Commercial List]

Northstar Aerospace Inc., Re

2013 CarswellOnt 4056, 2013 ONSC 1780, 227 A.C.W.S. (3d) 929

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

In the Matter of a Plan of Compromise or Arrangement of Northstar Aerospace, Inc., Northstar Aerospace (Canada) Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company Applicants

Morawetz J.

Judgment: April 9, 2013
Docket: CV-12-9761-00CL

Counsel: C.J. Hill, J. Szumski for Court-Appointed Monitor, Ernst & Young Inc.
J. Wall for Her Majesty the Queen in Right of Ontario, as Represented by the Ministry of the Environment
P. Guy, K. Montpetit for Former Directors and Officers Group
Steven Weisz for Fifth Third Bank

Subject: Insolvency

MOTION by court-appointed monitor of applicant companies for approval of adjudication process and for final determination with respect to validity of claims and indemnity.

***Morawetz J.*:**

Motion Overview

1 This is a motion brought by Ernst & Young Inc., in its capacity as court-appointed Monitor (the "Monitor") of Northstar Aerospace, Inc. ("Northstar Inc."), Northstar Aerospace (Canada) Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company (collectively, the "Applicants"), for approval of an adjudication process and for a final determination with respect to whether two claims submitted in the claims procedure (the "Claims Procedure") authorized by order of August 2, 2012 (the "Claims Procedure Order") are valid claims for which the former directors and officers of the Applicants (the "D&Os") are indemnified pursuant to the indemnity (the "Directors' Indemnity") contained in paragraph 23 of the Initial Order dated June 14, 2012 [2012 CarswellOnt 8605 (Ont. S.C.J. [Commercial List])] (the "Initial Order").

2 If they are so indemnified, the D&Os may be entitled to the benefit of certain funds held in a reserve by the Monitor (the "D&O Charge Reserve") to satisfy such claims. If they are not, then there are no claims against the D&O Charge Reserve and the funds can be released to Fifth Third Bank, in its capacity as agent for itself, First Merit Bank, N.A. and North Shore Community Bank & Trust Company (in such capacity, the "Pre-Filing Agent").

3 For the following reasons, I have determined that the adjudication process should be approved and that the D&Os are not entitled to the benefit of the D&O Charge Reserve.

4 In my view, for the purposes of determining this motion, it is not necessary to determine whether the claims filed by the MOE and the D&Os are pre-filing or post-filing claims. References in this endorsement to "MOE Pre-Filing D&O Claim", "MOE Post-Filing D&O Claim" and "WeirFoulds Post-Filing D&O Claim" have been taken from the materials filed by the parties. This endorsement includes references to those terms for identification purposes, but no determination is being made as to whether these claims are pre-filing or post-filing claims.

5 The two claims at issue are described in proofs of claim (collectively, "the Proofs of Claim") filed by Her Majesty the Queen in Right of the Province of Ontario as Represented by the Ministry of the Environment (the "MOE") and by WeirFoulds LLP ("WeirFoulds") on behalf of certain of the D&Os ("WeirFoulds D&Os").

6 The MOE proof of claim (the "MOE Proof of Claim") asserts, among other things, a "Pre-Filing D&O Claim" (the "MOE Pre-Filing D&O Claim") and a "Post-Filing D&O Claim" (the "MOE Post-Filing D&O Claim") (collectively, the "MOE D&O Claims"), for costs incurred and to be incurred by the MOE in carrying out certain remediation activities originally imposed on the Applicants in an Ontario MOE Director's Order issued under the *Environmental Protection Act*, R.S.O. 1990, c. E. 19 (the "EPA") on March 15, 2012 (the "March 15 Order"). The basis for the D&Os' purported liability is a future Ontario MOE Director's Order (the "Future Director's Order"), which the MOE intends to issue against the D&Os. According to the Monitor's counsel, the Future Director's Order will require the D&Os to conduct the same remediation activities previously required of the Applicants.

7 The WeirFoulds proof of claim (the "WeirFoulds Proof of Claim") responds to the threat of the Future Director's Order. It asserts a Post-Filing D&O Claim (the "WeirFoulds Post-Filing D&O Claim") by the individual WeirFoulds D&Os for contribution and indemnity against each other, and against the former directors and officers of the predecessors of Northstar Inc., in respect of any liability that they may incur under the Future Director's Order.

8 Neither the MOE nor the D&Os object to the Monitor's proposed adjudication procedure.

Background to the CCAA Proceedings

9 On May 14, 2012, the Applicants obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C. 36 ("CCAA"); Ernst & Young Inc. was subsequently appointed as the Monitor (the "CCAA Proceedings").

10 A number of background facts have been set out in *Northstar Aerospace Inc., Re*, 2012 ONSC 4423 (Ont. S.C.J. [Commercial List]) (*Northstar*) and *Northstar Aerospace Inc., Re*, 2012 ONSC 6362 (Ont. S.C.J. [Commercial List]). A number of the issues with respect to MOE's claims against the Applicants have been covered in a previous decision. See *Northstar*, *supra.*

Directors' Indemnification and Directors' Charge

11 The Initial Order provided that the Applicants would grant the Directors' Indemnity, indemnifying the D&Os against obligations and liabilities that they may incur as directors and officers of the Applicants after the commencement of the CCAA Proceedings.

12 Paragraph 23 of the Initial Order provides:

> 23. This court orders that the CCAA Entities shall indemnify their directors and officers against obligations and liabilities that they may incur as directors and officers of the CCAA entities after the commencement of the within proceedings, except to the extent that, with respect to any director or officer the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

13 Paragraph 24 of the Initial Order further provides that the D&Os and the chief restructuring officer would have the benefit of a charge, in the amount of US$1,750,000, on the Applicants' current and future assets, undertakings and properties, to secure the Directors' Indemnity (the "Directors' Charge").

14 The Directors' Charge, as established in the Initial Order, was fixed ahead of all security interests in favour of any person, other than the "Administration Charge", "Critical Suppliers' Charge" and the "DIP Lenders' Charge".

15 The statutory basis for the Directors' Charge is set out in section 11.51 of the CCAA, which reads as follows:

> 11.51(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge - in an amount that the court considers appropriate - in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> 11.51(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

16 Any order under this provision affects, or potentially affects, the priority status of creditors. It is through this lens that the court considers motions. The order is discretionary in nature, is extraordinary in nature and should be, in my view, applied restrictively as it alters the general priority regime affecting secured creditors. In this case, the order was made and it has priority over Fifth Third Bank.

D&O Claims

17 On August 2, 2012, the Claims Procedure Order was issued to solicit the submissions of Proofs of Claim by the claims bar date of October 23, 2012 (the "Claims Bar Date") in respect of all "D&O Claim[s]".

18 As indicated by the Monitor's counsel, the definition of a "D&O Claim" is very broad. It includes both claims that arose prior to June 14, 2012 (pre-filing D&O claims) and claims that arose from and after June 14, 2012 (post-filing D&O claims). It also potentially includes both post-filing D&O claims which are secured by the Directors' Charge and post-filing D&O claims which are not secured by the Directors' Charge.

19 Paragraph 25 of the Claims Procedure Order specifically recognizes this distinction:

> 25. This court orders that no Post-Filing D&O Claim shall be paid by the Monitor from the D&O Charge Reserve without the consent of the Pre-Filing Agent and the CRO Counsel and D&O Counsel or further Order of the court and the determination that a claim is a Post-Filing D&O Claim does not create a presumption that such D&O Claim is entitled to be paid by the Monitor from the D&O Charge Reserve.

20 The MOE D&O Claims concurrently asserts the MOE Pre-Filing D&O Claim and the MOE Post-Filing D&O Claim for the same amounts, namely:

> (a) $66,240.36 for costs incurred by the MOE to carry out the remediation activities described in the March 15 Order up to the date when the MOE Proof of Claim was filed;
>
> (b) $15 million for future costs to be incurred by the MOE to carry out the remediation activities described in the March 15 Order; and
>
> (c) a presently unknown amount required to conduct additional environmental remediation work necessary to decontaminate the Site and the Bishop Street Community.

21 As there are no funds available for distribution to unsecured pre-filing creditors in the CCAA Proceedings, the Monitor appropriately has not considered the validity of the MOE Pre- Filing D&O Claim. This motion, from the Monitor's standpoint, therefore only addresses the MOE Post-Filing D&O Claim.

22 The WeirFoulds Proof of Claim provides that:

> This proof of claim is filed in order to preserve the right to commence:
>
> (1) any and all claims over that any of the [WeirFoulds D&Os] may have against each other; and

> (2) any and all claims that any of the [WeirFoulds D&Os] may have against any former director or officer of Northstar Aerospace, Inc., or predecessor companies, for contribution or indemnity, based upon any applicable cause of action in law or in equity, in relation to any liability that may be found to exist against any of the [WeirFoulds D&Os] in connection with the proofs of claim filed in the within proceedings by the Ontario Ministry of the Environment, dated October 19, 2012.

23 For the purpose of resolving the entitlement of any claimant to the D&O Charge Reserve, paragraph 22 of the Claims Procedure Order allows the Monitor and certain other parties to bring a motion seeking approval of an adjudication procedure for determination as to whether any claim asserted in the Claims Procedure is a post-filing D&O claim which constitutes a claim for which the D&Os are indemnified under the Directors' Indemnity.

Issues to Consider

24 The D&Os are bringing a motion on April 18, 2013 to determine the proper venue for the adjudication of the Post-Filing D&O Claims. There is considerable overlap between the issues raised on this motion and the issues raised on the pending motion.

25 In my view, it is appropriate for this endorsement to exclusively address the narrow issue raised in this motion, namely, whether the Proofs of Claims are valid claims for which the D&Os are indemnified pursuant to the Directors' Indemnity contained in the Initial Order. A consideration of whether the claims are pre-filing claims or post-filing claims, with respect to the D&Os, is better addressed in the motion returnable on April 18, 2013.

26 The Monitor's counsel appropriately sets out the issues of this motion, as follows:

> (a) Whether the court should approve the proposed adjudication process and issue a determination as to whether the disputed post-filing D&O claims constitute valid claims for which the D&Os are indemnified under the Directors' Indemnity;
>
> (b) Whether the MOE Post-Filing D&O Claim is a valid claim for which the D&Os are indemnified under the Directors' Indemnity;
>
> (c) Whether the WeirFoulds Post-Filing D&O Claim is a valid claim for which the D&Os are indemnified under the Directors' Indemnity; and
>
> (d) Whether the D&O Charge Reserve should be released and paid over to the Pre-Filing Agent.

Analysis and Conclusion

27 I conclude, for the following reasons, that (a) the adjudication process should be approved; (b) the MOE Post-Filing D&O Claims are not claims for which the D&Os are indemnified under paragraph 23 of the Initial Order; (c) the WeirFoulds Post-Filing D&O Claims are not claims for which the D&Os are indemnified under paragraph 23 of the Initial Order; and (d) the D&O Charge Reserve should be paid over to the Pre-Filing Agent.

28 The Directors' Charge, as contemplated by section 11.51 of the CCAA, is appropriate in the current circumstances (notwithstanding it being a discretionary and extraordinary provision, as outlined above) because it is directly tailored to the purposes of creating a charge, and its impact is limited.

29 The purpose of a section 11.51 charge is twofold: (1) to keep the directors and officers in place during the restructuring to avoid a potential destabilization of the business; and (2) to enable the CCAA applicants to benefit from experienced board of directors and experienced senior management. Courts have accepted that, without certain protections, officers and directors will often discontinue their service in CCAA restructurings. See *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) and *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]).

30 In this case, the Applicants' basis for seeking the Directors' Charge is set out in the affidavit of Mr. Yuen, sworn June 13, 2012, which was filed in support of the Initial Order application. He described the purpose of the Directors' Charge as:

> To ensure the ongoing stability of the CCAA Entities' business during the CCAA period, the CCAA Entities require the continued participation of the CRO and the CCAA Entities' officers and executives who manage the business and commercial activities of the CCAA Entities.

31 The Yuen affidavit goes on to identify the specific obligations and liabilities for which the Directors' Charge was requested, including liability for unpaid wages, pension amounts, vacation pay, statutory employee deductions and HST. At paragraph 143 of his affidavit, Mr. Yuen states:

> I am advised by Daniel Murdoch of Stikeman Elliott LLP, counsel to the CCAA Entities, and do verily believe, that in certain circumstances directors can be held liable for certain obligations of a company owing to employees and government entities. As at May 18, 2012, the CCAA Entities were potentially liable for some or all of unpaid wages, pension amounts, vacation pay, statutory employee deductions, and HST (Harmonized Sales Tax) of approximately CDN $1.65 million ...

32 The Monitor's counsel submits that the quantum of the Directors' Charge was tailored to the Applicants' existing liability for such amounts.

33 The scope of a section 11.51 charge is limited in several ways:

> (a) section 11.51 does not authorize the creation of a charge in favour of any party other than a director or officer (or chief restructuring officer) of the companies under CCAA protection;
>
> (b) section 11.51 does not authorize the creation of a charge for purposes other than to indemnify the directors and officers against obligations and liabilities that they may incur as a director or officer of the company after the commencement of its CCAA Proceedings; and
>
> (c) section 11.51(4) requires the court to exclude from the section 11.51 charge the obligations and liabilities of directors and officers incurred through their own gross negligence or wilful misconduct.

34 In my view, it would be inappropriate to determine that the Proofs of Claim are claims for which the D&Os are entitled to be indemnified under the Directors' Indemnity, as doing so would wrongly and inequitably affect the priority of claims as between the MOE and the Fifth Third Bank.

35 In the context of the MOE claims against the Applicants in these CCAA proceedings, it has already been determined, in *Northstar*, *supra*, that the MOE claims are unsecured and subordinate to the position of Fifth Third Bank. It would be a strange outcome, and invariably lead to inconsistent results, if the MOE could, in the CCAA Proceedings, improve its unsecured position against Fifth Third Bank by issuing a Director's Order after the commencement of CCAA Proceedings, based on an environmental condition which occurred long before the CCAA Proceedings. This would result in the MOE achieving indirectly in these CCAA Proceedings that which it could not achieve directly.

36 Simply put, the activity that gave rise to the MOE claims occurred prior to the CCAA proceedings. It is not the type of claim to which the Directors' Charge under section 11.51 responds. Rather, in the CCAA proceedings, it is an unsecured claim and does not entitle the MOE to obtain the remedy sought on this motion. The fact that the MOE seeks this remedy through the D&Os does not change the substance of the position.

37 The situation facing the Applicants, the Monitor, Fifth Third Bank, and others affected by the Directors' Charge, has to be considered as part of the CCAA Proceedings. In my view, it would be highly inequitable to create a parallel universe, wherein certain MOE claims as against the Applicants are treated as unsecured claims and MOE D&O Claims and the WeirFoulds Post-Filing D&O Claim are treated as secured claims with respect to the Directors' Charge.

38 It could be that the MOE has a remedy against the D&Os; however, any remedy they may have does not provide recourse against the D&O Charge in these CCAA Proceedings. Nevertheless, it remains open for the MOE to pursue its claims against the D&Os on the motion returnable on April 18, 2013.

Order

39 In the result, I grant the Monitor's motion, approve the aforementioned adjudication process, and approve the activities of the Monitor as described in the Seventh Report of the Monitor dated November 7, 2012. I also direct the following:

(1) The MOE Post-Filing D&O Claim is not a claim for which the D&Os are indemnified under the Directors' Indemnity;

(2) The WeirFoulds Post-Filing D&O Claim is not a claim for which the D&Os are indemnified under the Directors' Indemnity; and

(3) The US$1,750,000 held by the Monitor in respect of the D&O Charge Reserve be paid to the Pre-Filing Agent.

Motion granted.

TAB 12

2016 ONSC 6800
Ontario Superior Court of Justice [Commercial List]

Performance Sports Group Ltd., Re

2016 CarswellOnt 17492, 2016 ONSC 6800, 272 A.C.W.S. (3d) 470, 41 C.B.R. (6th) 245

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PERFORMANCE SPORTS GROUP LTD., BAUER HOCKEY CORP., BAUER HOCKEY RETAIL CORP., BAUER PERFORMANCE SPORTS UNIFORMS CORP., BPS CANADA INTERMEDIATE CORP., BPS DIAMOND SPORTS CORP., EASTON BASEBALL/SOFTBALL CORP., KBAU HOLDINGS CANADA, INC., PERFORMANCE LACROSSE GROUP CORP., PSG INNOVATION CORP., BAUER HOCKEY RETAIL INC., BAUER HOCKEY, INC., BAUER PERFORMANCE SPORTS UNIFORMS INC., BPS DIAMOND SPORTS INC., BPS US HOLDINGS INC., EASTON BASEBALL/SOFTBALL INC., PERFORMANCE LACROSSE GROUP INC., PSG INNOVATION INC. (Applicants)

Newbould J.

Heard: October 31, 2016
Judgment: November 1, 2016
Docket: CV-16-11582-00CL

Counsel: Peter Howard, Kathryn Esaw, for Applicants
Robert I. Thornton, Rachel Bengino, for Proposed Monitor Ernst & Young Inc.
Bernard Boucher, John Tuzyk, for Sagard Capital Partners, L.P
David Bish, Adam Slavens, for Fairfax Financial Holdings Limited
Robert Staley, for Board of directors of Performance Sports Group Ltd.
Joseph Latham, Ryan Baulke, for Ad Hoc Committee of certain term lenders
Tony Reyes, Evan Cobb, for Bank of America, the ABL DIP lender

Subject: Insolvency

REASONS for granting of debtors' application for protection under *Companies' Creditors Arrangement Act*.

***Newbould J.*:**

1 On October 31, 2016 Performance Sports Group Ltd. ("PSG") and the other Applicants (collectively, the "Applicants" or the "PSG Entities") applied for and were granted protection under the CCAA and an Initial Order was signed, for reasons to follow. These are my reasons.

2 PSG, a public company incorporated under British Columbia law and traded publicly on the Toronto and New York stock exchanges, is the ultimate parent of the other PSG Entities, as well as certain entities in Europe which are not applicants in the this proceeding.

3 The PSG Entities are leading designers, developers and manufacturers of high performance sports equipment and related apparel. Historically focused on hockey, the PSG Entities expanded their business to include equipment and apparel in the baseball/softball and lacrosse markets. The hockey business operates under the BAUER, MISSION and EASTON brands; the baseball/softball business operates under the EASTON and COMBAT brands, and the lacrosse business operates under the MAVERIK and CASCADE brands.

4 The hockey and baseball/softball markets are the PSG Entities' largest business focus, generating approximately 60% and 30% of the Applicants' sales in fiscal 2015, respectively, with remaining sales derived from the lacrosse and apparel businesses. The PSG Entities have a diverse customer base, including over 4,000 retailers across the globe and more than 60 distributors. In fiscal 2015, approximately 58% of the PSG Entities' total sales were in the U.S., approximately 24% were in Canada, and approximately 18% were in the rest of the world.

5 The PSG Entities are generally structured so that there is a Canadian and U.S. subsidiary for each major business line. Some of the entities also perform specific functions such as risk management, accounting etc. for the benefit of the other PSG Entities. The Applicants have commenced parallel proceedings in the U.S. under Chapter 11 of the US Bankruptcy Code in the Bankruptcy Court for the District of Delaware.

Employees and benefits

6 As of September 30, 2016, the Applicants had 728 employees globally, with 224 employees in Canada, 430 in the U.S., 23 in Asia and 51 in Europe.

7 The majority of the PSG Entities' workforce is non-unionized. Canada is the only location with unionized employees, who are employed by Bauer Canada in Blainville, Quebec. 33 of 119 full-time Blainville situated employees are members of the United Steelworkers' Union of America Local 967 and are subject to a five-year collective bargaining agreement expiring on November 30, 2017.

8 Under the collective bargaining agreement with the unionized employees in Blainville, Quebec, Bauer Canada maintains a simplified defined contribution pension plan registered with Retraite Quebec. Under the plan, Bauer Canada matches employee contributions up to C$0.35/per hour worked by the employee up to a maximum of 80 hours bi-weekly.

9 Bauer Canada provides a supplemental pension plan (the "Canadian SERP") for nine former executives which is not a registered pension plan and does not accept new participants. There is no funding obligation under these plans. As at May 31, 2016, the Canadian SERP had an accrued benefit obligation of approximately C$4.53 million. The PSG Entities do not intend to continue paying the Canadian SERP obligations during the CCAA proceedings.

10 The PSG Entities provide a post-retirement life insurance plan to most Canadian employees. The life insurance plan is not funded and as at May 31, 2016 had an accrued benefit obligation of C$614,000. In February, 2016, the PSG Entities closed a distribution facility in Mississauga, Ontario. Approximately 51 employees belonging to the Glass, Molders, Pottery, Plastics and Allied Workers International Union were terminated in January and February 2016 because of the closure.

11 Due to the consolidation of the COMBAT operations with the EASTON operations, the PSG Entities terminated the employment of an additional 85 individuals between July and October, 2016, of whom approximately 77% were employees located in Canada and 23% were employees located in the U.S. The workforce reductions, primarily related to consolidation of the COMBAT operations, have resulted in the number of the PSG Entities' employees falling by approximately 15% since the end of fiscal 2016 and approximately 19% since the end of calendar 2015.

Assets and liabilities

12 As at September 30, 2016, the Applicants had assets with a book value of approximately $594 million and liabilities with a book value of approximately $608 million.

13 The majority of the Applicants' assets are comprised of accounts receivable, inventory and intangible assets. The Applicants' intellectual property and brand assets are a significant part of their businesses. The PSG Entities' patent portfolio includes hundreds of issued and pending patent applications covering a number of essential business lines. In addition to their patent portfolio, the PSG Entities have a number of registered trademarks to protect their brands.

14 The major liabilities of the PSG Entities are obligations under:

(a) a term loan facility (the "Term Loan Facility"): PSG is the borrower with a syndicate of lenders (the "Term Lenders") participating in the Term Loan Facility. The Term Loan Facility is governed by the term loan credit agreement dated as of April 15, 2014 (the "Term Loan Agreement"). As at October 28, 2016, approximately $330.5 million plus $1.4 million accrued interest was outstanding under the Term Loan Facility.

(b) an Asset-based revolving facility (the "ABL Facility" and together with the Term Loan Facility, the "Facilities"): a number of the PSG Entities are borrowers and BOA is the agent for a syndicate of lenders (the "ABL Lenders" and, together with the Term Lenders, the "Secured Lenders") participating in the ABL Facility. The ABL Facility is governed by the revolving ABL credit agreement dated as of April 15, 2014 (the "ABL Agreement"). As at October 28, 2016, approximately $159 million was outstanding under the ABL Facility.

Problems leading to the CCAA filing

15 A number of industry-wide and company-specific events have caused significant financial difficulties for the Applicants in the past 18 months:

a. Several key customers, retailers of sports equipment and apparel and sporting goods stores, abruptly filed for bankruptcy in late 2015 and 2016, resulting in substantial write-offs of accounts receivable and reduced purchase orders.

b. A marked and unexpected underperformance in the two most significant of the PSG Entities' business lines, being the Bauer Business and the Easton Business, has had an extremely negative effect on the PSG Entities' overall profitability.

c. The PSG Entities' financial results have been negatively affected by currency fluctuations.

d. The PSG Entities reduced their earnings guidance for FY2016 in response to their recent financial difficulties, which triggered a sharp decline in their common share price. Due that fall in share prices, the PSG Entities incurred considerable professional fees defending a recent class action and responding to inquiries by U.S. and Canadian regulators as to their continuous disclosure record.

e. The PSG Entities have triggered an event of default under their Facilities as a result of their failure to file certain reporting materials required under U.S. and Canadian securities law. The PSG Entities have been operating under the forbearance of their secured lenders since August 29, 2016, but that forbearance expired on October 28, 2016, leaving the PSG Entities in default under their Facilities.

Anticipated stalking horse bid sales process

16 The Applicants, in response to the myriad of issues leading to the current liquidity crisis and in particular in response to their failure to timely file the reporting materials, engaged in a thorough review of the PSG Entities' strategic alternatives. The PSG Entities concluded that negotiating a going-concern sale of their businesses was the optimal course to maximize value, and structured a process by which do so.

17 As part of that process, the PSG Entities have entered into an asset purchase agreement (the "Stalking Horse Agreement") for the sale of substantially all of their assets to a group of investors led by Sagard Capital Partners, L.P., the holder of approximately 17% of the shares of PSG, and Fairfax Financial Holdings Limited for a purchase price of $575 million. The Stalking Horse Agreement contemplates that the Applicants will continue as a going concern under new ownership, their secured debt will be fully repaid and payment of trade creditors. It further contemplates the preservation of a significant number of jobs in Canada and the U.S. The bid contemplated under the Stalking Horse Agreement will, subject to Court approval, serve as the stalking horse bid in a CCAA/Chapter 11 sales process to take place over the next 60 days of the proceedings and which is expected to conclude early in 2017. Approval of the sales process will be sought on the come-back motion later in November.

Analysis

18 I am quite satisfied that each of the PSG Entities are debtor companies within the meaning of the CCAA and that they are insolvent with liabilities individually and as a whole over the threshold of $5 million.

19 There are two DIP loans for which approval is sought, being an ABL DIP and a Term Loan DIP, as follows:

> (a) A group comprised of members of the ABL Lenders ("ABL DIP Lenders"), will provide an operating loan facility of $200 million (the "ABL DIP Facility") pursuant to an ABL DIP Credit Agreement (the "ABL DIP Credit Agreement"). The advances are expected to be made progressively and on an as-needed basis. All receipts of the Applicants will be applied to progressively replace the existing indebtedness under the ABL Credit Agreement, which is in the amount of $160 million. Accordingly, the facility provided by the ABL DIP Lenders is estimated provide up an additional $25 million of liquidity as compared to what is currently provided under the ABL Facility.
>
> (b) The Sagard Group (the "Term Loan DIP Lenders" and together with the ABL DIP Lenders, the "DIP Lenders"), will provide a term loan facility (the "Term Loan DIP Facility" and together with the ABL DIP Facility, the "DIP Facilities") in the amount of $361.3 million pursuant to a Term Loan DIP Credit Agreement (the "Term Loan DIP Credit Agreement" and together with the ABL DIP Credit Agreement, the "DIP Agreements"). The advances are expected to be made progressively as the funds are needed. The Term Loan DIP Facility will be applied to refinance the existing indebtedness under the Term Loan Credit Agreement, in the amount of approximately $331.3 million, to finance operations and to pay expenditures pertaining to the restructuring process. Accordingly, the Term Loan DIP Facility will provide approximately $30 million in new liquidity to fund ongoing operating and capital expenses during the restructuring proceedings.

20 The DIP Facilities were negotiated after the Applicants retained Centerview Partners LLC to assist in putting the required interim financing in place. The Applicants, with the assistance of Centerview, determined that obtaining interim financing from a third party would be extremely challenging, unless such facility was provided either junior to the ABL Facility and Term Loan Facility, on an unsecured basis, or paired with a refinancing of the existing indebtedness. The time was tight and in view of the existing charges against the assets and the very limited availability of unencumbered assets, it was thought that there would be little or no interest for third parties to act as interim financing providers. Accordingly, the Applicants decided to focus their efforts on negotiating DIP financing with its current lenders and stakeholders.

21 I am satisfied that the DIP Facilities should be approved, taking into account the factors in section 11.2(4) of the CCAA. Without DIP financing, the PSG Entities do not have sufficient cash on hand or generate sufficient receipts to continue operating their business and pursue a post-filing sales process. The management of the PSG Entities' business throughout the CCAA process will be overseen by the Monitor, who will supervise spending under the ABL DIP Facility. The Monitor [1] is supportive of the DIP Facilities in light of the fact that the Applicants are facing a looming liquidity crisis in the very short term and the Applicants, Centerview and the CRO have determined that there is little alternative other than to enter into the proposed DIP Agreements.

22 Section 11.2(1) of the CCAA provides that security for a DIP facility may not secure an obligation that existed before the order authorizing the security was made. The effect of this provision is that advances under a DIP facility may not be used to repay pre-filing obligations. In this case, the ABL DIP Facility is a revolving facility. Under its terms, receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility. The applicants submit that in this case, the ABL DIP Facility preserves the pre-filing status quo by upholding the relative pre-stay priority position of each secured creditor. By requiring that the PSG Entities only use post-filing cash receipts to pay down the accrued balance under the revolving credit facility, the ABL DIP Lenders are in no better position with respect to the priority of their pre-filing debt relative to other creditors. I accept that no advances under the ABL DIP Facility will be used to pay pre-filing obligations and there has been inserted in the Initial Order a provision that expressly prevents that. The provision that receipts from operations of the PSG Entities post-filing may be used to pay down the existing ABL Facility is approved.

23 The PSG Entities seek authorization to pay pre-filing amounts owing to the following suppliers, so long as these payments are approved by the Monitor:

> (a) Foreign suppliers located throughout Asia to which the PSG Entities predominantly source their manufacturing operations;
>
> (b) Domestic suppliers located in the U.S. and Canada which supply critical goods and services;
>
> (c) Suppliers in the Applicants' extensive global shipping, warehousing and distribution network, which move raw materials to and from the Applicants' global manufacturing centers and to move finished products to the Applicants' customers;
>
> (d) Those suppliers who delivered goods to the PSG Entities in the twenty days before October 31, 2016 — all of whom are entitled to be paid for their services under U.S. bankruptcy law; and
>
> (e) Third parties such as contractors, builders and repairs, who may potentially assert liens under applicable law against the PSG Entities.

24 There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. The recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern. See *Canwest Global Communications Corp., Re* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) at para. 43.

25 I am satisfied that an order should be made permitting the payments as requested. Any interruption of supply or service by the critical suppliers could have an immediate materially adverse impact on the PSG Entities' business, operations and cash flow, and could thereby seriously jeopardize their ability to restructure and continue as a going concern. Certain of the critical suppliers may not be able to continue to operate if not paid for pre-filing goods and services. The PSG Entities do not have any readily available means to replace these suppliers or, alternatively, to compel them to supply goods and services. There is a substantial risk that certain of the critical suppliers, including foreign suppliers, will interrupt supply if the pre-filing arrears that they are owed are not paid, all of which would risk unanticipated delays, interruptions and shutdowns. Payment of amounts in excess of $10,000 will require Monitor approval.

26 The PSG Entities seek approval to continue the use of their current Transfer Pricing Model to operate their business in the ordinary course. The Transfer Pricing Model is intended to ensure that each individual PSG Entity is compensated for the value of their contribution to the PSG Entities' overall business. The Applicants say that to ensure that the PSG Entities' intercompany transfers are not inhibited and stakeholder value is not eroded with regard to any particular entity, the Court should approve use of the Transfer Pricing Model. No doubt section 11 of the CCAA gives the Court jurisdiction to make the order sought and to continue the business as it has been operated prior to the CCAA and in this case it is desirable in light of the intention to sell the business as a going concern. I approve the continued use of the Transfer Pricing Model. In doing so, I am not to be taken as making any judgment as to the validity of the Transfer Pricing Model, i.e. whether it would pass muster with the relevant taxing authorities.

27 The PSG Entities seek an administrative charge in the amount of $7.5 million, and it is supported by the Monitor. The charge is to cover the fees and disbursements of the Monitor, U.S. and Canadian counsel to the Monitor, U.S. and Canadian counsel to the Applicants and counsel to the directors of the Applicants, and as defined in the APL DIP Agreement, and is to cover the fees and disbursements incurred both before and after the making of the Initial Order.

28 I realize that the model order provides for an administration charge to protect fees and disbursements incurred both before and after the order is made by of the Monitor, counsel to the Monitor and the Applicant's counsel. In this case, I raised a concern that past fees for a broad number of lawyers, including defence class action counsel in the U.S., could be paid from cash whereas it appeared from the material that there may be unpaid severance or other payments owing to employees in Canada that would not be paid.

29 Normally it is not an issue what an administration charge covers, with professionals taking care when advising companies in financial trouble and contemplating CCAA proceedings that they remain current with their billings. The CCAA does not expressly state whether an administration charge can or cannot cover past outstanding fees or disbursements, but the language would appear to imply that it is to cover only current fees and disbursement. Section 11.52(1) provides:

> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

30 Regarding (a), a Monitor is appointed in the Initial Order and its duties are performed during the CCAA proceeding, not before. Regarding (b), the language "for the purpose of proceedings under this Act" would appear to relate to proceedings, and not some other work such as a lawyer for the debtor defending litigation against the debtor. The same can be said regarding the language in (c) "effective participation in proceedings under this Act".

31 In response to my concerns about the Canadian employees being protected against past unpaid obligations, I was advised that it is the intention of the applicants to bring a motion on the come-back hearing to permit all past outstanding amounts to be paid to the Canadian employees. No counsel appearing for any of the other parties voiced any concern with that. In the circumstances I permitted the administration charge to be granted. If no such motion is brought on the come-back hearing or it is not granted, the administration charge should be revisited.

32 It appears clear, however, that an administration charge under section 11.52(1) can only be granted to cover work done in connection with a CCAA proceeding. Thus it is not possible for such a charge to protect fees of lawyers in other jurisdictions who may be engaged by the debtor either in foreign insolvency proceedings or other litigation. In the circumstances, the administration charge in this case shall not be used to cover the fees and disbursements of any of the applicants' lawyers in the U.S. chapter 11 proceedings or in any class action or other suit brought against any of the applicants. It may be that in the future, thought should be given as to whether it is appropriate at all to provide for an administration charge to cover pre-filing expenses.

33 The Canadian PSG Entities are expected to have positive net cash flows during the CCAA proceeding. Part of that money will be used to fund the deficit expected to be experienced by the US PSG Entities during the same period. At this time of year, due to hockey sales, the Canadian PSG Entities fund the US PSG Entities. The Applicants seek authorization to effect intercompany advances, secured by an intercompany charge. It is said that as PSG Entities' business is highly integrated and depends on intercompany transfers, the intercompany charge will preserve the status quo between PSG Entities.

34 Intercompany charges to protect intercompany advances have been approved before in CCAA proceedings under the general power in section 11 to make such order as the court considers appropriate. See *Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 107 (B.C. S.C.) and *Fraser Papers Inc., Re* [2009 CarswellOnt 3658 (Ont. S.C.J. [Commercial List])], 2009 CanLII 32698.

35 In this case, I also raised the issue about cash leaving Canada during the CCAA process while unpaid amounts owing to employees in Canada were outstanding. Apart from the comfort of the anticipated motion on the come-back hearing to pay these unpaid amounts, the Monitor is of the view that the intercompany charge is the best way to protect the Canadian creditors. The Monitor states that while it is difficult at this juncture to ascertain whether the intercompany charge is sufficient to protect the interest of each individual estate, considering that the Stalking Horse bid contemplates that there should be substantial funds available after the payment of the secured creditors' claims, the intercompany charge appears to offer some measure of protection to the individual estates. In view of the foregoing, the Proposed Monitor considers that the intercompany charge is reasonable in the circumstances. I approve the intercompany charge.

36 A standard directors' charge for $7.5 million is supported by the Monitor and it is approved, as is the request that Brian J. Fox of Alvarez & Marsal North America, LLC be appointed as the Chief Restructuring Officer of the PSG Entities. Given the anticipated complexity of their insolvency proceedings, which include plenary proceedings in Canada and the United States, the PSG Entities will benefit from a CRO.

Order accordingly.

Footnotes

1 Ernst & Young has filed a Report as the Proposed Monitor. For ease of reference I refer to Ernst & Young in this decision as the Monitor.

TAB 13

2011 ONSC 7641
Ontario Superior Court of Justice

P.J. Wallbank Manufacturing Co., Re

2011 CarswellOnt 15300, 2011 ONSC 7641, [2011] O.J. No. 5922, 211 A.C.W.S. (3d) 17, 88 C.B.R. (5th) 281

In the Matter of the Proposal of P.J. Wallbank Manufacturing Co. Limited

D.M. Brown J.

Heard: December 21, 2011
Judgment: December 21, 2011
Docket: CV-11-0123-OTCL

Counsel: J. Fogarty, S.-A. Wilson for Applicant
G. Moffat for General Motors LLC
T. Slahta for TCE Capital Corporation

Subject: Insolvency; Estates and Trusts

MOTION by bankrupt corporation for authorization to borrow under DIP credit facility and to grant interim financing charge.

***D.M. Brown J.*:**

I. Overview of motion for approval of DIP financing

1 P.J. Wallbank Manufacturing Co. Limited, a manufacturer of springs and wireforms for automotive and other industrial customers, filed a Notice of Intention to Make a Proposal under the *Bankruptcy and Insolvency Act* on December 12, 2011. Doyle Salewski Inc. was appointed as Proposal Trustee. Wallbank moves under section 50.6 of the *BIA* for authorization to borrow under a DIP credit facility from General Motors LLC, as well as the granting of an Interim Financing Charge against its property in favour of GM.

2 This motion was brought on less than 24 hours notice. From the affidavits of service filed, I am satisfied that notice was given to interested parties in accordance with my directions of yesterday.

II. The Debtor and its creditors

3 Since 2008 Wallbank has experienced a downturn in its business linked, in part, to a slowdown in the automotive sector and, more recently, to the loss of a major customer this past summer.

4 Wallbank has several secured creditors. It owes Danbury Financial Services Inc. about $720,000.00 under a credit facility. Until September, 2011, TCE Capital Corporation factored Wallbank's accounts receivable, but stopped as a result of a default on that facility. Wallbank owes TCE approximately $700,000.00. Both Danbury and TCE have registered financing statements against Wallbank over all classes of collateral except "consumer goods". Wallbank owes P. & B. W. Holdings Inc., the trustee of a family trust, $724,500; the Trust has subordinated its interest in Wallbank's property to each of Danbury and TCE. Wallbank owes $74,180.53 to three remaining secured creditors: Xerox Canada Inc., Anthony Wallbank and Edward Wallbank. All three have subordinated their security in favour of Danbury and TCE.

5 As of the date of the NOI Wallbank owed Canada Revenue Agency $132,467.28 for unpaid source deductions, as well as approximately $1.22 million to unsecured creditors.

III. The proposed DIP Facility

6 Danbury has terminated its credit facility with Wallbank, and TCE has ceased factoring the company's receivables. Neither firm is prepared to advance further funds to Wallbank.

7 Wallbank is a key supplier to GE for springs. GE has agreed to provide immediate funding to Wallbank pursuant to the terms of an Accommodation Agreement dated December 12, 2011 and a DIP Facility Term Sheet.

8 The Accommodation Agreement offers two types of interim financing. First, GE agreed to provide Initial Financing of up to $160,450.00 to cover professional fees and to cover Wallbank's post-filing operations until a DIP order was obtained. According to the affidavit from Mr. Anthony Wallbank, the company's President, to date GE has advanced $193,850 under this facility.

9 GM is also prepared to make available additional DIP Financing up to a maximum of $500,000.00, including the amounts advanced under the Initial Financing. [1] Such further advances are conditional on (i) an agreement between GM and Wallbank on a budget for the company's continued operations up until February 26, 2012 and (ii) obtaining an interim financing order consistent with the terms of the Accommodation Agreement. Under the proposed Interim Financing Charge, all advances made by GM under the Accommodation Agreement would be secured by (i) a first priority charge on Wallbank's inventory and postfiling accounts receivable and (ii) a lien on Wallbank's other pre-filing assets junior only to the liens of Danbury, TCE and Xerox, but senior to any other liens.

10 Wallbank seeks an order that the DIP Facility would be on the terms, and subject to the conditions, set forth in the Accommodation Agreement and the DIP Facility Term Sheet, subject to some amendments reflected in a revised draft order, including certain provisions TCE wished included in the order. The Accommodation Agreement contains several important terms concerning Wallbank's operations:

> (i) absent an event of default, GM agrees to refrain from re-sourcing the component parts made by Wallbank for up to 60 days;
>
> (ii) GM agrees to pay for post-filing orders on a "net 7 days prox" basis;
>
> (iii) Wallbank agrees to build an inventory of GM-ordered component parts in accordance with an inventory bank production plan to be agreed upon with GM;
>
> (iv) The parties have identified which tools used by Wallbank belong to GM and to other parties; and,
>
> (v) Wallbank agrees not to manufacture products for other Large or Medium Customers without GM's prior consent and without those customers agreeing to abide by all or some of the terms of the Accommodation Agreement, including terms governing the time for the payment of receivables and the price of the products

11 Under the DIP Facility Term Sheet, the Facility will:

> (i) have a term of up to 60 days, mirroring the No Resource Period agreed to by GM under the Accommodation Agreement;
>
> (ii) bear interest at a rate of 13%, with interest payable monthly in arrears; and,
>
> (iii) be repaid upon the sale of any property of Wallbank out of the ordinary course of business.

IV. Analysis

A. The statutory provisions

12 Section 50.6 of the *BIA* provides, in part, as follows:

> 50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) 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 debtor'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 debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(*a*) or 50.4(2)(*a*), as the case may be. The security or charge may not secure an obligation that exists before the order is made.
>
> . . .
>
> (3) The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.
>
> . . .
>
> (5) In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the debtor is expected to be subject to proceedings under this Act;
>
> (b) how the debtor's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the debtor's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
>
> (e) the nature and value of the debtor's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the trustee's report referred to in paragraph 50(6)(*b*) or 50.4(2)(*b*), as the case may be.

B. Consideration of the various factors

B.1 Likely duration of NOI proceedings

13 The evidence indicates that Wallbank likely will not be subject to NOI proceedings past the end of February, 2012. It requires the DIP Facility to continue operating, and by its terms that facility has a maximum term of 60 days from the date of filing the NOI. The cash-flow statement filed by Wallbank projects that it will have drawn fully on the DIP Facility by the middle of next February.

B.2 Management of Wallbank's affairs

14 Although current management will continue to operate Wallbank, as described above the Accommodation Agreement places significant restrictions on the company's operations. Simply put, GM wants to use the next 45 days or so to build up an inventory of needed component parts and is insisting that any other customer who wishes to order product from Wallbank must do so on the credit and pricing terms set out in the Accommodation Agreement. Those terms require very prompt payment of receivables and an agreement to pay a higher price for Wallbank's products.

15 The materials do not disclose how many employees presently work at Wallbank. Some employees are members of the Canadian Auto Workers. The Proposal Trustee reports that a dispute currently exists whereby the CAW is not permitting Wallbank to ship product to Gates Corporation, a result of which could be a reduction by $40,000.00 in the opening accounts receivable forecast in the cash-flow statement.

B.3 Enhancement of prospects of a viable proposal

16 According to the Proposal Trustee Wallbank is developing a restructuring plan which would involve either (i) identifying a strategic partner, (ii) restructuring its debts, or (iii) an orderly liquidation of its assets.

17 Wallbank filed a cash-flow projection for the period ending February 26, 2012. The projection was vetted by a DIP advisor appointed by GM. The cash-flow supports Mr. Wallbank's statement that without the proposed DIP Facility the company will be unable to fund its ongoing business operations and restructuring efforts during the NOI proceedings. The Proposal Trustee concurs with that assessment:

> In the event that the DIP Loan is not approved by the Court, the Company may have no choice but to immediately cease operations, and the Company's ability to make a proposal to its creditors will be severely compromised.

18 The evidence is clear that absent approval of the DIP Facility, Wallbank will close its doors and turn off its lights.

B.4 Report of the Proposal Trustee

19 In its December 20, 2011 report the Proposal Trustee stated that it was satisfied that Wallbank is proceeding in good faith with its proposal, supported the need for interim financing, and concluded that "the benefits of granting such an Order far outweigh the prejudice to the Company, the creditors, employees and customers that these stakeholders would experience if the Order were not granted."

B.5 Nature and value of Wallbank's property

20 Although Wallbank filed evidence about its current indebtedness, it did not file any detailed historical evidence about balance sheet or profit/loss position. The current value of its assets is unclear; the evidence suggests that Wallbank has operated at a loss for at least the past two years.

B.6 Confidence of major creditors

21 According to the Proposal Trustee certain customers support Wallbank's proposal efforts: GM, Omex, Dayco, Magna Corporation, Stacktole, 3M, Bontaz and Admiral Tool.

22 As to creditors, GM, of course, supports Wallbank's motion. The Trust has indicated that it does not oppose the order, but without prejudice to its right to move to vary the order at some later date. In light of changes made to the proposed DIP Order as a result of negotiations amongst the parties, Danbury does not oppose the order sought. Xerox was served earlier today with the motion materials, but has not communicated any position to Wallbank's counsel.

23 TCE does not oppose the order sought, as revised, provided the order is made subject to three conditions:

> (i) The order would be without prejudice to TCE's asserted position with respect to its ownership of factored receivables;
>
> (ii) Wallbank, TCE and GM will agree on a process for the collection and remittance of accounts receivable; and,
>
> (iii) GM waives its rights of set-off relating to pre-November 30, 2011 accounts receivable purchased by TCE, save and except for Allowed Set-Offs as defined in section 2.4(B) of the Accommodation Agreement.

Both Wallbank and GM are amenable to those conditions. I accept those conditions and make them part of my order.

B.7 Prejudice to creditors as a result of the Interim Financing Charge

24 Although, like any charge, the Interim Financing Charge will impact all creditors' positions to some degree, the terms of the charge's priority have been negotiated to minimize the prejudice to Danbury and TEC. As well, given the immediate

cessation of Wallbank's activities would result from the failure to approve the DIP Facility and Interim Financing Charge, on balance the benefit to all stakeholders of the proposed DIP Facility significantly outweighs any prejudice.

25 Sections 2.1 and 2.2 of the Accommodation Agreement contemplated that both components of the Initial Financing advanced by GM — professional fees and the funding of operations — would be secured by the Interim Financing Charge. Section 50.6(1) of the *BIA* provides that a charge "may not secure an obligation that exists before the order is made". Wallbank advised that all funds made available by GM for professional fees are unspent and remain in counsel's trust account. Wallbank intends to return those funds to GM which plans, in turn, to advance similar amounts to Wallbank in the event a DIP Order is made. GM confirmed that the amounts advanced to date under section 2.1(C) of the Accommodation Agreement would not be subject to the Interim Financing Charge, but would be secured by the security described in the opening language of section 2.1 of the Accommodation Agreement. In my view the proposed treatment of the funds relating to professional fees is consistent with the intent of section 50.6(1) of the *BIA* and I approve it.

B.8 Conclusion

26 For these reasons I am satisfied that it is appropriate to authorize Wallbank to enter into the DIP Facility agreement and to grant the proposed Interim Financing Charge. Accordingly, an order shall go in the form submitted by the applicant, which I have signed.

Motion granted.

Footnotes

1 DIP Facility Term Sheet.

TAB 14

2010 SCC 60, 2010 CSC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, 2010 CSC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

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

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

APPEAL by creditor from judgment reported at 2009 CarswellBC 1195, 2009 BCCA 205, [2009] G.S.T.C. 79, 98 B.C.L.R. (4th) 242, [2009] 12 W.W.R. 684, 270 B.C.A.C. 167, 454 W.A.C. 167, 2009 G.T.C. 2020 (Eng.) (B.C. C.A.), allowing Crown's appeal from dismissal of application for immediate payment of tax debt.

***Deschamps J.*:**

1 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 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.

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 (B.C. S.C. [In Chambers])).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). 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 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] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. 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?

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 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 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 Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), 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 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, October 3, 1991, at pp. 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 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).

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]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. 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, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

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, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

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

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., Re*, 2009 QCCS 6332 (C.S. Que.), leave to appeal granted, 2010 QCCA 183 (C.A. Que.)). 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 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 am. 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. Bank. 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 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 v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), 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. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), 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").

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, 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.

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 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, [2003] G.S.T.C. 21 (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 c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), 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, 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 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.

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*.

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 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 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.

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" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), 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. Gen. Div. [Commercial List])), 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.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), 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 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., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), 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 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, 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.

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. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); 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.

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?

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 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 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), 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 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 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*.

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.

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.

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 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 lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), 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 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*.

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.

3.4 Express Trust

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.

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).

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.

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 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.

***Fish J. (concurring)*:**

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*"). 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 (B.C. S.C. [In Chambers])).

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, [2005] G.S.T.C. 1 (Ont. 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.

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:

> **227 (4) Trust for moneys deducted** — 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) Extension of trust** — 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 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 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*....

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

67 (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.

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) the *CCAA* and in s. 67(3) 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) [Deemed] 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 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).

...

> **(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 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, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust 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 be subject to no deemed trust or priority in favour of the Crown.

***Abella J. (dissenting)*:**

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*EIA*"), 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:

> **222 (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.

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:

> **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.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. 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 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 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, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), 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]

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 derogani*).

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 c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

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:

> [T]he 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 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 *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "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,
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> ...
>
> (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 reorder the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the 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 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.

Appeal allowed.

Pourvoi accueilli.

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 (i);

(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,

(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,

(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, 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 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 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.

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 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*);

(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 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 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 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.

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) [Deemed] 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 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

(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

(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

(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.

Footnotes

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.

2 The amendments did not come into force until September 18, 2009.

TAB 15

2021 SCC 25, 2021 CSC 25
Supreme Court of Canada

Sherman Estate v. Donovan

2021 CarswellOnt 8339, 2021 CarswellOnt 8340, 2021 SCC 25, 2021 CSC 25, 331 A.C.W.S. (3d) 489, 458 D.L.R. (4th) 361, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 72 C.R. (7th) 223, EYB 2021-391973

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate (Appellants) and Kevin Donovan and Toronto Star Newspapers Ltd. (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee (Interveners)

Wagner C.J.C., Moldaver, Karakatsanis, Brown, Rowe, Martin, Kasirer JJ.

Heard: October 6, 2020
Judgment: June 11, 2021
Docket: 38695

Proceedings: affirming *Donovan v. Sherman Estate* (2019), 56 C.P.C. (8th) 82, 47 E.T.R. (4th) 1, 2019 CarswellOnt 6867, 2019 ONCA 376, C.W. Hourigan J.A., Doherty J.A., Paul Rouleau J.A. (Ont. C.A.); reversing *Toronto Star Newspapers Ltd. v. Sherman Estate* (2018), 41 E.T.R. (4th) 126, 2018 CarswellOnt 13017, 2018 ONSC 4706, 28 C.P.C. (8th) 102, 417 C.R.R. (2d) 321, S.F. Dunphy J. (Ont. S.C.J.)

Counsel: Chantelle Cseh, Timothy Youdan, for Appellants
Iris Fischer, Skye A. Sepp, for Respondents
Peter Scrutton, for Intervener, Attorney General of Ontario
Jacqueline Hughes, for Intervener, Attorney General of British Columbia
Ryder Gilliland, for Intervener, Canadian Civil Liberties Association
Ewa Krajewska, for Intervener, Income Security Advocacy Centre
Robert S. Anderson, Q.C., for Interveners, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.
Adam Goldenberg, for Intervener, British Columbia Civil Liberties Association
Khalid Janmohamed, for Interveners, HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee

Subject: Civil Practice and Procedure; Criminal; Estates and Trusts

APPEAL by estate trustees from judgment reported at *Donovan v. Sherman Estate* (2019), 2019 ONCA 376, 2019 CarswellOnt 6867, 47 E.T.R. (4th) 1, 56 C.P.C. (8th) 82 (Ont. C.A.), allowing appeal from judgment imposing sealing orders.

POURVOI formé par les fiduciaires d'une succession à l'encontre d'un jugement publié à *Donovan v. Sherman Estate* (2019), 2019 ONCA 376, 2019 CarswellOnt 6867, 47 E.T.R. (4th) 1, 56 C.P.C. (8th) 82 (Ont. C.A.), ayant accueilli l'appel interjeté à l'encontre d'un jugement imposant une ordonnance de mise sous scellés.

Kasirer J. **(Wagner C.J.C. and Moldaver, Karakatsanis, Brown, Rowe and Martin JJ. concurring):**

I. Overview

1 This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.

2 Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

3 Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

4 This appeal turns on whether concerns advanced by persons seeking an exception to the ordinarily open court file in probate proceedings — the concerns for privacy of the affected individuals and their physical safety — amount to important public interests that are at such serious risk that the files should be sealed. The parties to this appeal agree that physical safety is an important public interest that could justify a sealing order but disagree as to whether that interest would be at serious risk, in the circumstances of this case, should the files be unsealed. They further disagree whether privacy is in itself an important interest that could justify a sealing order. The appellants say that privacy is a public interest of sufficient import that can justify limits on openness, especially in light of the threats individuals face as technology facilitates widespread dissemination of personally sensitive information. They argue that the Court of Appeal was mistaken to say that personal concerns for privacy, without more, lack the public interest component that is properly the subject-matter of a sealing order.

5 This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. Pointing to cases decided in other contexts, the appellants contend that privacy should be recognized here as a public interest that, on the facts of this case, substantiates their plea for orders sealing the probate files. The respondents resist, recalling that privacy has generally been seen as a poor justification for an exception to openness. After all, they say, virtually every court proceeding entails some disquiet for the lives of those concerned and these intrusions on privacy must be tolerated because open courts are essential to a healthy democracy.

6 This appeal offers, then, an occasion to decide whether privacy can amount to a public interest in the open court jurisprudence and, if so, whether openness puts privacy at serious risk here so as to justify the kind of orders sought by the appellants.

7 For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.

8 In this case, and with this interest in mind, it cannot be said that the risk to privacy is sufficiently serious to overcome the strong presumption of openness. The same is true of the risk to physical safety here. The Court of Appeal was right in the circumstances to set aside the sealing orders and I would therefore dismiss the appeal.

II. Background

9 Prominent in business and philanthropic circles, Bernard Sherman and Honey Sherman were found dead in their Toronto home in December of 2017. Their deaths had no apparent explanation and generated intense public interest and press scrutiny. In January of the following year, the Toronto Police Service announced that the deaths were being investigated as homicides. As the present matter came before the courts, the identity and motive of those responsible remained unknown.

10 The couple's estates and estate trustees (collectively the "Trustees") [1] sought to stem the intense press scrutiny prompted by the events. The Trustees hoped to see to the orderly transfer of the couple's property, at arm's length from what they saw as the public's morbid interest in the unexplained deaths and the curiosity around apparently great sums of money involved.

11 When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

12 Initially granted, the sealing orders were challenged by Kevin Donovan, a journalist who had written a series of articles on the couple's deaths, and Toronto Star Newspapers Ltd., for which he wrote (collectively the "Toronto Star"). [2] The Toronto Star said the orders violated its constitutional rights of freedom of expression and freedom of the press, as well as the attending principle that the workings of the courts should be open to the public as a means of guaranteeing the fair and transparent administration of justice.

III. Proceedings Below

A. Ontario Superior Court of Justice, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (Dunphy J.)

13 In addressing whether the circumstances warranted interference with the open court principle, the application judge relied on this Court's judgment in *Sierra Club* . He noted that a confidentiality order should only be granted when: "(1) such an order is necessary ... to prevent a serious risk to an important interest because reasonable alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression and the public interest in open and accessible court proceedings" (para. 13(d)).

14 The application judge considered whether the Trustees' interests would be served by granting the sealing orders. In his view, the Trustees had correctly identified two legitimate interests in support of making an exception to the open court principle: "protecting the privacy and dignity of victims of crime and their loved ones" and "a reasonable apprehension of risk on behalf of those known to have an interest in receiving or administering the assets of the deceased" (paras. 22-25). With respect to the first interest, the application judge found that "[t]he degree of intrusion on that privacy and dignity has already been extreme and ... excruciating" (para. 23). For the second interest, although he noted that "it would have been preferable to include objective evidence of the gravity of that risk from, for example, the police responsible for the investigation", he concluded that "the lack of such evidence is not fatal" (para. 24). Rather, the necessary inferences could be drawn from the circumstances notably the "willingness of the perpetrator(s) of the crimes to resort to extreme violence to pursue whatever motive existed" (*ibid.*). He concluded that the "current uncertainty" was the source of a reasonable apprehension of the risk of harm and, further, that the foreseeable harm was "grave" (*ibid.*).

15 The application judge ultimately accepted the Trustees' submission that these interests "very strongly outweigh" what he called the proportionately narrow public interest in the "essentially administrative files" at issue (paras. 31 and 33). He therefore

concluded that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on the rights and interests of the affected individuals.

16 Finally, the application judge considered what order would protect the affected individuals while infringing upon the open court principle to the minimum extent possible. He decided no meaningful part of either file could be disclosed if one were to make the redactions necessary to protect the interests he had identified. Open-ended sealing orders did not, however, sit well with him. The application judge therefore sealed the files for an initial period of two years, with the possibility of renewal.

B. Court of Appeal for Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (Doherty, Rouleau and Hourigan JJ.A.)

17 The Toronto Star's appeal was allowed, unanimously, and the sealing orders were lifted.

18 The Court of Appeal considered the two interests advanced before the application judge in support of the orders to seal the probate files. As to the need to protect the privacy and dignity of the victims of violent crime and their loved ones, it recalled that the kind of interest that is properly protected by a sealing order must have a public interest component. Citing *Sierra Club*, the Court of Appeal wrote that "[p]ersonal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle" (para. 10). It concluded that the privacy interest for which the Trustees sought protection lacked this quality of public interest.

19 While it recognized the personal safety of individuals as an important public interest generally, the Court of Appeal wrote that there was no evidence in this case that could warrant a finding that disclosure of the contents of the estate files posed a real risk to anyone's physical safety. The application judge had erred on this point: "the suggestion that the beneficiaries and trustees are somehow at risk because the Shermans were murdered is not an inference, but is speculation. It provides no basis for a sealing order" (para. 16).

20 The Court of Appeal concluded that the Trustees had failed the first stage of the test for obtaining orders sealing the probate files. It therefore allowed the appeal and set aside the orders.

C. Subsequent Proceedings

21 The Court of Appeal's order setting aside the sealing orders has been stayed pending the disposition of this appeal. The Toronto Star brought a motion to adduce new evidence on this appeal, comprised of land titles documents, transcripts of the cross-examination of a detective on the murder investigation, and various news articles. This evidence, it says, supports the conclusion that the sealing orders should be lifted. The motion was referred to this panel.

IV. Submissions

22 The Trustees have appealed to this Court seeking to restore the sealing orders made by the application judge. In addition to contesting the motion for new evidence, they maintain that the orders are necessary to prevent a serious risk to the privacy and physical safety of the affected individuals and that the salutary effects of sealing the court probate files outweigh the harmful effects of limiting court openness. The Trustees argue that two legal errors led the Court of Appeal to conclude otherwise.

23 First, they submit the Court of Appeal erred in holding that privacy is a personal concern that cannot, without more, constitute an important interest under *Sierra Club* . The Trustees say the application judge was right to characterize privacy and dignity as an important public interest which, as it was subject to a serious risk, justified the orders. They ask this Court to recognize that privacy in itself is an important public interest for the purposes of the analysis.

24 Second, the Trustees submit that the Court of Appeal erred in overturning the application judge's conclusion that there was a serious risk of physical harm. They argue that the Court of Appeal failed to recognize that courts have the ability to draw reasonable inferences by applying reason and logic even in the absence of specific evidence of the alleged risk.

25 The Trustees say that these errors led the Court of Appeal to mistakenly set aside the sealing orders. In answer to questions at the hearing, the Trustees acknowledged that an order redacting certain documents in the file or a publication ban could assist in addressing some of their concerns, but maintained neither is a reasonable alternative to the sealing orders in the circumstances.

26 The Trustees submit further that the protection of these interests outweighs the deleterious effects of the orders. They argue that the importance of the open court principle is attenuated by the nature of these probate proceedings. Given that it is non-contentious and not strictly speaking necessary for the transfer of property at death, probate is a court proceeding of an "administrative" character, which diminishes the imperative of applying the open court principle here (paras. 113-14).

27 The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star's view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful. According to the Toronto Star and some of the interveners, the Trustees' position would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files is not highly sensitive. On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

28 In the alternative, even if there were a serious risk to one or another important interest, the Toronto Star says the sealing orders are not necessary because the risk could be addressed by an alternative, less onerous order. Furthermore, it says the orders are not proportionate. In seeking to minimize the importance of openness in probate proceedings, the Trustees invite an inflexible approach to balancing the effects of the order that is incompatible with the principle that openness applies to all court proceedings. In any event, there is a public interest in openness specifically here, given that the certificates sought can affect the rights of third parties and that openness ensures the fairness of the proceedings, whether they are contested or not.

V. Analysis

29 The outcome of the appeal turns on whether the application judge should have made the sealing orders pursuant to the test for discretionary limits on court openness from this Court's decision in *Sierra Club* .

30 Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480, at para. 23; Vancouver Sun (Re), 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23-26). Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. "In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so" (*Khuja v. Times Newspapers Ltd*, 2017 UKSC 49, [2019] A.C. 161 (U.K. S.C.), at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1326-39, per Cory J.). Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 878; R. v. Mentuck, 2001 SCC 76, [2001] 3 S.C.R. 442, at paras. 32-39; *Sierra Club*, at para. 56). The test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise (*Mentuck*, at para. 33). The parties agree that this is the appropriate framework of analysis for resolving this appeal.

31 The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court's jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a fundamental value necessary to the preservation of a

free and democratic society (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25; Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403, at paras. 65-66, per La Forest J. (dissenting but not on this point); *New Brunswick*, at para. 40). Courts have invoked privacy, in some instances, as the basis for an exception to openness under the *Sierra Club* test (see, e.g., R. v. Henry, 2009 BCCA 86, 270 B.C.A.C. 5, at paras. 11 and 17). At the same time, the jurisprudence acknowledges that some degree of privacy loss — resulting in inconvenience, even in upset or embarrassment — is inherent in any court proceeding open to the public (*New Brunswick*, at para. 40). Accordingly, upholding the presumption of openness has meant recognizing that neither individual sensibilities nor mere personal discomfort associated with participating in judicial proceedings are likely to justify the exclusion of the public from court (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *New Brunswick*, at para. 41). Determining the role of privacy in the *Sierra Club* analysis requires reconciling these two ideas, which is the nub of the disagreement between the parties. The right of privacy is not absolute; the open court principle is not without exceptions.

32 For the reasons that follow, I disagree with the Trustees that the ostensibly unbounded privacy interest they invoke qualifies as an important public interest within the meaning of *Sierra Club* . Their broad claim fails to focus on the elements of privacy that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

33 Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under *Sierra Club* . Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

34 This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar — higher and more precise than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

35 I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

36 In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club* . Moreover, as I shall endeavour to explain, there was no serious risk of physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

A. The Test for Discretionary Limits on Court Openness

37 Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; A.B. v. Bragg Communications Inc., 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

38 The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

(1) court openness poses a serious risk to an important public interest;

(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (Toronto Star Newspapers Ltd. v. Ontario, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

39 The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (New Brunswick, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)*, (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law ... thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

40 The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the Charter is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

41 The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also Mentuck, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

42 While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

43 The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of "important interest" transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause (see, e.g., P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (4th ed. 2020), at para. 3.185; J. Bailey and J. Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2016), 48 Ottawa L. Rev. 143, at pp. 154-55). At the same time, however, the requirement that a serious risk to an important interest be demonstrated imposes a meaningful threshold necessary to maintain the presumption of openness. Were it merely a matter of weighing the benefits of the limit on court openness against its negative effects, decision-makers confronted with concrete impacts on the individuals appearing before them may struggle to put adequate weight on the less immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

44 Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court's authority. The court's decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis*, (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

45 It is true that other non-probate estate planning mechanisms may allow for the transfer of wealth outside the ordinary avenues of testate or intestate succession — that is the case, for instance, for certain insurance and pension benefits, and for certain property held in co-ownership. But this does not change the necessarily open court character of probate proceedings. That non-probate transfers keep certain information related to the administration of an estate out of public view does not mean that the Trustees here, by seeking certificates from the court, somehow do not engage this principle. The Trustees seek the benefits that flow from the public judicial probate process: transparency ensures that the probate court's authority is administered fairly and efficiently (*Vancouver Sun*, at para. 25; *New Brunswick*, at para. 22). The strong presumption in favour of openness plainly applies to probate proceedings and the Trustees must satisfy the test for discretionary limits on court openness.

B. The Public Importance of Privacy

46 As mentioned, I disagree with the Trustees that an unbounded interest in privacy qualifies as an important public interest under the test for discretionary limits on court openness. Yet in some of its manifestations, privacy does have social importance beyond the person most immediately concerned. On that basis, it cannot be excluded as an interest that could justify, in the right circumstances, a limit to court openness. Indeed, the public importance of privacy has been recognized by this Court in

various settings, and this sheds light on why the narrower aspect of privacy related to the protection of dignity is an important public interest.

47 I respectfully disagree with the manner in which the Court of Appeal disposed of the claim by the Trustees that there is a serious risk to the interest in protecting personal privacy in this case. For the appellate judges, the privacy concerns raised by the Trustees amounted to "[p]ersonal concerns" which cannot, "without more", satisfy the requirement from *Sierra Club* that an important interest be framed as a public interest (para. 10). The Court of Appeal in our case relied, at para. 10, on *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, in which it was held that "[p]urely personal interests cannot justify non-publication or sealing orders" (para. 25). Citing as authority judgments of this Court in *MacIntyre* and *Sierra Club*, the court continued by observing that "personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test" (para. 25). Respectfully stated, the emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the necessity requirement in this case and in *Williams* is, I think, mistaken. Personal concerns that relate to aspects of the privacy of an individual who is before the courts can coincide with a public interest in confidentiality.

48 Like the Court of Appeal, I do agree with the view expressed particularly in the pre-*Charter* case of *MacIntyre*, that where court openness results in an intrusion on privacy which disturbs the "sensibilities of the individuals involved" (p. 185), that concern is generally insufficient to justify a sealing or like order and does not amount to an important public interest under *Sierra Club* . But I disagree with the Court of Appeal in this case and in *Williams* that this is because the intrusion only occasions "personal concerns". Certain personal concerns — even "without more" — can coincide with important public interests within the meaning of *Sierra Club* . To invoke the expression of Binnie J. in F.N. (Re), 2000 SCC 35, [2000] 1 S.C.R. 880, at para. 10, there is a "public interest in confidentiality" that is felt, first and foremost, by the person involved and is most certainly a personal concern. Even in *Williams*, the Court of Appeal was careful to note that where, without privacy protection, an individual would face "a substantial risk of serious debilitating emotional ... harm", an exception to openness should be available (paras. 29-30). The means of discerning whether a privacy interest reflects a "public interest in confidentiality" is therefore not whether the interest reflects or is rooted in "personal concerns" for the privacy of the individuals involved. Some personal concerns relating to privacy overlap with public interests in confidentiality. These interests in privacy can be, in my view, important public interests within the meaning of *Sierra Club* . It is true that an individual's privacy is pre-eminently important to that individual. But this Court has also long recognized that the protection of privacy is, in a variety of settings, in the interest of society as a whole.

49 The proposition that privacy is important, not only to the affected individual but to our society, has deep roots in the jurisprudence of this Court outside the context of the test for discretionary limits on court openness. This background helps explain why privacy cannot be rejected as a mere personal concern. However, the key differences in these contexts are such that the public importance of privacy cannot be transposed to open courts without adaptation. Only specific aspects of privacy interests can qualify as important public interests under *Sierra Club* .

50 In the context of s. 8 of the Charter and public sector privacy legislation, La Forest J. cited American privacy scholar Alan F. Westin for the proposition that privacy is a fundamental value of the modern state, first in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28 (concurring), and then in Dagg, at para. 65 (dissenting but not on this point). In the latter case, La Forest J. wrote: "The protection of privacy is a fundamental value in modern, democratic states. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one's own thoughts, actions and decisions" (para. 65 (citations omitted)). That statement was endorsed unanimously by this Court in Lavigne, at para. 25.

51 Further, in Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401 2013 SCC 62, [2013] 3 S.C.R. 733 (“UFCW”), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as "intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values" (para. 24). The importance of privacy, its "quasi-constitutional status" and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., Lavigne, at para. 24; *Bragg*, at para. 18, per Abella J., citing TorontoStar Newspaper Ltd. v. Ontario, 2012 ONCJ

27, 289 C.C.C. (3d) 549, at paras. 40-41 and 44; Douez v. Facebook, Inc., 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 59). In *Douez*, Karakatsanis, Wagner (as he then was) and Gascon JJ. underscored this same point, adding that "the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person's privacy interests" (para. 59).

52 Privacy as a public interest is underlined by specific aspects of privacy protection present in legislation at the federal and provincial levels (see, e.g., Privacy Act, R.S.C. 1985, c. P-21; Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 ("PIPEDA"); Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31; Charter of Human Rights and Freedoms, CQLR, c. C-12, s. 5; *Civil Code of Québec*, arts. 35 to 41). [3] Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective (*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which "the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process" was explicitly noted). There is also continued support for the social and public importance of individual privacy in the academic literature (see, e.g., A. J. Cockfield, "Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies" (2007), 40 U.B.C. L. Rev. 41, at p. 41; K. Hughes, "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012), 75 *Modern L. Rev*. 806, at p. 823; P. Gewirtz, "Privacy and Speech" (2001), *Sup. Ct. Rev*. 139, at p. 139). It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean, however, that privacy generally is an important public interest in the context of limits on court openness.

53 The fact that the case before the application judge concerned individuals who were advancing their own privacy interests, which were undeniably important to them as individuals, does not mean that there is no public interest at stake. In *F.N. (Re)*, this was the personal interest that young offenders had in remaining anonymous in court proceedings as a means of encouraging their personal rehabilitation (para. 11). All of society had a stake, according to Binnie J., in the young person's personal prospect for rehabilitation. This same idea from *F.N. (Re)* was cited in support of finding the interest in *Sierra Club* to be a public interest. That interest, rooted first in an agreement of personal concern to the contracting parties involved, was a private matter that evinced, alongside its personal interest to the parties, a "public interest in confidentiality" (*Sierra Club*, at para. 55). Similarly, while the Trustees have a personal interest in preserving their privacy, this does not mean that the public has no stake in this same interest because — as this Court has made clear — it is related to moral autonomy and dignity which are pressing and substantial concerns.

54 In this appeal, the Toronto Star suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is "something more" to elevate them beyond personal concerns and sensibilities (R.F., at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in *Bragg* (para. 14; see also J. Rossiter, Law of Publication Bans, Private Hearings and Sealing Orders (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one's professional standing (see, e.g., R. v. Paterson(1998), 102 B.C.A.C. 200, at paras. 76, 78 and 87-88). Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim (see S. v. Lamontagne, 2020 QCCA 663, at paras. 34-35 (CanLII)). In the same way, the prospect of surrendering sensitive commercial information would have impaired the conduct of the party's defence in *Sierra Club* (at para. 71), or could pressure an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., Himel v. Greenberg, 2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of these related

and valid important public interests does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above.

55 Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from publicity, including to prevent the disclosure of sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., A.B. v. Canada (Citizenship and Immigration), 2017 FC 629, at para. 9 (CanLII)) and a history of substance abuse and criminality (see, e.g., R. v. Pickton, 2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at p. 1353, per Wilson J.). Writing extra-judicially, McLachlin C.J. explained that "[i]f we are serious about peoples' private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way" ("Courts, Transparency and Public Confidence: To the Better Administration of Justice" (2003), 8 Deakin L. Rev. 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.

C. The Important Public Interest in Privacy Bears on the Protection of Individual Dignity

56 While the public importance of privacy has clearly been recognized by this Court in various settings, caution is required in deploying this concept in the test for discretionary limits on court openness. It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy are generally seen as of insufficient importance to overcome the presumption of openness. The Toronto Star has raised the concern that recognizing privacy as an important public interest will lower the burden for applicants because the privacy of litigants will, in some respects, always be at risk in court proceedings. I agree that the requirement to show a serious risk to an important interest is a key threshold component of the analysis that must be preserved in order to protect the open court principle. The recognition of a public interest in privacy could threaten the strong presumption of openness if privacy is cast too broadly without a view to its public character.

57 Privacy poses challenges in the test for discretionary limits on court openness because of the necessary dissemination of information that openness implies. It bears recalling that when Dickson J., as he then was, wrote in *MacIntyre* that "covertness is the exception and openness the rule", he was explicitly treating a privacy argument, returning to and dismissing the view, urged many times before, "that the 'privacy' of litigants *requires* that the public be excluded from court proceedings" (p. 185 (emphasis added)). Dickson J. rejected the view that personal privacy concerns require closed courtroom doors, explaining that "[a]s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings" (p. 185).

58 Though writing before *Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For example, in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that "a party who institutes a legal proceeding waives his or her right to privacy, at least in part" (para. 42). *MacIntyre* and cases like it recognize — in stating that openness is the rule and covertness the exception — that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.

59 The Toronto Star is therefore right to say that the privacy of individuals will very often be at some risk in court proceedings. Disputes between and concerning individuals that play out in open court necessarily reveal information that may have otherwise remained out of public view. Indeed, much like the Court of Appeal in this case, courts have explicitly adverted to this concern when concluding that mere inconvenience is insufficient to cross the initial threshold of the test (see, e.g., *3834310* Canada inc. v. Chamberland2004 CanLII 4122(Que. C.A.), at para. 30). Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interest for the purposes of the test for discretionary limits on court openness could

render this initial requirement moot. Many cases would turn on the balancing at the proportionality stage. Such a development would amount to a departure from *Sierra Club*, which is the appropriate framework and one which must be preserved.

60 Further, recognizing an important interest in privacy generally could prove to be too open-ended and difficult to apply. Privacy is a complex and contextual concept (*Dagg*, at para. 67; see also B. McIsaac, K. Klein and S. Brown, *The Law of Privacy in Canada* (loose-leaf), vol. 1, at pp. 1-4; D. J. Solove, "Conceptualizing Privacy" (2002), 90 Cal. L. Rev. 1087, at p. 1090). Indeed, this Court has described the nature of limits of privacy as being in a state of "theoretical disarray" (R. v. Spencer, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35). Much turns on the context in which privacy is invoked. I agree with the Toronto Star that a bald recognition of privacy as an important interest in the context of the test for discretionary limits on court openness, as the Trustees advance here, would invite considerable confusion. It would be difficult for courts to measure a serious risk to such an interest because of its multi-faceted nature.

61 While I acknowledge these concerns have merit, I disagree that they require that privacy never be considered in determining whether there is a serious risk to an important public interest. I reach this conclusion for two reasons. First, the problem of privacy's complexity can be attenuated by focusing on the purpose underlying the public protection of privacy as it is relevant to the judicial process, in order to fix precisely on that aspect which transcends the interests of the parties in this context. That narrower dimension of privacy is the protection of dignity, an important public interest that can be threatened by open courts. Indeed, rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation (*Spencer*, at para. 35; *Edmonton Journal*, at p. 1362, per Wilson J.). That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine.

62 Second, I recall that in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of openness by showing a serious risk to this interest. The burden of showing a risk to such an interest on the facts of a given case constitutes the true initial threshold on the person seeking to restrict openness. It is never sufficient to plead a recognized important public interest on its own. The demonstration of a serious risk to this interest is still required. What is important is that the interest be accurately defined to capture only those aspects of privacy that engage legitimate public objectives such that showing a serious risk to that interest remains a high bar. In this way, courts can effectively maintain the guarantee of presumptive openness.

63 Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; Coltsfoot Publishing Ltd. v. Foster-Jacques, 2012 NSCA 83, 320 N.S.R. (2d) 166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club* . As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] "[t]he confidentiality of the proceedings may be justified, in particular, in order to protect the parties' privacy .... However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be held *in camera* or to impose a publication ban" (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

64 How should the privacy interest at issue be understood as raising an important public interest relevant to the test for discretionary limits on court openness in this context? It is helpful to recall that the orders below were sought to limit access to documents and information in the court files. The Trustees' argument on this point focused squarely on the risk of immediate and widespread dissemination of the personally identifying and other sensitive information contained in the sealed materials by the Toronto Star. The Trustees submit that this dissemination would constitute an unwarranted intrusion into the privacy of the affected individuals beyond the upset they have already suffered as a result of the publicity associated with the death of the Shermans.

65 In my view, there is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals. This Court has had occasion to underscore the connection between the privacy interest engaged by open courts and the protection of dignity specifically. For example, in *Edmonton Journal*, Wilson J. noted that the impugned provision which would limit publication about matrimonial proceedings addressed "a somewhat different aspect of privacy, one more closely related to the protection of one's dignity ... namely the personal anguish and loss of dignity that may result from having embarrassing details of one's private life printed in the newspapers" (pp. 1363-64). In *Bragg*, as a further example, the protection of a young person's ability to control sensitive information was said to foster respect for "dignity, personal integrity and autonomy" (para. 18, citing Toronto Star Newspaper Ltd., at para. 44).

66 Consistent with this jurisprudence, I note by way of example that the Quebec legislature expressly highlighted the preservation of dignity when the *Sierra Club* test was codified in the Code of Civil Procedure, CQLR, c. C-25.01 (“C.C.P.”), art. 12 (see also Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile*, *chapitre C-25.01* (2015), art. 12). Under art. 12 *C.C.P.*, a discretionary exception to the open court principle can be made by the court if "public order, in particular the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests", requires it.

67 The concept of public order evidences flexibility analogous to the concept of an important public interest under *Sierra Club* yet it recalls that the interest invoked transcends, in importance and consequence, the purely subjective sensibilities of the persons affected. Like the "important public interest" that must be at serious risk to justify the sealing orders in the present appeal, public order encompasses a wide array of general principles and imperative norms identified by a legislature and the courts as fundamental to a given society (see Goulet v. Transamerica Life Insurance Co. of Canada, 2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 42-44, citing *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), at p. 2570, aff'd [1997] 3 S.C.R. 844). As one Quebec judge wrote, referring to *Sierra Club* prior to the enactment of art. 12 *C.C.P.*, the interest must be understood as defined [TRANSLATION] "in terms of a public interest in confidentiality" (see *3834310 Canada inc.*, at para. 24, per Gendreau J.A. for the court of appeal). From among the various considerations that make up the concept of public order and other legitimate interests to which art. 12 *C.C.P.* alludes, it is significant that dignity, and not an untailored reference to either privacy, harm or access to justice, was given pride of place. Indeed, it is that narrow aspect of privacy considered to be a fundamental right that courts had fixed upon before the enactment of art. 12 *C.C.P.* — [TRANSLATION] "what is part of one's personal life, in short, what constitutes a minimum personal sphere" (*Godbout*, at p. 2569, per Baudouin J.A.; see also A. v. B.1990 CanLII 3132(Que. C.A.), at para. 20, per Rothman J.A.).

68 The "preservation of the dignity of the persons involved" is now consecrated as the archetypal public order interest in art. 12 *C.C.P.* It is the exemplar of the *Sierra Club* important public interest in confidentiality that stands as justification for an exception to openness (S. Rochette and J.-F. Côté, "Article 12", in L. Chamberland, ed., *Le grand collectif: Code de procédure civile — Commentaires et annotations* (5th ed. 2020), vol. 1, at p. 102; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at para. 1-111). Dignity gives concrete expression to this public order interest because all of society has a stake in its preservation, notwithstanding its personal connections to the individuals concerned. This codification of *Sierra Club* 's notion of important public interest highlights the superordinate importance of human dignity and the appropriateness of limiting court openness on this basis as against an overbroad understanding of privacy that might be otherwise unsuitable to the open court context.

69 Consistent with this idea, understanding privacy as predicated on dignity has been advanced as useful in connection with challenges brought by digital communications (K. Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context” (2011), 56 McGill L.J. 289, at p. 314).

70 It is also significant, in my view, that the application judge in this case explicitly recognized, in response to the relevant arguments from the Trustees, an interest in "protecting the privacy *and dignity* of victims of crime and their loved ones" (para. 23 (emphasis added)). This elucidates that the central concern for the affected individuals on this point is not merely protecting their privacy for its own sake but privacy where it coincides with the public character of the dignity interests of these individuals.

71 Violations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one's ability to present aspects of oneself to others in a selective manner (D. Matheson, "Dignity and Selective Self-Presentation", in I. Kerr, V. Steeves and C. Lucock, eds., *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (2009), 319, at pp. 327-28; L. M. Austin, "Re-reading Westin" (2019), 20 *Theor. Inq. L.* 53, at pp. 66-68; Eltis (2016), at p. 13). Dignity, used in this context, is a social concept that involves presenting core aspects of oneself to others in a considered and controlled manner (see generally Matheson, at pp. 327-28; Austin, at pp. 66-68). Dignity is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen in public. This was even alluded to by La Forest J., dissenting but not on this point, in *Dagg*, where he referred to privacy as "[a]n expression of an individual's unique personality or personhood" (para. 65).

72 Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally Bragg, at para. 23). La Forest J., concurring, observed in *Dyment* that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible court must be attuned and responsive to the harm it causes to other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.

73 I am accordingly of the view that protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test.

74 Focusing on the underlying value of privacy in protecting individual dignity from the exposure of private information in open court overcomes the criticisms that privacy will always be at risk in open court proceedings and is theoretically complex. Openness brings intrusions on personal privacy in virtually all cases, but dignity as a public interest in protecting an individual's core sensibility is more rarely in play. Specifically, and consistent with the cautious approach to the recognition of important public interests, this privacy interest, while determined in reference to the broader factual setting, will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self.

75 If the interest is ultimately about safeguarding a person's dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they are as a person. Therefore the information that will be revealed by court openness must consist of intimate or personal details about an individual — what this Court has described in its jurisprudence on s. 8 of the Charter as the "biographical core" — if a serious risk to an important public interest is to be recognized in this context (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; R. v. Tessling, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 60; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46). Dignity transcends personal inconvenience by reason of the highly sensitive nature of the information that might be revealed. This Court in *Cole* drew a similar line between the sensitivity of personal information and the public interest in protecting that information in reference to the biographical core. It held that "reasonable and informed Canadians" would be more willing to recognize the existence of a privacy interest where the relevant information cuts to the "biographical core" or, "[p]ut another way, the more personal and confidential the information" (para. 46). The presumption of openness means that mere discomfort associated with lesser intrusions of privacy will generally be tolerated. But there is a public interest in ensuring that openness does not unduly entail the dissemination of this core information that threatens dignity — even if it is "personal" to the affected person.

76 The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This

threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.

77 There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions (see, e.g., *A.B.*, at para. 9), stigmatized work (see, e.g., Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario, 2021 ONSC 1100, at para. 28 (CanLII)), sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), and subjection to sexual assault or harassment (see, e.g., Fedeli v. Brown, 2020 ONSC 994, at para. 9 (CanLII)). I would also note the submission of the intervener the Income Security Advocacy Centre, that detailed information about family structure and work history could in some circumstances constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

78 I pause here to note that I refer to cases on s. 8 of the Charter above for the limited purpose of providing insight into types of information that are more or less personal and therefore deserving of public protection. If the impact on dignity as a result of disclosure is to be accurately measured, it is critical that the analysis differentiate between information in this way. Helpfully, one factor in determining whether an applicant's subjective expectation of privacy is objectively reasonable in the s. 8 jurisprudence focuses on the degree to which information is private (see, e.g., *R. v.* Marakah, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 31; *Cole*, at paras. 44-46). But while these decisions may assist for this limited purpose, this is not to say that the remainder of the s. 8 analysis has any relevance to the application of the test for discretionary limits on court openness. For example, asking what the Trustees' reasonable expectation of privacy was here could invite a circular analysis of whether they reasonably expected their court files to be open to the public or whether they reasonably expected to be successful in having them sealed. Therefore, it is only for the limited purpose described above that the s. 8 jurisprudence is useful.

79 In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. While this is obviously a fact-specific determination, some general observations may be made here to guide this assessment.

80 I note that the seriousness of the risk may be affected by the extent to which information would be disseminated without an exception to the open court principle. If the applicant raises a risk that the personal information will come to be known by a large segment of the public in the absence of an order, this is a plainly more serious risk than if the result will be that a handful of people become aware of the same information, all else being equal. In the past, the requirement that one be physically present to acquire information in open court or from a court record meant that information was, to some extent, protected because it was "practically obscure" (D. S. Ardia, “Privacy and Court Records: Online Access and the Loss of Practical Obscurity”(2017), 4 U. Ill. L. Rev. 1385, at p. 1396). However, today, courts should be sensitive to the information technology context, which has increased the ease with which information can be communicated and cross-referenced (see Bailey and Burkell, at pp. 169-70; Ardia, at pp. 1450-51). In this context, it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order.

81 It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v.* Quesnelle, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information is broader or more easily

accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 U.T.L.J. 305, at p. 346).

82 Further, the seriousness of the risk is also affected by the probability that the dissemination the applicant suggests will occur actually occurs. I hasten to say that implicit in the notion of risk is that the applicant need not establish that the feared dissemination will certainly occur. However, the risk to the privacy interest related to the protection of dignity will be more serious the more likely it is that the information will be disseminated. While decided in a different context, this Court has held that the magnitude of risk is a product of both the gravity of the feared harm and its probability (R. v. Mabior, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 86).

83 That said, the likelihood that an individual's highly sensitive personal information will be disseminated in the absence of privacy protection will be difficult to quantify precisely. It is best to note as well that probability in this context need not be identified in mathematical or numerical terms. Rather, courts may merely discern probability in light of the totality of the circumstances and balance this one factor alongside other relevant factors.

84 Finally, and as discussed above, individual sensitivities alone, even if they can be notionally associated with "privacy", are generally insufficient to justify a restriction on court openness where they do not rise above those inconveniences and discomforts that are inherent to court openness (*MacIntyre*, at p. 185). An applicant will only be able to establish that the risk is sufficient to justify a limit on openness in exceptional cases, where the threatened loss of control over information about oneself is so fundamental that it strikes meaningfully at individual dignity. These circumstances engage "social values of superordinate importance" beyond the more ordinary intrusions inherent to participating in the judicial process that Dickson J. acknowledged could justify curtailing public openness (pp. 186-87).

85 To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court's emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

D. The Trustees Have Failed to Establish a Serious Risk to an Important Public Interest

86 As *Sierra Club* made plain, a discretionary order limiting court openness can only be made where there is a serious risk to an important public interest. The arguments on this appeal concerned whether privacy is an important public interest and whether the facts here disclose the existence of serious risks to privacy and safety. While the broad privacy interest invoked by the Trustees cannot be relied on to justify a limit on openness, the narrower concept of privacy understood in relation to dignity is an important public interest for the purposes of the test. I also recognize that a risk to physical safety is an important public interest, a point on which there is no dispute here. Accordingly, the relevant question at the first step is whether there is a serious risk to one or both of these interests. For reasons that follow, the Trustees have failed to establish a serious risk to either. This alone is sufficient to conclude that the sealing orders should not have been issued.

(1) The Risk to Privacy Alleged in this Case Is Not Serious

87 As I have said, the important public interest in privacy must be understood as one tailored to the protection of individual dignity and not the broadly defined interest the Trustees have asked this Court to recognize. In order to establish a serious risk to this interest, the information in the court files about which the Trustees are concerned must be sufficiently sensitive in that it strikes at the biographical core of the affected individuals. If it is not, there is no serious risk that would justify an exception to openness. If it is, the question becomes whether a serious risk is made out in light of the facts of this case.

88 The application judge never explicitly identified a serious risk to the privacy interest he identified but, to the extent he implicitly reached this conclusion, I respectfully do not share his view. His finding was limited to the observation that "[t]he degree of intrusion on that privacy and dignity [i.e., that of the victims and their loved ones] has already been extreme and, I am sure, excruciating" (para. 23). But the intense scrutiny faced by the Shermans up to the time of the application is only part of the equation. As the sealing orders can only protect against the disclosure of the information in these court files relating to probate, the application judge was required to consider the sensitivity of the specific information they contained. He made no such measure. His conclusion about the seriousness of the risk then focused entirely on the risk of physical harm, with no indication that he found that the Trustees met their burden as to the serious risk to the privacy interest. Said very respectfully and with the knowledge that the application judge did not have the benefit of the above framework, the failure to assess the sensitivity of the information constituted a failure to consider a required element of the legal test. This warranted intervention on appeal.

89 Applying the appropriate framework to the facts of this case, I conclude that the risk to the important public interest in the affected individuals' privacy, as I have defined it above in reference to dignity, is not serious. The information the Trustees seek to protect is not highly sensitive and this alone is sufficient to conclude that there is no serious risk to the important public interest in privacy so defined.

90 There is little controversy in this case about the likelihood and extent of dissemination of the information contained in the estate files. There is near certainty that the Toronto Star will publish at least some aspects of the estate files if it is provided access. Given the breadth of the audience of its media organization, and the high-profile nature of the events surrounding the death of the Shermans, I have no difficulty in concluding that the affected individuals would lose control over this information to a significant extent should the files be open.

91 With regard to the sensitivity of the information, however, the information contained in these files does not reveal anything particularly private about the affected individuals. What would be revealed might well cause inconvenience and perhaps embarrassment, but it has not been shown that it would strike at their biographical core in a way that would undermine their control over the expression of their identities. Their privacy would be troubled, to be sure, but the relevant privacy interest bearing on the dignity of the affected persons has not been shown to be at serious risk. At its highest, the information in these files will reveal something about the relationship between the deceased and the affected individuals, in that it may reveal to whom the deceased entrusted the administration of their estates and those who they wished or were deemed to wish to be beneficiaries of their property at death. It may also reveal some basic personal information, such as addresses. Some of the beneficiaries might well, it may fairly be presumed, bear family names other than Sherman. I am mindful that the deaths are being investigated as homicides by the Toronto Police Service. However, even in this context, none of this information provides significant insight into who they are as individuals, nor would it provoke a fundamental change in their ability to control how they are perceived by others. The fact of being linked through estate documents to victims of an unsolved murder is not in itself highly sensitive. It may be the source of discomfort but has not been shown to constitute an affront to dignity in that it does not probe deeply into the biographical core of these individuals. As a result, the Trustees have failed to establish a serious risk to an important public interest as required by *Sierra Club* .

92 The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see Bragg, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., Bragg, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

93 Further, while the intense media scrutiny on the family following the deaths suggests that the information would likely be widely disseminated, it is not in itself indicative of the sensitivity of the information contained in the probate files.

94 Showing that the information that would be revealed by court openness is sufficiently sensitive and private such that it goes to the biographical core of the affected individual is a necessary prerequisite to showing a serious risk to the relevant public interest aspect of privacy. The Trustees did not advance any specific reason why the contents of these files are more sensitive than they may seem at first glance. When asserting a privacy risk, it is essential to show not only that information about individuals will escape the control of the person concerned — which will be true in every case — but that this particular information concerns who the individuals are as people in a manner that undermines their dignity. This the Trustees have not done.

95 Therefore, while some of the material in the court files may well be broadly disseminated, the nature of the information has not been shown to give rise to a serious risk to the important public interest in privacy, as appropriately defined in this context in reference to dignity. For that reason alone, I conclude that the Trustees have failed to show a serious risk to this interest.

(2) The Risk to Physical Safety Alleged in this Case is Not Serious

96 Unlike the privacy interest raised in this case, there was no controversy that there is an important public interest in protecting individuals from physical harm. It is worth underscoring that the application judge correctly treated the protection from physical harm as a distinct important interest from that of the protection of privacy and found that this risk of harm was "foreseeable" and "grave" (paras. 22-24). The issue is whether the Trustees have established a serious risk to this interest for the purpose of the test for discretionary limits on court openness. The application judge observed that it would have been preferable to include objective evidence of the seriousness of the risk from the police service conducting the homicide investigation. He nevertheless concluded there was sufficient proof of risk to the physical safety of the affected individuals to meet the test. The Court of Appeal says that was a misreading of the evidence, and the Toronto Star agrees that the application judge's conclusion as to the existence of a serious risk to safety was mere speculation.

97 At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v.* Chanmany, 2016 ONCA 576, 352 O.A.C. 121, at para. 45).

98 As the Trustees correctly argue, it is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. The question is ultimately whether this record allowed the application judge to objectively discern a serious risk of physical harm.

99 This conclusion was not open to the application judge on this record. There is no dispute that the feared physical harm is grave. I agree with the Toronto Star, however, that the probability of this harm occurring was speculative. The application judge's conclusion as to the seriousness of the risk of physical harm was grounded on what he called "the degree of mystery that persists regarding both the perpetrator and the motives" associated with the deaths of the Shermans and his supposition that this motive might be "transported" to the trustees and beneficiaries (para. 5; see also paras. 19 and 23). The further step in reasoning that the unsealed estate files would lead to the perpetrator's next crime, to be visited upon someone mentioned in the files, is based on speculation, not the available affidavit evidence, and cannot be said to be a proper inference or some kind of objectively discerned harm or risk thereof. If that were the case, the estate files of every victim of an unsolved murder would pass the initial threshold of the test for a sealing order.

100 Further, I recall that what is at issue here is not whether the affected individuals face a safety risk in general, but rather whether they face such a risk as a result of the openness of these court files. In light of the contents of these files, the Trustees had to point to some further reason why the risk posed by this information becoming publicly available was more than negligible.

101 The speculative character of the chain of reasoning leading to the conclusion that a serious risk of physical harm exists in this case is underlined by differences between these facts and those cases relied on by the Trustees. In *X. v. Y.*, 2011 BCSC 943, 21

B.C.L.R. (5th) 410, the risk of physical harm was inferred on the basis that the plaintiff was a police officer who had investigated "cases involving gang violence and dangerous firearms" and wrote sentencing reports for such offenders which identified him by full name (para. 6). In *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, Watt J.A. considered it "self-evident" that the disclosure of identifiers of an undercover operative working in counter-terrorism would compromise the safety of the operative (para. 41). In both cases, the danger flowed from facts establishing that the applicants were in antagonistic relationships with alleged criminal or terrorist organizations. But in this case, the Trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the Shermans' deaths and the association of the affected individuals with the deceased is not reasonably possible on this record. It is not a reasonable inference but, as the Court of Appeal noted, a conclusion resting on speculation.

102 Were the mere assertion of grave physical harm sufficient to show a serious risk to an important interest, there would be no meaningful threshold in the analysis. Instead, the test requires the serious risk asserted to be well grounded in the record or the circumstances of the particular case (*Sierra Club*, at para. 54; *Bragg*, at para. 15). This contributes to maintaining the strong presumption of openness.

103 Again, in other cases, circumstantial facts may allow a court to infer the existence of a serious risk of physical harm. Applicants do not necessarily need to retain experts who will attest to the physical or psychological risk related to the disclosure. But on this record, the bare assertion that such a risk exists fails to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting the intervention of the Court of Appeal.

E. There Would Be Additional Barriers to a Sealing Order on the Basis of the Alleged Risk to Privacy

104 While not necessary to dispose of the appeal, it bears mention that the Trustees would have faced additional barriers in seeking the sealing orders on the basis of the privacy interest they advanced. I recall that to meet the test for discretionary limits on court openness, a person must show, in addition to a serious risk to an important interest, that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality (*Sierra Club*, at para. 53).

105 Even if the Trustees had succeeded in showing a serious risk to the privacy interest they assert, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. The condition that the order be necessary requires the court to consider whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk (*Sierra Club*, at para. 57). An order imposing a publication ban could restrict the dissemination of personal information to only those persons consulting the court record for themselves and prohibit those individuals from spreading the information any further. As I have noted, the likelihood and extent of dissemination may be relevant factors in determining the seriousness of a risk to privacy in this context. While the Toronto Star would be able to consult the files subject to a publication ban, for example, which may assist it in its investigations, it would not be able to publish and thereby broadly disseminate the contents of the files. A publication ban would seem to protect against this latter harm, which has been the focus of the Trustees' argument, while allowing some access to the file, which is not possible under the sealing orders. Therefore, even if a serious risk to the privacy interest had been made out, it would likely not have justified a sealing order, because a less onerous order would have likely been sufficient to mitigate this risk effectively. I hasten to add, however, that a publication ban is not available here since, as noted, the seriousness of the risk to the privacy interest at play has not been made out.

106 Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed

by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

VI. Conclusion

107 The conclusion that the Trustees have failed to establish a serious risk to an important public interest ends the analysis. In such circumstances, the Trustees are not entitled to any discretionary order limiting the open court principle, including the sealing orders they initially obtained. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the Trustees had failed at this stage of the test for discretionary limits on court openness. This is dispositive of the appeal. The decision to set aside the sealing orders rendered by the application judge should be affirmed. Given that I propose to dismiss the appeal on the existing record, I would dismiss the Toronto Star's motion for new evidence as being moot.

108 For the foregoing reasons, I would dismiss the appeal. The Toronto Star requests no costs given the important public issues in dispute. As such, there will be no order as to costs.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 As noted in the title of proceedings, the appellants in this matter have been referred to consistently as the "Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate." In these reasons the appellants are referred to throughout as the "Trustees" for convenience.

2 The use of "Toronto Star" as a collective term referring to both respondents should not be taken to suggest that only Toronto Star Newspapers Ltd. is participating in this appeal. Mr. Donovan is the only respondent to have been a party throughout. Toronto Star Newspapers Ltd. was a party in first instance, but was removed as a party on consent at the Court of Appeal. By order of Karakatsanis J. dated March 25, 2020, Toronto Star Newspapers Ltd. was added as a respondent in this Court.

3 At the time of writing the House of Commons is considering a bill that would replace part one of *PIPEDA*: Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

TAB 16

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1re inst.)), qui avait accueilli en partie la demande.

The judgment of the court was delivered by *Iacobucci J.*:

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a $1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998*, SOR/98-106

151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

A. Federal Court of Canada, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found

that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets," this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

> (1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35

A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?

B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais*, *supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais*, *supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

> A publication ban should only be ordered when:
>
> (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, *supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

> (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
>
> (b) the judge must consider whether the order is limited as much as possible; and
>
> (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve *any* important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

> A publication ban should only be ordered when:
>
> > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right*. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, *supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

> A confidentiality order under R. 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck*, *supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35

(S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been" accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and, in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal in the sense that at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits" may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) Salutary Effects of the Confidentiality Order

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan*, *supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck*, *supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) Deleterious Effects of the Confidentiality Order

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a *general* principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the *particular* deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra*, *supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*, *supra*, *per* Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents

relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be *promoted* by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents, with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would, in turn, assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a

confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

> While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values," we must guard carefully against judging expression according to its popularity."

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

> Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-1354:

> One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would

be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court Rules, 1998*.

Appeal allowed.

Pourvoi accueilli.

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TAB 17

Court of Queen's Bench of Alberta

Citation: Stone Sapphire Ltd. v. Transglobal Communications Group Inc., 2008 ABQB 575

Date: 20080919
Docket: 0503 00170; BE03 071018
Registry: Edmonton

Between:

Stone Sapphire Ltd.

Applicant
Defendant by Counterclaim

- and -

Transglobal Communications Group Inc. and Steven Prescott

Respondents
Plaintiffs by Counterclaim

And Between:

Transglobal Communications Group Inc.

Plaintiff by Counterclaim

- and -

Stone Sapphire Ltd., Stone Sapphire Limited, Gary Rana, Vick Rana and Alex Chan

Defendants by Counterclaim

And:

Docket: BE03 071018

In the Matter of the Bankruptcy and Insolvency Act
Proposal of Transglobal Communications Group Inc.

Corrected judgment: A corrigendum was issued on October 6, 2008; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Madam Justice J.E. Topolniski

I. Introduction

[1] After losing an application for partial summary judgment and receiving an award against it (award), applying to adduce new evidence to support a motion to vary or rescind the award, and receiving a demand for payment of all obligations due to its banker, Transglobal Communications Ltd. filed a notice of intention to make a proposal (NOI) pursuant to s. 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*).

[2] Transglobal's ability to make a viable *BIA* proposal (due to be filed October 14, 2008) apparently rests heavily on the outcome of this dispute between its banker and a judgment creditor concerning entitlement to USD $1,533,352.62 paid into Court by Transglobal (payment in) as a condition of obtaining a stay of enforcement of the award.

[3] This priority determination concerns the effect of certain Court orders relating to the award and the payment in and whether the payment in was made in the ordinary course of Transglobal's business or otherwise is not subject to the security involved as a result of the *Personal Property Security Act*, R.S.A. c. P-7 (*PPSA*), the common law, and the banker's security.

II. The Actors and Their Positions

[4] Transglobal sells imported goods to stores across North America. Typically, it takes orders from customers, procures the necessary inventory to fill the orders from offshore suppliers and sells them it to its customers.

[5] Stone Sapphire Ltd. is an overseas company that procured goods for Transglobal. A dispute concerning unpaid invoices of USD $2,280,828.57 prompted litigation that Transglobal defended. In turn, it counterclaimed for an amount exceeding Stone Sapphire's claim. Stone Sapphire was granted the award on April 12, 2007, but has not been entitled to enforce on it as a result of the stay of enforcement.

[6] Stone Sapphire asserts that the payment in was sufficiently 'earmarked' for it and trumps the banker's security. It argues, in any event, that the payment in was made in the ordinary course of Transglobal's business. It contends that if Transglobal had simply paid all of the invoices that led to the award when they became due, the banker could not have claimed a security interest, and submits that there should be no difference between a voluntary and involuntary payment of

the amount due. Stated otherwise, the payment in should be considered equivalent to payment on the account owing.

[7] HSBC Bank Canada (HSBC) is Transglobal's banker. It holds a perfected security interest over all of Transglobal's present and after-acquired personal property under the terms of a general security agreement (GSA) and s. 427 *Bank Act* security (BAS) (collectively, the security). It characterizes Stone Sapphire as, at best, a judgment creditor stayed from executing on the award and, at worst, a litigant required to re-apply for judgment because of the stay on entry of the order granting the award.

[8] HSBC takes the position that the payment in cannot properly be classified as one fitting within the "ordinary course of business" exception. It contends that the common law "licence theory" has been subsumed by the *PPSA,* and that for policy reasons simple judgment debts should not be given elevated status, thereby reversing priorities.

III. Facts

[9] The facts pertinent to the orders concerning the award can be briefly stated as follows:

(a) The award and conditional stay on enforcement were granted on April 12, 2007 by Mr. Justice Lee, who was case managing the litigation (***Stone Sapphire Ltd. v. Transglobal Communications Group Inc.***, 2007 ABQB 236, 416 A.R. 289). The order reads in part:

> 3. The Defendant Transglobal is granted a stay of execution of the within judgment conditional upon Transglobal or anyone on its behalf paying the Judgment Amount into the Court of Queen's Bench of Alberta not later than June 11, 2007.
>
> 4. Once paid into Court, the Judgment Amount shall be invested in an interest bearing account and shall not be released to the Plaintiff without further Order of the Court.

(b) On June 5, 2007, Lee J. extended the deadline for the payment in. He also addressed Transglobal's desire to bring applications to adduce new evidence (new evidence application) and to have the award varied or set aside (re-hearing application). His order of that date reads in part:

> 1. This Order sets deadlines and conditions for a hearing of an application ("Application") to adduce new evidence with respect to the Plaintiff's motion for summary judgment and for the variation, reconsideration, discharge or setting aside of the Reasons for Judgment of Mr. Justice Lee dated April 12, 2007.

2. The Order arising from the Reasons for Judgment of April 12, 2007 is stayed (the "Stay") pending the hearing of the Application.

. . .

11. If Transglobal fails to make any payment in accordance with the payment schedule set forth in paragraph 3 herein, Transglobal's Application shall be struck, the Stay lifted and the Plaintiff may immediately appear before Justice Lee to seek entry of the Order of April 12, 2007 in the form attached as Schedule "A", or as modified by Justice Lee at such appearance, at which time the Plaintiff is at liberty to take enforcement steps to execute upon the April 12, 2007 Order and shall be entitled to its costs of enforcement of that Order.

(c) By September 12, 2007, Transglobal had paid $1,000,000 into Court, but was having difficulty meeting the September 15th deadline for completion of the payment in. Lee J. extended the deadline for the payment in until December 15, 2007 (2007 ABQB 563).

(d) On December 12, 2007, Transglobal sought and obtained another extension of the deadline for completing the payment in to mid-January 2008 (2007 ABQB 763).

(e) The new evidence application was heard on April 2, 2008. Mr. Justice Lee reserved his decision.

(f) The NOI was filed on May 20, 2008.

(g) Lee J. issued written Reasons refusing the new evidence application on June 27, 2008 (2008 ABQB 397), stating at para.51:

> I do however reconfirm that no stay of proceedings arising from the Notice of Intention will affect the entry of the Order arising from Stone Sapphire's Summary Judgment already issued by the Court on April 12, 2007. My Summary Judgment decision takes effect from the date of its pronouncement on April 12, 2007 pursuant to Rule 322(2).

(h) The April 12, 2007 order was filed on July 7, 2008.

(i) Transglobal met the January 2008 deadline for the payment in. A letter from Transglobal's then counsel indicated: "I am writing to confirm that

Transglobal has paid the sum of $1,533,352.60 into court…". Various Certificates of Payment into Court state: "The Defendant Transglobal Communications Group Inc. hereby tenders …"

(j) The security contains typical covenants, including these provisions found in the GSA:

> 4.1 The Debtor covenants and agrees that at all times while this General Security Agreement remains in effect the Debtor will:
>
> 4.1.2 not, without prior written consent of the bank:
>
> ….
>
> (b) grant, sell, exchange, transfer, assign, lease or otherwise dispose of the Collateral;
>
> provided always that, until default, the Debtor may, in the ordinary course of the Debtor's business sell or lease inventory, and, subject to clause 5.2 hereof, use monies available to the Debtor…
>
> …
>
> 5.2 The Debtor acknowledges that any payments on or other proceeds of the Collateral received by the Debtor from Account Debtors… shall be received and held by the Debtor in trust for the Bank and shall be turned over to the Bank forthwith upon request.

(k) Clause 5 of the BAS provides in part:

> 5. The Customer shall at all times duly and seasonably pay and discharge all claims whatsoever in any way secured by or constituting a charge upon the Property or any part thereof...

IV. The Issues

[10] The issues can be briefly stated as follows:

A. What was the effect of the April 12 and June 5, 2007 orders?

B. Did HSBC's security interest apply to the monies paid in?

C. Was the payment in made in the ordinary course of business, or otherwise free of HSBC's security interest under the *PPSA*, the common law licence theory, or the security itself?

V. Analysis

A. What was the Effect of the April 12 and June 5, 2007 orders?

[11] There are a number of authorities concerning priority disputes over monies paid into court that, although not directly on point, nevertheless are instructive. The following principles can be distilled from these cases:

1. To trump a trustee's priority to funds paid into court under a garnishee or as a condition of opening up a default judgment, the judgment creditor must have completed execution (***T.L. Cleary Drilling Co. (Trustee of) v. Beaver Trucking Ltd.***, [1959] S.C.R. 311, 38 C.B.R. 1; ***Tradmor Investments Ltd. v. Valdi Foods (1987) Inc.*** (1993), 33 C.B.R. (3d) 244 (Ont. Ct. Gen. Div.), aff'd (1997), 43 C.B.R. (3d) 135 (OCA))

2. An order permitting payment out of monies paid into court on obtaining a further order is insufficient to trump the trustee's priority to the funds (***T.L. Cleary Drilling Co.***).

3. A judgment creditor is not elevated to the status of secured creditor by virtue of a payment into court, whether that payment is to advance an appeal or as security for costs (***T.L. Cleary Drilling Co.***; ***Tradmor Investments Ltd.***; and ***Laker (Trustee of) v. Colby*** (1987), 66 C.B.R. (N.S.) 71 (Que. Sup. Ct.)).

4. A judgment creditor may trump a trustee's priority to funds paid into court if the funds are sufficiently 'earmarked' and the creditor has 'done all that it could' to access the funds (***Careen Estate v. Quinlan Brothers Ltd.*** (2004), 2 C.B.R. (5th) 102 (Nfld. S.C.)).

5. A secured creditor trumps a trustee's priority to funds paid into court if the monies are the subject of valid security (*BIA*, s. 70; (***T.L. Cleary Drilling Co.***; ***McCurdy Supply Company Limited v. Doyle*** (1957), 64 Man. R. 289 (Q.B.), aff'd without reasons (1957), 64 Man. R. 365n (C.A.)).

[12] In ***T.L. Cleary Drilling Co.***, Locke J. (who wrote separate concurring Reasons) rejected the proposition that service of a garnishee order created an equitable charge on a judgment debt, observing (at para. 14) that a contrary result would mean that "a creditor sufficiently alert to bring an action and attach moneys owing to a debtor on the brink of insolvency may thereby

obtain preference over other creditors who refrain from bringing actions", something directly contrary to the intent and purpose of the *Bankruptcy Act*. Accordingly, Locke J. said that an assignment in bankruptcy takes precedence over a garnishment unless it has been completely executed by payment to the creditor or his agent.

[13] Speaking for the other members of the unanimous court, Judson J. expressed the view (at para. 18) that:

> It is not sufficient that the fund may have been stopped in the hands of the garnishee or that it may be in court subject to further order or even subject to payment-out on an order already issued. Nor does it matter when the money was attached or paid into court or what the status of the action may have been when bankruptcy supervened. The only question is -- has the execution procedure been completed by payment to the creditor or his agent? [Emphasis added.]

[14] Judson J. explained this in the context of s. 41(1) of the then *Bankruptcy Act*, R.S.C. 1952, c. 14. Its successor, s. 70 (1) of the *BIA*, provides:

> Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except such as have been completely executed by payment to the creditor or his agent, and except also the rights of a secured creditor.

[15] In this vein, Mr. Justice Judson noted (at para. 20) that until the concluding phrase of the section "…and except also the rights of a secured creditor," the words of the section could not be plainer and the claim of the trustee prevails over that of the judgment creditor under any of the execution procedures mentioned, unless there has been payment to the creditor or his agent.

[16] Judson J. referred to ***McCurdy Supply Company Limited***, a priority dispute between a garnisheeing creditor, an assignee of a mortgage for full value prior to bankruptcy, and the trustee. The effect of s. 41(1) of the *Bankruptcy Act* was not raised. He noted (at para. 25) that whatever the position of the garnisheeing creditor may have been, whether secured creditor or not, there was "a much more serious obstacle in the way of the trustee in bankruptcy" as there was no property to pass to him because the bankrupt had made a complete assignment of the mortgage prior to bankruptcy.

[17] In an annotation to the decision ((1959), 38 C.B.R. 1), Carl H. Morowetz suggests that it accorded with jurisprudence in Ontario, and particularly ***Re Christian*** (1957), 36 C.B.R. 131 (Ont. H.C.J.), in which Smiley J. ruled that the opposite view would defeat the principle of the *Bankruptcy Act* concerning distribution of the property of the debtor amongst all creditors.

[18] ***Tradmor Investments Ltd.*** involved a priority dispute between a plaintiff creditor and a trustee to monies paid into court prior to the defendant's bankruptcy as a condition of setting aside a default judgment. Carruthers J. ruled that the money was the property of the defendant/bankrupt, commenting that any other result would create the anomaly of putting the plaintiff in a superior position than it would have been in as an unsecured creditor after judgment was upheld on appeal. The Ontario Court of Appeal expressly rejected the notion that the payment into court elevated the litigant's position to that of a secured creditor.

[19] The priority dispute in ***Tercon Contractors Ltd. v. Cassiar Mining Corp.*** (1994), 24 C.B.R. (3d) 206 (B.C.C.A.) was over a pre-bankruptcy settlement offer paid into court by the defendant under Rule 37 of the *British Columbia Supreme Court Rules*, which provided that:

> 37(3) Money paid into court shall remain in court subject to further order unless the plaintiff elects to accept it under this rule.
>
> . . .
>
> (8) Subject to subrules (9) and (10), where money is paid into court under this rule, except under subrule (6), a party, at any time before the commencement of the trial, may accept and take out of court the whole sum or any one or more of the specified sums paid in, in satisfaction of that party's claim or claims, by filing and delivering to each party of record a notice in Form 29.

[20] In the end, the plaintiff, who had not accepted the offer at the date of the bankruptcy, lost out to the trustee. The Court of Appeal observed (at para. 9) that the money paid into court was the bankrupt's until the plaintiff either accepted the offer or succeeded in the action.

[21] ***Laker*** is a Quebec decision. The English version headnote summarizes the case as one involving a judgment debtor posting money into court as a condition of appeal, losing his appeal and then making an assignment into bankruptcy before the monies were paid out to the judgment creditor. The court ruled in favour of the trustee, rejecting the notion that the creditor could bootstrap his position by relying on the payment into court. In the absence of a completed execution procedure, the money remained the property of the bankrupt.

[22] In ***Careen Estate***, a pre-judgment attachment order prompted Careen Estate to pay money into court pending disposition of the trial. When judgment was awarded against it, counsel for Careen Estate informed the trial judge that his client intended to make an assignment into bankruptcy that day. The trial judge ordered immediate payment out of the monies in court to the plaintiff, but when the defendant's counsel sought payment of the funds, courthouse staff informed him that the court needed to confirm the payment and issue a certificate in accordance with the *Rules of Court*, which could not be accomplished by the close of business that day. Within an hour of that happening, Careen Estate made an assignment into bankruptcy.

[23] Distinguishing the circumstances from those in ***T.L. Cleary Drilling Co.***, Russell J. found (at paras. 18 and 31) that the funds became the plaintiff's property because of the timing of the trial judge's order permitting immediate payout of the monies paid into court and the fact the plaintiff had taken all steps necessary to request the funds.

[24] Russell J. in ***Careen Estate at para. 35*** referred to Registrar Quinn decision in ***Harmon Valley Co-op Feeders Association v. Collins Barrow Ltd.*** (1998), 1 C.B.R. (4th) 220 (Alta. Q.B.). The plaintiff in that case had obtained an order requiring the defendant to pay monies into court and obtained judgment before the defendant gave notice of its intention to make a proposal under the *BIA*. The proposal ultimately failed. Rejecting the proposition that the funds in court were "earmarked" for the creditor, Registrar Quinn stated (para. 26):

> ... In the present case it cannot be said the funds in court were "earmarked" for Harmon Valley. The funds were not paid into court to provide the bankrupts an opportunity to obtain a trial of an action or to allow Harmon Valley to prove a builders lien or some other security.

[25] Although he used the term "earmarked" as it was used in the 1913 decision of ***Doctor v. People's Trust Co.*** (1913), 14 D.L.R. 451 (B.C.S.C.), Registrar Quinn chose not to follow that case, saying it was not authority for the proposition that the funds ceased to be the property of the defendant on being paid into court since it was only if the plaintiff won the case at the second trial that it could claim the money.

[26] ***Doctor*** concerned a pre-bankruptcy payment into court to secure a new trial. A plaintiff obtained judgment for $3,650 and a costs award. The defendant got an order permitting a re-trial on condition that it pay $4,000 into court to answer any judgment the plaintiff might obtain. It paid the money into court, had the re-trial, lost the re-trial, and then made an assignment into bankruptcy. The court gave the plaintiff priority to the $4,000, expressing the view (at paras. 5-6) that the money had been paid in as against the happening of the contingency that judgment would be secured in favour of the plaintiff, which contingency had occurred before the assignment. The court indicated that the money paid in was appropriated or earmarked and when the second judgment was given, it became the plaintiff's. The short delay in applying for payment out did not change the character of the situation.

[27] With this backdrop, I first consider the plain language of the subject orders.

[28] The April 12, 2007 order unambiguously describes its purpose - to stay immediate enforcement on the award by Stone Sapphire if certain conditions are met. It gave Transglobal a choice; either make the payment in and enjoy a stay of enforcement, or do not and face enforcement proceedings. If Transglobal chose the former, Stone Sapphire had the ability to attach the payment, if two things happened:

1. Transglobal failed to make the payment in by the deadline (or presumably if it removed all or part of it); and

2. A further order was granted allowing Stone Sapphire to access the payment in.

[29] Neither of those things happened.

[30] Consistent with this is the plain language of paragraph 11 of the June 5, 2007 order. It describes the consequences if Transglobal failed to meet the then extended deadline for the payment in. In that eventuality, the new evidence application would be struck, the stay of enforcement would be lifted, and Stone Sapphire could seek entry of the order of April 12, 2007 and could then take enforcement steps to execute on that order.

[31] None of those things happened.

[32] In short, this is what the orders granted by Lee J. concerning the payment in did:

1. They gave Transglobal a chance to have its counterclaim tried without the interference of enforcement proceedings.

2. They gave some modicum of protection to Stone Sapphire. I say a modicum of protection because:

   (a) The protection is dependant on Stone Sapphire obtaining a further order releasing the payment in after adjudication of Transglobal's counterclaim.

   (b) Obtaining such an order cannot be presumed to be a sure thing since, when the time is ripe, Stone Sapphire must satisfy the Court that the order is appropriate after considering such matters as procedural setoffs (if any) and competing claims of other judgment and secured creditors.

[33] This is what the orders granted by Lee J. concerning the payment in did not do:

1. They did not elevate Stone Sapphire's status to that of a secured creditor.

2. They did not otherwise give Stone Sapphire a property interest in the payment in.

3. They did not interfere with HSBC's secured creditor status and claim to the payment in.

[34] The authorities cited are distinguishable on their unique facts, but the distinctions do not detract from the underlying principle applied in each case that regardless of the scenario giving rise to a payment into court, a judgment creditor is simply an unsecured creditor until it has

completed execution proceedings. Unless the fruits of the proceedings are in the hands of the judgment creditor, it has no property interest in the asset.

[35] Stone Sapphire is a judgment creditor whose enforcement proceedings are far from complete. It stands on the same footing in this fundamental respect as the creditors in ***T.L. Cleary Drilling Co.***, ***Laker***, ***Tercon***, and ***Tradmor***.

[36] The proposition in ***Doctor*** that, without evidence of a completed execution process, funds paid into court nevertheless may be sufficiently "earmarked" for an unsecured creditor to defeat the interests of a trustee in bankruptcy (and similarly a secured creditor), offends the underlying premise of the *BIA* concerning distribution of a bankrupt's property among all creditors, and the specific language of s. 70 of the *BIA*. These concerns were not addressed by the court in ***Doctor***. Further, the court's conclusion was based on the presumption that had the trial judge given his judgment in open court, an immediate application for payment out would have been made, which would have been successful. Presumption can be a dangerous thing and should be avoided, particularly where it can lead to the reversal of priorities or preferences. In any event, I am not satisfied that ***Doctor*** remains good law in light of the Supreme Court of Canada's subsequent decision in ***T.L. Cleary Drilling Co.***

[37] Irrespective of the notion of "earmarking," Stone Sapphire is not in the same category as the creditor in ***Careen Estate***, which obtained an order for payment out of the monies in court and did all that it could to make that happen before the assignment in bankruptcy occurred, only to be frustrated by bureaucratic requirements.

[38] Given these conclusions, I need not address HSBC's contention that the June 5, 2007 order stayed the April 12, 2007 order in its entirety and, accordingly, Stone Sapphire would have had to obtain a fresh order for summary judgment.

B. Did HSBC's Security Interest Apply to the Payment In?

[39] It is evident from the discussion above that Stone Sapphire had no property interest in the payment in. Stone Sapphire argues that HSBC failed to prove that the monies used to fund the payment in would have been caught by its security. I reject that argument. The uncontroverted evidence is that the monies to fund the payment in were paid by Transglobal. There is no evidence to suggest that those monies were anything but present or after-acquired personal property such that they would have been caught by HSBC's security. In the circumstances, I conclude that HSBC's security interest applies to the payment in.

C. Was the Payment in Made in the Ordinary Course of Business, or Otherwise Free of HSBC's Security Interest under the *PPSA*, the Common Law Licence Theory, or the Security Itself?

1. ***PPSA***

[40] The BSA is excluded from application of the *PPSA* by s. 4 of that Act.

[41] The GSA, however, is subject to its operation by virtue of s. 3, which provides as follows:

> 3(1) Subject to section 4, this Act applies to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and without limiting the generality of clause (a), a chattel mortgage, conditional sale, floating charge, pledge, trust indenture, trust receipt, assignment, consignment, lease, trust and transfer of chattel paper where they secure payment or performance of an obligation."

[42] The GSA grants HSBC a security interest in all present and after-acquired property, an interest addressed by s. 28(1) of the *PPSA*, which states:

> 28(1) Subject to this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest continues in the collateral, unless the secured party expressly or impliedly authorized the dealing, and extends to the proceeds, ...

[43] Under s. 28(1), HSBC's security interest continues in the collateral unless the payment in was a "dealing" with the collateral and one that was authorized by HSBC. It was neither.

[44] Also of concern is s. 31 of the *PPSA*, which applies where a creditor is paid in currency or by instrument. Section 31 reads:

> 31(1) A holder of money has priority over any security interest perfected under section 25 or temporarily perfected under section 28(3) if the holder acquired the money without knowledge that it was subject to a security interest, or is a holder for value, whether or not the holder acquired the money without knowledge that it was subject to a security interest.
>
> (2) A creditor who receives an instrument drawn or made by a debtor and delivered in payment of a debt owing to the creditor by that debtor has priority over a security interest in the instrument whether or not the creditor has knowledge of the security interest at the time of delivery."

[45] This protection does not help Stone Sapphire since the payment was not:

(a) a payment made to it in the form of currency;

(b) a payment made to it in the form of an instrument;

(c) a payment made to it at all.

[46] It was simply a payment into court to satisfy a condition which would allow Transglobal to take advantage of a stay of enforcement of the award.

[47] Section 30(2) of the *PPSA* is another relevant provision protective of third parties. It reads:

> 30(2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest in the goods given by the seller or lessor or arising under section 28 or 29, whether or not the buyer or lessee has knowledge of it, unless the buyer or lessee also has knowledge that the sale or lease constitutes a breach of the security agreement under which the security interest was created.

[48] In ***Northwest Equipment Inc. v. Daewoo Heavy Industries America Corp.***, 2002 ABCA 79 at para. 14, 299 A.R. 250, the Alberta Court of Appeal explained the purpose of s. 30(2) as follows:

> Under s. 30(2), a buyer of goods sold in the ordinary course of the seller's business takes the goods free from any perfected or unperfected security interest given by the seller. Its purpose "is to avoid disruption to commerce and injustice to unsuspecting ordinary course buyers which would otherwise result if such buyers were required in every case to conduct a search of the Personal Property Registry before buying goods": *Cuming and Wood*, supra, at 213. The focus is on commercial practicality: ***Fairline Boats Ltd. v. Leger*** (1980), 1 P.P.S.A.C. 218 at 220-21 (Ont. H.C.J.). The ordinary course exception applies whether or not the buyer knew of the security interest, and even though the security agreement limited the seller's rights to dispose of the goods. The exception does not apply if the buyer was aware that the transaction was in breach of the security agreement.

[49] In ***Fairline Boats Ltd. v. Lager*** (1980), 1 P.P.S.A.C. 218 at 222 (Ont. H.C.J.), Linden J. offered the following advice for determining whether a transaction is one that is in the ordinary course of business:

> ... the courts must consider all of the circumstances of the sale. Whether it was a sale in the ordinary course of business is a question of fact. (See the Ziegel article, *supra*, at p. 86.) The usual, or regular type of transaction that people in the seller's business engage in must be evaluated. If the transaction is one that is not normally entered into by people in the seller's business, then it is not in the ordinary course of business. If those in the sellers business ordinarily do enter into such agreements, then, even though it may not be the most common type of contract, it may still be one in the ordinary course of business.

[50] Applying ***Fairline Boats Ltd.***, the Court of Appeal in ***369413 Alberta Ltd. v. Pocklington***, 2000 ABCA 307 at para. 21, 271 A.R. 280 [***Gainers***] instructed that courts should undertake a "broad and case-specific analysis of the ordinary course of the company's business" by objectively examining the usual type of activity in which the business is engaged, followed by a comparison of that general activity to the specific activity in question. Citing ***Aubrett Holdings Ltd. v. Canada***, [1998] G.S.T.C. 17 (T.C.C.), the court said that the transaction "must fall into place as part of the undistinguished common flow of business carried on, calling for no remark and arising out of no special or peculiar situation."

[51] ***Gainers*** concerned an asset sale, but the following factors considered by the Court of Appeal (at para. 22) are instructive nonetheless:

> (I) The nature and significance of the transaction: it ought to be one that a manager might reasonably be expected to carry out on the manager's own initiative without making prior reference back or subsequent report to superior authorities, such as the board of directors or the shareholders…
>
> . . .
>
> (iv) The reason for the transaction: it ought not to have occurred as a response to financial difficulties or in suspicious circumstances…
>
> (v) The intent of the transaction: neither its intent nor its effect should have been to undermine bank security…
>
> (vi) The frequency of the type of transaction: an unusual or isolated transaction might be viewed differently from a routine one.

[52] In ***Northwest Equipment Inc.***, quoting R.C.C. Cuming and R.J. Wood, *British Columbia Personal Property Security Act Handbook*, 4th ed. (Scarborough: Carswell, 1998) at 215, the Alberta Court of Appeal said (at para. 15) that "[s]ales in the ordinary course of business are usually 'carried out under normal terms and consistent with general commercial practices.'"

[53] Application of these considerations in the present case leads to the conclusion that the payment in was not an ordinary course transaction because:

> (a) It is in excess of $1,500,000. While there was no evidence adduced to suggest that it was one a manager could make without reference to superior authorities, it is substantial given the business' operation and cash flows as detailed in various reports to the Court by the Proposal Trustee.
>
> (b) It arose out of a special or peculiar situation; to obtain a stay of enforcement proceedings on the award which, in turn, arose in a dispute about contractual obligations and setoffs.

(c) Its purpose was to stave off enforcement proceedings until Transglobal's counterclaim could be adjudicated.

(d) While a secondary consequence was to undermine bank security, there is no evidence to indicate that such was the intent.

(e) There is no evidence to show that its occurrence was anything but an isolated event.

(f) There is no evidence to show that the payment in falls "into place as part of the undistinguished common flow of business carried on, calling for no remark and arising out of no special or peculiar situation" or was "carried out under normal terms and consistent with general commercial practices."

[54] If a dispute about the parties' respective obligations and alleged breaches of same had not arisen, and Transglobal had paid the invoices as they became due, such transactions doubtless would fit within the ordinary course exception. However, that is not what happened.

[55] HSBC's priority position is not disturbed by the ordinary course of business exception in the *PPSA*.

2. The Common Law Licence

[56] The Supreme Court of Canada in ***Royal Bank of Canada v. Sparrow Electric Corp.***, [1997] 1 S.C.R. 411 at para. 91 offered the following description of licence theory:

> [L]icence theory holds that a bank's security interest in a debtor's inventory, though it be fixed and specific, is subject nevertheless to a licence in the debtor to deal with that inventory in the ordinary course of business. Consequently, says the theory, the bank's claim to the inventory must give way to any debts incurred in the ordinary course of business.

[57] The court in ***Sparrow Electric Corp.*** at para. 94 indicated that a security agreement with a licence to sell creates "…a defeasible interest; but the event of defeasance is the actual sale of the inventory and the actual application of the proceeds against an obligation to a third party."

[58] According to the court in ***Sparrow Electric Corp.***, all of the following factors must be established in order for the common law licence theory to apply:

1. The source of the payment must be proceeds from a sale of inventory (para. 96).

2. The recipient of the payment must be a third party (para. 94).

3. The object of the payment must be in "satisfaction of obligations that are immediately incidental to an actual sale of the inventory" (para. 89).

[59] The evidence tendered on this application does not support the payment in fitting the definition and parameters of the licence theory because:

(a) There is no evidence of the source of the funds used to make the payment in. There are any number of possible sources of the funding, just one of which is proceeds of the sale of inventory.

(b) The payment in was not made to a third party, and in particular, Stone Sapphire. It was simply a payment into court for the sole purpose of securing a stay of enforcement.

[60] HSBC submitted that this analysis was unnecessary since the common law licence theory has been subsumed by the *PPSA*. In ***Sparrow Electric Corp.***, the Supreme Court of Canada spoke to the effect of s. 28 of the *PPSA*. It did not say that it had subsumed the common law licence.

[61] In Ronald C.C. Cuming, Catherine Walsh and Roderick J. Wood's text, *Personal Property Security Law* (Toronto: Irwin Law Inc., 2005) at 176, the authors say this about the licence theory in the era of the *PPSA*:

> The *PPSA* expressly states that a transferee of collateral takes free of a security interest where the dealing was expressly or impliedly authorized by the secured party. Even where authority has not been given, the *PPSA* replaces the priority ground previously occupied by the implied licence jurisprudence with explicit priority rules that protect the title acquired by a buyer or lessee of goods in the ordinary course of business and by a holder of money and a purchaser of negotiable and quasi-negotiable collateral.

[62] The authors hypothesize that the paucity of discussion about the common law licence theory after ***Sparrow Electric Corp.*** may be because the "codified provisions of the *PPSA*, and in particular the *PPSA*s of the western provinces, sufficiently deal with debtors' ability to transfer property free and clear in the ordinary course of business."

[63] I need not decide whether the *PPSA* has occupied the field of the common law licence theory to resolve this priority dispute. Even presuming that it has not, the test for establishing a common law licence to deal is not been met.

3. HSBC's Security

[64] Clause 5 of the BAS requires that Transglobal: "... at all times duly and seasonably pay and discharge all claims whatsoever in any way secured by or constituting a charge upon the Property or any part thereof."

[65] Stone Sapphire contends that the effect of this provision is to estop HSBC from laying claim to the payment in since it was a payment on a judgment and one which HSBC required that Transglobal make. However, the payment in was not made on account of or to discharge a claim. Moreover, this provision simply governs the relationship between the parties. It does not expand the scope of the any common law licence that Transglobal might have had. (***Sparrow Electric Corp.*** at para. 101).

[66] Like s. 30(2) of the *PPSA*, the GSA authorizes the use of monies available to Transglobal in the ordinary course of business (clause 4.1.2). The distinction is that, under the GSA, the proceeds of sale are held in trust for HSBC (clause 5.2).

VI. Conclusion

[67] The orders of April 12 and June 5, 2007 gave Transglobal a chance to have its counterclaim tried without the interference of enforcement proceedings. They gave some modicum of protection to Stone Sapphire, but neither elevated its status to that of a secured creditor nor otherwise gave it a property interest in the payment in. The orders did not affect HSBC's secured creditor status and priority to the payment in.

[68] HSBC had a security interest in the monies used by Transglobal to fund the payment in. Under a *PPSA* analysis, the payment in was neither one made to a creditor by cash or instrument nor one made in the ordinary course of business. Accordingly, HSBC's security interest continues and it has priority to the payment in.

[69] Even if the common law licence theory is in effect in Alberta, the test set out by the Supreme Court of Canada in ***Sparrow Electric Corp.*** is not satisfied. HSBC's priority position is unaffected by the common law licence theory.

[70] Finally, the obligation described in clause 5 of the BSA does not impact on HSBC's priority position.

[71] The parties may speak to costs within 30 days of the date of this decision.

Heard on the 5th day of September , 2008.

Dated at the City of Edmonton, Alberta this 19th day of September, 2008.

J.E. Topolniski
J.C.Q.B.A.

Appearances:

Kentigern A. Rowan and
H. Lance Williams
Ogilvie LLP
for the Applicant (Defendant by Counterclaim)

Charles P. Russell, Q.C. and
Kenneth W. Fitz
McLennan Ross LLP
for the Respondents (Plaintiffs by Counterclaim)

TAB 18

Corrigendum of the Reasons for Judgment
of
The Honourable Madam Justice J.E. Topolniski

The second docket number listed should be BE03 071018.

In paragraph 9, subparagraph (i) please note quotations should be at the end of the paragraph.

In paragraph 39, sentence five should read “after-acquired personal property”.

1986 CarswellAlta 137
Alberta Court of Queen's Bench

Yorkshire Trust Co. v. 304231 Alberta Ltd.

1986 CarswellAlta 137, [1986] 5 W.W.R. 168, [1986] A.W.L.D. 1166,
[1986] A.J. No. 546, 1 A.C.W.S. (3d) 58, 46 Alta. L.R. (2d) 47, 71 A.R. 351

YORKSHIRE TRUST COMPANY v. 304231 ALBERTA LTD.

Virtue J.

Judgment: June 19, 1986
Docket: Calgary No. 8501-20398

Counsel: *F. R. Foron*, for Canadian Commercial Bank.
J. D. Poole, for plaintiff.
C. J. Shaw, for Jecco Development Ltd. et al.

Subject: Corporate and Commercial

Application for declaration of priority.

***Virtue J.*:**

1 The issue to be determined is whether, in the circumstances of this case, a garnishee by an unsecured creditor takes priority over security given previously by the judgment debtor.

2 The facts are as follows:

1. Jecco Development Ltd., Jecco Corporation Ltd. and certain other related corporations ("Jecco") were indebted to Canadian Commercial Bank ("C.C.B.") pursuant to loans made to Jecco by C.C.B.

2. Pursuant to a negotiated settlement made in or around December 1983, Jecco agreed to transfer all of their interest in certain assets to C.C.B., such assets being subject to security granted to C.C.B. by Jecco. In consideration of the transfer, the indebtedness of Jecco to C.C.B. was reduced by approximately $10,000,000.

3. As a result of the transfer, lands formerly registered in the name of Jecco were registered in the name of C.C.B. On one of the parcels of land Yorkshire held a first mortgage granted by Jecco in the amount of $1,035,164.75.

4. On or about 24th April 1984 C.C.B. sold all of the assets which it had received from Jecco to 304231 Alberta Ltd. ("304231") for approximately the same price as the amount by which Jecco's indebtedness to the bank was reduced. C.C.B. also sold certain other assets which it held to 304231 and also, subsequent to the above sale, advanced approximately $3,000,000 in funds to pay out certain prior encumbrances on the properties sold to 304231.

5. C.C.B. advanced the money to 304231 for the purchase of the assets and, in consideration of those advances and additional moneys advanced to pay out certain prior encumbrances, 304231 granted to C.C.B., inter alia, the following security:

(a) general assignment of book debts;

(b) fixed and floating charge debenture in the principal amount of $200,000,000;

(c) supplemental debenture;

(d) pledge agreement of the debenture;

(e) general hypothecation of collateral securities.

6. Because of its financial difficulties C.C.B. is being wound up pursuant to the provisions of the Winding-Up Act (Canada) and all proceedings against C.C.B. have been stayed pursuant to the orders of the Court of Queen's Bench of Alberta dated 3rd September 1985 and 24th January 1986.

7. 304231 defaulted on the mortgage to Yorkshire and that company commenced foreclosure proceedings which eventually, by leave of the court, led to a deficiency judgment in the amount of $425,098.76 against both 304231 and C.C.B.

8. Pursuant to its judgment against 304231, on or about 1st April 1986 Yorkshire garnisheed a number of tenants of 304231 and Madiera Property Management Ltd. ("Madiera"), the property manager for 304231.

9. Subsequent to the initial garnishee and pursuant to its general assignment of book debts, C.C.B. by its liquidator on 16th April 1986 appointed an agent to collect the accounts receivable of 304231 and gave proper notice of this action under its assignment to those debtors of 304231 who had been garnisheed.

10. Yorkshire again on 1st May 1986 issued garnishee summonses on Madiera and the tenants referred to in para. 8 above.

11. On or about 20th May 1986 C.C.B. by its liquidator appointed a receiver and manager of all of the property, assets and undertaking of 304231.

12. The moneys paid into court pursuant to the garnishees remained in court and had not been paid out at the time of this application.

13. C.C.B. by its liquidator made this application for a declaration that it has priority by way of its security to the funds garnisheed by Yorkshire and over all moneys accruing due to 304231 from debtors of 304231, and for an order directing that any funds paid into the clerk of the court or the sheriff's office of the judicial district of Calgary be forthwith paid over to Price Waterhouse Limited, liquidator of C.C.B., or its solicitors.

3 There was no evidence before me nor any submission by counsel for Yorkshire that the transfer of assets by Jecco to C.C.B. was anything other than a bona fide transaction for value.

4 Yorkshire has not sought to set aside the transfer of assets from C.C.B. to 304231 and would defeat its purpose if it were to do so because its garnishee of the debtors of 304231 can only stand if the properties on which the rents are being paid are owned by 304231 and not by C.C.B. Otherwise there would be no debt due and owing to 304231 to which its garnishee could attach. The evidence satisfies me that the transfer of assets by C.C.B. to 304231 and the granting of security for the purchase price and additional moneys advanced were bona fide transactions carried out for the legitimate purposes of the bank and 304231.

5 The factual basis upon which this matter must be decided is that 304231, a validily constituted corporation, has given valid security to C.C.B., which security is prior in time to Yorkshire's garnishee.

6 While Yorkshire's claim is based upon a garnishee summons, its basic position is that of an execution creditor. The position in law of an execution creditor relative to the property of his debtor is succinctly stated by the Supreme Court of Canada in *Jellett v. Wilkie* (1896), 26 S.C.R. 282, 16 C.L.T. 260, where, at pp. 288-89, Sir Henry Strong C.J.C. says:

> No proposition of law can be more amply supported by authority than that which the respondents invoke as the basis of the judgment under appeal, namely, that an execution creditor can only sell the property of his debtor subject to all such charges, liens and equities as the same was subject to in the hands of his debtor.

7 In discussing this "broad rule of justice" at p. 290 the Chief Justice referred to "... the obvious distinction between a purchaser who pays his money relying on getting the specific land he buys and a creditor who is in no such position ..."

8 Prowse J.A. in *Re Lemarre; Univ. of Calgary v. Morrison*, [1978] 2 W.W.R. 465, 27 C.B.R. (N.S.) 41, 78 D.T.C. 6155, 85 D.L.R. (3d) 392, 8 A.R. 533 (C.A.), applied the rule in *Jellett v. Wilkie*, supra, in discussing the position of an execution creditor who had garnisheed. He says at p. 468:

> By such proceeding the judgment creditor or the party seeking to become a judgment creditor attaches money due or accruing to debtor. The proceeding merely authorizes attaching the debtor's property, not the interest of third parties in the debtor's property. In this regard they have the same effect as seizure under a writ of execution: see *Jellett v. Wilkie* ...

And at the same page, he cites with approval *O'Neil & Co. v. Galbraith & Sons* (1914), 7 W.W.R. 155 (B.C.S.C.), for the proposition that "Service of a garnishee does not bind a debt which has been assigned prior to service of the notice even if notice of that assignment has not been given to the debtor ..."

9 I take it as a general principle of law that a garnishee summons can only attach moneys due or accruing due to a debtor subject to all such charges, liens and equities as the same was subject to in the hands of the debtor.

10 I have already set out the five forms of security given by the debtor 304231 to C.C.B. prior to the garnishee. I propose to deal specifically first with the fixed and floating charge debenture and then with the general assignment of book debts.

Priority of floating charge debenture

11 The debenture was executed on 24th April 1984 and registered 3rd May 1984. The validity of its form, execution and registration were not questioned by Yorkshire. Yorkshire garnisheed on 1st April 1986 and again on 1st May 1986. C.C.B. crystallized its debenture by the appointment of a receiver-manager for 304231 on 20th May 1986, that is, after the garnishees but before the moneys garnisheed were paid out of court. The situation here is similar to the situation dealt with by the Manitoba Court of Appeal in *Gen. Brake & Clutch Service Ltd. v. W.A. Scott & Sons Ltd.*, 59 D.L.R. (3d) 741, [1975] W.W.D. 158 (Man. C.A.), as appears in the judgment of Freedman C.J.M. at p. 744 where he stated:

> We have then a situation in which the garnishing creditor served its garnishing orders before the crystallization of the charge contained in the debenture. But that crystallization occurred very soon after, indeed before payment into Court and of course before payment out, the latter event not yet having taken place. The plaintiff as garnishing creditor contends that it has priority, arguing that the service of the garnishing order operated as an absolute transfer from the judgment debtor to the judgment creditor of the property in the debt attached. The receiver on the other hand claims priority on the view that the debt attached represented an asset of the defendant company that was subject to the floating charge, and that, the floating charge having become a fixed charge before the garnishment was completed by payment out, the moneys in Court are properly payable to the receiver.

After a careful analysis of the law the Chief Justice concludes at p. 748:

> In the result I hold that the claim of the receiver has priority over that of the garnishing creditor. I would direct that the moneys in Court be paid to the receiver accordingly.

12 The Chief Justice at p. 747 rests his decision upon the principle that

> ... an execution creditor has no greater rights in the property of his debtor than the debtor himself, and that the debtor's property is subject to the debenture-holder's rights under the floating charge, which entitles him to a specific charge upon the seized property if and when the floating charge crystallizes before execution is completed

citing *Imp. Oil Ltd. v. Abilene Contr. Co.* (1966), 56 W.W.R. 757, 57 D.L.R. (2d) 572 at 575 (B.C.C.A.).

13 I am of the opinion that the same principle governs this case and that unless some other principle of law or equity intervenes, the debenture having been granted prior in time to the garnishee and having been crystallized before the garnisheed moneys were paid out of court, the rights of the debenture holder take priority over the garnishee. In reaching that conclusion I am not unmindful of the fact that the garnishees were issued before the debenture was crystallized and I am aware of the dicta of D. C. McDonald J. in *Alta. Paper Co. v. Metro. Graphics Ltd.* (1983), 28 Alta. L.R. (2d) 52, 24 B.L.R. 134, 49 C.B.R. (N.S.) 63, 47 A.R. 279 (Q.B.), where at pp. 59-60 McDonald J. says:

> In the *General Brake* case, however, the receiver was not appointed until after the service of the garnishee summons. It was held that the appointment was the act responsible for crystallization. Freedman C.J.M. delivered the judgment of the majority of the court. After indicating that service of a garnishee summons does not have the effect of transferring property in the debt from the judgment debtor to the judgment creditor, he concluded that the debenture holder had priority even before crystallization. Implicit in this reasoning is the notion that the debenture creates an equitable interest prior to crystallization.
>
> From a theoretical point of view, however, this position is difficult to justify. An uncrystallized floating charge ought not to create an equitable interest in any of the assets of the judgment debtor, because no assets of the judgment debtor are attached. Accordingly, service of a garnishee summons prior to crystallization should attach a debt unencumbered by the debenture.
>
> However, I need not consider this point further because in the present case the garnishee summons was served after crystallization of the security provided by the debenture.

14 It is true that in *General Brake*, the Manitoba Court of Appeal was dealing with the case of a judgment creditor claiming under a garnishee order served before the appointment of the receiver but the garnishee moneys had not yet been paid to the execution creditor. It was held that the debenture holder took priority over the garnishee. The distinguishing feature is that crystallization of the debenture occurred before the garnishee moneys were paid out of court, that is, before execution was completed and the moneys vested in the execution creditor.

15 As a garnishee summons does not have the effect of transferring property in the debt from the judgment debtor to the judgment creditor, the garnisheed moneys are not beyond the reach of the debenture so long as the debenture is crystallized before the moneys are paid out of court.

16 The same view was expressed in *Jamison v. F.B.D.B.*, [1978] 5 W.W.R. 756, 28 C.B.R. (N.S.) 194, 78 D.T.C. 6482, 89 D.L.R. (3d) 234 (B.C.S.C.), where Macfarlane J. at p. 758 refers with approval to the *General Brake* case and to the summary of the law by the author of Kerr on Receivers, 14th ed. (1972), pp. 159-60:

> > But the title of the receiver prevails over that of execution creditors *who have not completed their execution* ... and therefore is good against a person who has obtained a garnishee order nisi, or even absolute, *if the charge crystallises before actual payment*.
>
> [emphasis added]

17 In the case before me the debenture had crystallized before payment out of the moneys garnisheed.

18 I observe as well that in *Coopers & Lybrand Ltd. v. Nat. Caterers Ltd.* (1982), 47 C.B.R. (N.S.) 57 (B.C.S.C.), the garnishee order was obtained on 18th March 1982 and the receiver appointed by the debenture holder on 13th April 1982, that is, after the garnishee. Locke J. held that the receiver had priority over the garnishee and noted in particular that the floating charge crystallized before the payment out of court of the garnishee moneys.

19 The *Coopers & Lybrand* case is in turn referred to with approval by the Ontario Court of Appeal in *MacKay & Hughes (1973) Ltd. v. Martin Potatoes Inc.* (1984), 46 O.R. (2d) 304, 51 C.B.R. (N.S.) 1, 4 P.P.S.A.C. 107, 9 D.L.R. (4th) 439, 4 O.A.C. 1 (C.A.), which also approves the *General Brake* case.

20 In Alberta the question appears to have been put to rest in *Structural Instrumentation Inc. v. Hayworth Truck & Trailer Ltd.*, 33 Alta. L.R. (2d) 33, [1984] 6 W.W.R. 68, 13 D.L.R. (4th) 615, 55 A.R. 1 (C.A.), where Laycraft J.A., after quoting from the judgment of Howland J.A. in *Ont. Dev. Corp. v. I.C. Suatac Const. Ltd.* (1976), 12 O.R. (2d) 465, 22 C.B.R. (N.S.) 42, 69 D.L.R. (3d) 353 (C.A.), says at p. 38:

> The conclusion reached by Howland J.A. with which I respectfully agree, is that upon crystallization the debenture attaches the specific assets so that the debenture holder is prior to all writs of execution filed after the date of the debenture *which have not actually been paid*. [emphasis added]

21 Applied to this case the principle means that the prior floating charge debenture having been crystallized after garnishee but before the garnishee moneys were paid out of court, the receiver under the debenture takes priority over the garnishee.

Priority of general assignment of book debts

22 C.C.B. held additional security in the form of a general assignment of book debts granted by 304231 on 24th April 1984 and registered 3rd May 1984, that is, prior to Yorkshire's garnishees. As stated above, Yorkshire garnisheed on 1st April 1986. On 18th April 1986 C.C.B. caused its agent to give notice of its assignment to the tenants of 304231 and to Madiera. On 1st May 1986 Yorkshire caused a second garnishee to be made.

23 A similar situation was considered by H. J. MacDonald J. in a very careful judgment in *Royal Bank of Can. v. A.G. Can.*, [1977] 6 W.W.R. 170, 25 C.B.R. (N.S.) 233, 3 B.L.R. 52, 8 A.R. 225 (T.D.), confirmed on appeal [1979] 1 W.W.R. 479, 29 C.B.R. (N.S.) 227, 13 A.R. 318 (C.A.). In that case a general assignment of book debts (in the same form as here) was given to the bank on 24th April 1968 and registered on 29th April 1968. Notice of assignment was given to the creditor on 11th April 1973 and in the mean time, on 3rd November 1972, the Crown, under the Income Tax Act, served the creditor with a garnishee demand. The issue in the case was whether the Department of National Revenue or the bank was entitled to the money which, but for the tax demand or the notice of the assignment of book debts, would have been payable to the taxpayer. It was held that the bank's assignment had priority. I take that case to be authority for the proposition that a general assignment of book debts takes priority over a garnishee even where garnishee is made prior to notice of the assignment where notice is given before the garnishee moneys are paid out.

24 *Lettner v. Pioneer Truck Equip. Ltd.* (1964), 47 W.W.R. 343 (Man. C.A.), is authority for the same proposition. In that case Guy J.A. adopts what in my opinion is a correct statement of the law with this statement at p. 346:

> ... the assignment takes precedence over the subsequent garnishing orders; lack of notice of the assignment to the debtors of the assignor does not affect the validity of the assignment ...

The legal reasons for this conclusion appear at p. 349:

> The assignment was effective as soon as it was signed and delivered to the bank. The giving of notice to any debtor of the assignor (that the assignment had been made) was not required in order to add anything to the completeness and the legality of the assignment. Furthermore, the notices to the debtors of the assignor could have been given at any time or times. The effect of this, of course, would have been to warn such debtors not to pay money to the assignor. But this deferred action would not constitute the assignment of future book debts a floating charge; and it could completely destroy the assignor's credit and thus render useless the credit facilities of the bank which enable persons, firms, and corporations to carry on their legitimate business.

25 I adopt that reasoning and conclude that the law in Alberta is that a general assignment of book debts being a specific charge takes priority over a subsequent garnishee. Lack of notice prior to the garnishee does not affect that priority when notice is given before the garnishee moneys are paid out to the execution creditor.

26 In the case before me notice of the assignment to C.C.B. was given before the garnishee moneys were paid out to the execution creditor Yorkshire. That being the case, I conclude that C.C.B.'s assignment takes priority over both Yorkshire's first

garnishee, which was issued before notice of the assignment, and, of course, the second garnishee, which was issued after notice was given.

27 Other authorities which support that conclusion are:

28 *Evans, Coleman & Evans Ltd. v. R.A. Nelson Const. Ltd.* (1958), 27 W.W.R. 38, 16 D.L.R. (2d) 123 (B.C.C.A.);

29 *Royal Bank of Can. v. R.*, 52 C.B.R. (N.S.) 198, 27 B.L.R. 276, 4 P.P.S.A.C. 131, 84 D.T.C. 6439, [1984] C.T.C. 573 (Fed. T.D.).

30 Counsel for Yorkshire takes the position that even if I should find that, under the general law, C.C.B. has priority over Yorkshire, as I have done, the situation in this case is different because C.C.B., which holds the security, owes money to Yorkshire under the same judgment and execution as Yorkshire holds against 304231, and moreover for the same debt.

31 His proposition is that, as C.C.B. is a judgment debtor of Yorkshire, it cannot assert a priority against Yorkshire. He cites a decision of Master Funduk in *Tow-Mor Properties Ltd. v. W.G. Fahlman Ent. Ltd.*, [1986] A.W.L.D. 583, Edmonton No. 8303-12031, 3rd March 1986 (not yet reported), in support and, in particular, the master's statement at p. 13 of the judgment that there is no such thing in law as priorities between a debtor and his creditors.

32 I do not accept counsel's submission as being the applicable law in this case. The responsibility of the receiver of C.C.B. is to wind up the corporation and to distribute its assets amongst its creditors, of which Yorkshire, under its deficiency judgment on the mortgage foreclosure, is one.

33 C.C.B. is entitled to realize on the securities it holds from 304231 and in priority to the garnishee of Yorkshire. The proceeds of the moneys that it recovers will in due course be available, insofar as the law extends, to the unsecured creditors of C.C.B., including Yorkshire.

34 I do not agree that Yorkshire's position as an unsecured creditor of C.C.B. should result in the normal law governing priorities being set aside. Such a ruling would have the result of allowing Yorkshire to realize on the secured assets in priority to the other unsecured creditors of C.C.B. with whom it should rank equally. Equity requires evenhandedness in the treatment of Yorkshire and the other unsecured creditors of C.C.B.

35 Counsel for Yorkshire suggests that I should set aside the ordinary law as to priorities because there is something "suspicious" in the transactions between C.C.B. and 304231. He refers to the judgment of Matas J.A. in the *General Brake* case, supra, where it is said at p. 753:

> The difficult legal position of a trade creditor is the same today as it was when Buckley, J., made his comments. But equitable principles may, in a proper case, offer relief to a creditor in a contest with a debenture-holder.
>
> In the case at bar, in response to respondent's argument that the equities are with the plaintiff, counsel for the receiver argued that the "equities are irrelevant". This takes the matter too far. There may be cases where the Court, in order to prevent an injustice from being done, would be obliged to consider the equities, if the circumstances of the case, in totality, would permit that course to be taken.
>
> In the instant case, in my view, there are not sufficient grounds to impeach the right of the receiver to priority.

36 The evidence in this case does not satisfy me that there were dealings in the nature of fraud or impropriety from which I can find, as urged by counsel for Yorkshire, that the equities are so with his client that in the circumstances the court should use its powers to defeat the priorities which the law provides. In short, there is nothing in the evidence which, in my opinion, warrants my doing anything other than applying the law with respect to the priorities as I have described it.

37 Let us suppose that the whole transaction between C.C.B. and 304231 were to be declared a nullity. That would simply leave Yorkshire in its original position as an unsecured creditor of C.C.B. The transfer of assets from C.C.B. to 304231 could

only benefit Yorkshire. Had the transfer not taken place, it would have a judgment against C.C.B. only. As a result of the transfer, Yorkshire has a judgment against C.C.B. as well as a judgment against 304231. How has it been harmed? I cannot agree that the transaction raises any equities in favour of Yorkshire to which this court should have regard.

38 In the result, the relief sought by Yorkshire in its notice of motion is denied and there will be an order:

a) declaring that C.C.B. has priority over Yorkshire to any funds paid into court pursuant to the garnishee summonses;

b) declaring that C.C.B. has priority over Yorkshire to moneys accruing due to 304231 Alberta Ltd. from debtors of 304231 Alberta Ltd. to the extent provided in the securities held by C.C.B.;

c) directing the clerk of the court of Queen's Bench or the sheriff of the judicial district of Calgary, as the case may be, to pay out to Price Waterhouse Limited, the liquidator of the Canadian Commercial Bank, or its solicitors, any funds paid into the clerk of the court or the sheriff's office pursuant to the said garnishee summonses.

39 C.C.B. will have costs in both motions.

Order accordingly.