COURT FILE NUMBER	
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
MATTER	IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, OF TRADESMEN ENTERPRISES LIMITED PARTNERSHIP AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, OF TRADESMEN ENTERPRISES INC.
APPLICANTS	TRADESMEN ENTERPRISES LIMITED PARTNERSHIP AND TRADESMEN ENTERPRISES INC.
DOCUMENT	**BENCH BRIEF OF THE APPLICANTS**

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APPLICATION BEFORE THE HONOURABLE JUSTICE C.M. JONES

FEBRUARY 3, 2021 AT 9:00 AM ON THE COMMERCIAL LIST

TABLE OF CONTENTS

I. INTRODUCTION

1. This is the Bench Brief of the Applicants, Tradesmen Enterprises Limited Partnership ("**TELP**") and its general partner, Tradesmen Enterprises Inc. ("**TEI**" and, together with TELP, "**Tradesmen**").

2. Tradesmen seeks Orders, among other things:

   (a) directing that the proposal proceedings of TEI and TELP (together, the "**Estates**") shall be procedurally consolidated and shall continue under a single estate, authorizing and directing the Proposal Trustee to administer the Estates on a consolidated basis, and granting ancillary relief arising from the procedural consolidation of the Estates;

   (b) pursuant to section 50.6 of the *Bankruptcy and Insolvency* Act, RSC 1965, c B-3, as amended (the "**BIA**"), authorizing Tradesmen to obtain and borrow from Bank of Montreal ("**BMO**") an interim financing credit facility in an amount not to exceed $1.9 million (the "**Interim Financing Facility**"), and granting BMO a priority charge (the "**Interim Financing Charge**") over all of Tradesmen's present and after-acquired assets, property, and undertakings (the "**Property**") to secure repayment of the Interim Financing Facility;

   (c) pursuant to section 64.2 of the BIA, granting each of the following professionals a priority charge (the "**Administration Charge**") over the Property to secure the payment of their respective fees and disbursements incurred in connection with Tradesmen's BIA proposal proceedings, up to an amount of $300,000:

      (i) Tradesmen's counsel;

      (ii) KSV Restructuring Inc. (in such capacity, the "**Proposal Trustee**"); and

      (iii) the Proposal Trustee's counsel; and

   (d) approving the ranking of priorities as between the Interim Financing Charge and the Administration Charge, and providing that each charge will rank ahead of any

and all charges, security interests, liens, trusts, deemed trusts, and encumbrances against the Property, including liens any claims under the deemed trust provisions of any provincial builders' lien legislation.

II. FACTS

A. Tradesmen's Business, Assets, and Liabilities

3. Tradesmen is a limited partnership established pursuant to the Alberta *Partnership Act*, RSA 2000, c P-3, providing general mechanical contracting, facility and pipeline construction, fabrication, assembly, maintenance and turnaround, and infrastructure and utilities services through Western Canada. Tradesmen's corporate head office is in Calgary, Alberta, and it has an assembly, fabrication and operations facility in Grande Prairie, Alberta.

4. TEI is Tradesmen's General Partner. TEI is an Alberta corporation.

5. Tradesmen's two shareholders are its founder, Dean Kato and his partner, Fulcrum Capital Partners Inc. ("**Fulcrum**").

6. Tradesmen has been operating since 2006, servicing existing facilities and completing major projects throughout Western Canada. Tradesmen has completed projects for the traditional and alternative energy sectors, including oil and gas, mining and metals, infrastructure and utilities, petrochemicals, and renewable energy.

7. As of November 30, 2020, Tradesmen had principal assets with a book value of approximately $52.5 million, and its principal liabilities totaled just over $47.6 million, including approximately $16.9 million owing to subcontractors, as described below.

8. In addition to its principal assets, Tradesmen now has a cause of action against Teck Coal Limited ("**Teck**"), as described below, which is its most significant asset.

9. BMO is Tradesmen's senior secured lender. Tradesmen currently owes BMO approximately $24.5 million on an operating line of credit, in excess of its limit of $23 million. Tradesmen also owes approximately $1.8 million to certain affiliates of Fulcrum

(the "**Fulcrum Entities**"). Tradesmen's obligations to the Fulcrum Entities are secured by a security interest against Tradesmen's Property, ranking behind BMO's security.

B. The Contract, the Project, and Teck's Delays in Approval and Payment

10. Until January 11, 2021, Tradesmen's most material, and essentially only contract (the "**Teck Contract**") was for the construction of the "Fording River Operations Active Water Treatment Facility South Project" located near Elkford, British Columbia (the "**Project**") for Teck.

11. Tradesmen entered into the Teck Contract with an effective date of May 28, 2019. The Project has significantly grown in scope and thus, in budget over the past year and a half. When Tradesmen entered into the Teck Contract, the budget was approximately $32 million, based on the scope of work then included. The scope of work under the Teck Contract has since grown substantially to a current approved budget of approximately $101 million, with a projected cost to complete of approximately $140 million.

12. The increase in scope of work on the Project was driven entirely by Teck and the numerous changes it requested under the Teck Contract, and on the Project generally.

13. Due to the vast change in the scope of work requested by Teck, Tradesmen issued numerous change order requests ("**CORs**"). Teck and Fluor Canada Ltd. ("**Fluor**"), Teck's engineering consultant, consistently failed to approve those CORs in a timely fashion, although they eventually approved the vast majority of CORs, and Tradesmen went on to perform the required work thereunder. In total, over 900 CORs were issued on the Project in connection with Tradesmen's work.

14. In addition to the CORs, Tradesmen issued approximately 1,700 requests for information ("**RFIs**") to Teck. RFIs are the means by which contractors gather further information as to the specifications and other details of changes requested by an owner.

15. Tradesmen encountered further delays on the part of Teck and Fluor in relation to their approval of change orders. These delays were contrary to the express terms of the Teck Contract and caused harm to Tradesmen. Despite Teck and Fluor approving numerous

CORs, and Tradesmen then proceeding with the approved work, Teck and Fluor also failed to approve the change orders associated with the CORs in a timely fashion. This, together with limitations imposed by Teck and Fluor on Tradesmen's invoicing, resulted in consistent and significant delays in payment to Tradesmen for its work on the Project.

16. Teck's and Fluor's delay in approving CORs and change orders, and Teck's delays in payment to Tradesmen had a significant and extremely negative impact on Tradesmen's cash flow, and thus, on its ability to pay its employees, subcontractors and vendors.

17. Despite Tradesmen having supplied employees to, and completed work on, the Project up until January 11, 2021, Teck has made no payments to Tradesmen since December 11, 2020, eliminating Tradesmen's principal source of cash, and crippling Tradesmen's ability to continue its business.

C. Termination of the Contract, the Liens, and the Litigation

18. On January 11, 2021, Tradesmen provided a notice of default to Teck's counsel, occasioned by the continual delays in payment, and non-payment, to Tradesmen for its work on the Project. On that same day, Teck issued a notice of termination of the Teck Contract. Tradesmen has disputed the manner in which Teck terminated the Teck Contract; however, Tradesmen and Fulcrum believe Teck will not reinstate the Teck Contract.

19. Tradesmen's position, as of January 11, 2021, is that well over $50 million is due or accruing due to Tradesmen by Teck. This is comprised of amounts pursuant to approved CORs, change orders that were approved, change orders that were not approved but should have been approved (because Tradesmen completed the requested work), as well as the original Teck Contract scope of work, and other miscellaneous amounts which Tradesmen is still in the process of tabulating and collecting.

20. As a result of Teck terminating the Teck Contract, Tradesmen filed claims of builders' liens under the British Columbia *Builders' Lien Act* (the "**BC BLA**"),[1] representing the amounts owing to Tradesmen resulting from Teck's changes to the scope of the Project. The amount claimed under each of the builders' liens is $48.55 million (collectively, the "**Liens**").

21. Tradesmen registered its Liens against title to lands and interests in lands where the Project is located and upon which Tradesmen did work. Third parties, namely the Province of British Columbia, FortisBC Energy Inc., and Canadian Pacific Limited, own these lands and interests in lands.

22. Tradesmen intends to enforce the Liens, and any other liens that it files, by way of a court action to be commenced in the Supreme Court of British Columbia, as is required pursuant to the BC BLA. It also intends to commence litigation against Fluor (together with the pending litigation in respect of the liens, the "**Litigation**").

23. Tradesmen owes its subcontractors on the Project approximately $16.9 million. These subcontractors may also assert claims under the BC BLA, including claims of lien and possibly, trust claims against any funds received by Tradesmen from Teck.

D. Tradesmen's Current Financial Situation

24. Teck's termination of the Teck Contract, Teck and Fluor's history of delayed approval of the numerous CORs, progress claims and change orders associated with the increased scope of work on the Project, and Teck's consistent delays in payment to Tradesmen for work approved by Teck and completed by Tradesmen, resulted in a significant liquidity crisis for Tradesmen. This has rendered Tradesman unable to pay its debts generally as they come due.

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[1] *Builders Lien Act*, SBC 1997, c 45 [**Authorities**, **Tab 1**]

25. In response to this liquidity crisis, and in consultation with their professional advisors, TEI and TELP determined that the only alternative was to seek court protection by filing Notices of Intention to Make a Proposal pursuant to subsection 50.4(1) of the BIA, which they did on February 1, 2021 (the "**NOIs**").

26. The purpose of Tradesmen's NOI proceedings (the "**Proceedings**") is to provide Tradesmen with the stability and breathing room to engage with its primary stakeholders on the best approach for pursuing and funding, the Litigation, with the ultimate goal of eventually continuing as a going concern in its business as a general contractor. The pursuit of the Litigation and preservation of Tradesmen's business will maximize recoveries for its creditors, and avoid the catastrophic effects of bankruptcy.

27. Although Tradesmen has significantly reduced its costs and limited its expenses to those that are critical to its pursuit of the Litigation, Tradesmen's cash flow projections show that it will require additional funds to enable it to function during the Proceedings.

28. Tradesmen estimates that it requires additional funding of approximately $1.9 million to the end of the Stay Period. Tradesmen will use this funding to pursue the Litigation, thereby maximizing returns to creditors, and preserving its business. The Interim Financing Facility is critical to Tradesmen's ability to realize on this plan.

29. Tradesmen and BMO are in the process of negotiating a Term Sheet for the Interim Financing Facility, which the parties will finalize before the hearing of Tradesmen's application. The Interim Financing Facility is conditional on, among other things, this Honourable Court granting the Interim Financing Charge.

III. ISSUES

30. Tradesmen's application requires this Honourable Court to determine whether to:

(a) approve Interim Financing Facility and the Interim Financing Charge, and grant the Interim Financing Charge priority over all other creditors with secured or priority claims against Tradesmen's property;

(b) approve the Administration Charge and grant it priority over all other creditors with secured or priority claims against Tradesmen's property; and

(c) grant an order to procedurally consolidate the NOI proceedings of each of TEI and TELP.

IV. LAW AND ARGUMENT

A. Approval of the Interim Financing Facility and the Interim Financing Charge is Necessary and Appropriate

i. Tradesmen's circumstances satisfy the requirements of section 50.6 of the BIA

31. Section 50.6 of the *BIA* confers this Honourable Court with the jurisdiction to grant an interim financing facility and corresponding interim financing charge:

> **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.[2] [emphasis added]

32. Subsection 50.6(5) of the BIA provides a non-exhaustive list of factors to be considered by a court in deciding whether to grant an interim financing charge:

> 50.6(5) 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;

[2] *BIA*, at s. 50.6 (1) [**Authorities, Tab 2**].

(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.[3]

33. These factors weigh heavily in favour of this Honourable Court approving the Interim Financing Facility and granting the Interim Financing Charge, as follows:

(a) ***Tradesmen expects to be subject to proceedings under this Act for only as long as necessary to stabilize operations and formulate a plan for the Litigation.***

Tradesmen entered into the Proceedings for the stability and breathing space offered by the stay of proceedings and the Interim Financing Facility. This will allow Tradesmen to work with its professional advisors and key stakeholders to determine the most appropriate and effective manner and means of proceeding with and funding the Litigation. Tradesmen has a clearly delineated set of priorities and a plan for efficiently moving them forward within the Proceedings.

(b) ***Tradesmen will manage its business and financial affairs during these Proceedings in a cost-effective and efficient manner, with oversight from advisors and key stakeholders***.

Tradesmen has planned to manage its business and financial affairs during its NOI proceedings with a streamlined group of key staff and with the support and advice of its professional advisors. Tradesmen will also continue to work closely with BMO, in its capacity as Tradesmen's primary secured creditor, throughout the Proceedings.

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[3] *BIA*, at s. 50.6 (5) [**Authorities, Tab 2**].

(c) ***Tradesmen's management has the confidence of its major creditors.***

BMO and the Fulcrum Entities consent to Tradesmen's application for approval of the Interim Financing Facility and related Interim Financing Charge.

Tradesmen has also served Teck and Tradesmen's subcontractors out of an abundance of caution, as Tradesmen's position is that neither Teck nor any subcontractors have priority claims against its Property.

(d) ***The Interim Financing Facility will enhance the prospects of Tradesmen making a viable proposal.***

Absent the Interim Financing Facility, there is no prospect of Tradesmen making a viable proposal. Without this funding, Tradesmen will have no ability to meet its ordinary course expenses as they come due. The Interim Financing Facility will allow Tradesmen to avoid bankruptcy or receivership and the corresponding detriment to all of its stakeholders that would result from, among other things, Tradesmen's inability to pursue the Litigation.

(e) ***The nature of Tradesmen's property is such that the Interim Financing Charge is critical to maximizing its value.***

Tradesmen's most valuable assets are the Liens and the Litigation. Tradesmen believes that the continued management of the Litigation by Tradesmen is critical to the maximization of value of these assets.

(f) ***The anticipated benefit to creditors of the Interim Financing Facility and Interim Financing Charge materially outweighs any resulting prejudice.***

Any prejudice to Tradesmen's creditors that may result from the Interim Financing Facility or related Charge is minimal, given the amount of the facility and Tradesmen's urgent need for funding for ordinary course expenses. More importantly, the benefit of the Interim Financing Facility to Tradesmen's creditors far outweighs any prejudice, as it will enable Tradesmen to remain in possession of its operations and prosecute the Litigation itself, thereby maximizing returns to the creditors. Further, the proposed Interim Financing Facility is on terms that are commercially reasonable in the circumstances of the loan.

(g) ***The Proposal Trustee's views.***

The Proposal Trustee supports the relief sought by Tradesmen.

34. For all of these reasons, Tradesmen respectfully submits that an order approving the Interim Financing Facility and granting the Interim Lender Charge is necessary and appropriate in the circumstances.

ii. This Honourable Court has jurisdiction to grant super priority to the Interim Financing Charge

35. This Honourable Court has the jurisdiction under section 50.6(3) of the BIA to order that the Interim Financing Charge rank in priority over the claim of any of Tradesmen's secured creditors. Section 50.6(3) provides that "[t]he court may order that the security or charge [granted in favour of the interim lender] rank in priority over the claim of any secured creditor of the debtor. [4]

36. Orders granting super priority to interim financing charges are critical to the availability of interim financing generally. In *Timminco Ltd., Re*, 2012 ONSC 948, Morawetz J. (as he then was) considered whether to grant a super priority charge in favour of an interim lender in CCAA proceedings. The Court granted the charge, finding that

> [i]t is unrealistic to expect that any commercially motivated DIP Lender will advance funds without receiving the priority that is being requested on this motion. […] The alternative […] of a DIP Charge without super priority […] is not, in my view, realistic, nor is directing the Monitor to investigate alternative financing without providing super priority. If there is going to be any opportunity for the Timminco Entities to put forth a restructuring plan, it seems to me that it is essential and necessary for the DIP Financing to be approved and the DIP Charge granted. The alternative is a failed CCAA process.[5]

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[4] *BIA*, at s. 50.6 (3) [**Authorities, Tab 2**].
[5] *Timminco Ltd., Re*, 2012 ONSC 948 at para 47 [**Authorities, Tab 3**].

37. Similarly, the Alberta Court of Appeal has recently endorsed "…the modern commercial reality that professional services and interim lending in CCAA proceedings are provided in reliance on super priorities."[6]

38. This modern commercial reality is present here. BMO's willingness to provide the Interim Financing Facility in the present case is contingent on this Honourable Court granting the Interim Financing Charge, with priority over all of Tradesmen's Property, subordinate only to the Administration Charge. Without the Interim Financing Facility, Tradesmen will have no opportunity to put forth a proposal to its creditors.

39. For these reasons, Tradesmen respectfully submits that this Honourable Court can, and should, grant super priority to the Interim Financing Charge.

iii. Alberta Courts routinely grant super priority to interim financing charges in BIA proceedings

40. In the past three years, the Alberta Court of Queen's Bench has granted orders conferring super priority on interim financing charges in a number of matters, including the following:

(a) In the Matter of the Notice of Intention to Make a Proposal of Manitok Energy Inc. and In the Matter of the Notice of Intention to Make a Proposal of Raimount Energy Corp.;[7]

(b) In the Matter of the Division I Proposal Proceedings of Aspen Air Corporation and Aspen Air U.S. Corp.;[8]

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[6] *Canada v. Canada North Group Inc.* 2019 ABCA 314 at para 51 [***Canada North***][**Authorities, Tab 4**], citing *Edmonton (City) v Alvarez & Marsal Canada Inc.*, 2019 ABCA 109 at para 17 **[Authorities, Tab 5]**.

[7] Order (Interim Financing) pronounced January 12, 2018 by the Honourable Madam Justice K.M. Homer, *In the Matter of the Notice of Intention to Make A Proposal of Manitok Energy Inc.* and *In the Matter of the Notice of Intention to Make a Proposal of Raimount Energy Corp*., at para 18 [**Authorities, Tab 6**].

[8] Order pronounced June 26, 2018 by the Honourable Madam Justice G.A. Campbell, *In the Matter of the Division 1 Proposal Proceedings of Aspen Air Corporation and Aspen Air U.S. Corp.*, at para 14 [**Authorities, Tab 7]**.

(c) In the Matter of Accel Energy Canada Limited[9] and In the Matter of Accel Canada Holdings Limited;[10]

(d) In the Matter of the Notice of Intention to Make a Proposal Under the *Bankruptcy and Insolvency Act* of Cabot Energy Inc.;[11]

(e) In the Matter of the *Bankruptcy and Insolvency Act*, and In the Matter of the Notice of Intention to Make a Proposal of Zargon Oil & Gas Ltd., Zargon Oil & Gas Partnership and Zargon U.S. Holdings Ltd.;[12] and

(f) In the Matter of the *Bankruptcy and Insolvency Act*, and In the Matter of the Notice of Intention to Make a Proposal of Greenfire Hangingstone Operating Corporation and In the Matter of the Notice of Intention to Make a Proposal of Greenfire Oil & Gas Ltd.[13]

41. The Orders granted in each of these proceedings contain language stating that the interim financing charge in each case ranked in priority to, among other things, all other security interests, trusts, liens, charges, encumbrances, and claims of secured creditors, statutory or otherwise.

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[9] Interim Financing Order pronounced November 7, 2019 by the Honourable Madam Justice J.H. Goss, *In the Matter of Accel Energy Canada Limited*, at para 14 [**Authorities, Tab 8]**.

[10] Interim Financing Order pronounced November 7, 2019 by the Honourable Madam Justice J.H. Goss, *In the Matter of Accel Canada Holdings Limited*, at para 14 [**Authorities, Tab 9]**.

[11] Order pronounced July 27, 2020 by the Honourable Madam Justice K.M. Homer, *In the Matter of the Notice of Intention to Make a Proposal Under the Bankruptcy and Insolvency Act of Cabot Energy Inc.*, at para 8 [**Authorities, Tab 10**].

[12] Order (Approval of Administration Charge, Interim Financing, Interim Financing Charge and Extension of Time to File a Proposal) pronounced on October 1, 2020 by the Honourable Justice D.R. Mah, *In the Matter of the Bankruptcy and Insolvency Act and In the Matter of the Notice of Intention to Make a Proposal of Zargon Oil & Gas Ltd., Zargon Oil & Gas Partnership and Zargon U.S. Holdings Ltd., supra* note at para 8 [**Authorities, Tab 11**].

[13] Order (Approval of Interim Financing and Interim Financing Charge, Sealing) pronounced December 17, 2020 by the Honourable Justice D.B. Nixon, *In the Matter of the Bankruptcy and Insolvency Act, RSC 9185, C B-3, As Amended and in the Matter of the Notice of Intention to Make a Proposal of Greenfire Hangingstone Operating Corporation and in the Matter of the Notice of Intention to Make a Proposal of Greenfire Oil & Gas Limited* at para 8 [**Authorities Tab 12**].

42. This Honourable Court also routinely grants interim financing charges with super priority in proceedings under the CCAA.[14] The willingness of Alberta courts to grant super priority to interim financing charges is reflected in the Alberta Template CCAA Initial Order, which provides that

> Each of the Directors' Charge, the Administration Charge, and the Interim Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property […] and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise […] in favour of any Person. [emphasis added][15]

43. In light of the foregoing, there is ample precedent for this Honourable Court to grant super priority to the Interim Financing Charge.

iv. It is necessary that the Interim Financing Charge have priority over deemed trusts

44. Given the nature of Tradesmen's business, it is critical that the Interim Financing Charge have priority over any statutory deemed trusts or liens against the Property, and specifically those arising pursuant to builders' lien legislation. Absent such priority, no debtor could reasonably expect an interim lender to advance any funding, given the significant level of risk inherent in lending without such protection. A refusal to grant priority over deemed trusts in builders' lien legislation could cause a chilling effect on the restructuring of contractors and others in the construction industry.

45. There is precedent for a super-priority charge to prime construction trusts and liens in Canadian insolvency proceedings. In the restructuring proceedings of Comstock Canada Ltd., CCL Realty Inc. and CCL Equities Inc. (collectively, "**Comstock**"),[16] Morawetz J.

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[14] See, for example, Second Amended and Restated CCAA Initial Order pronounced July 21, 2020 by the Honourable Madam Justice G.A. Campbell, *in the Matter of the Companies' Creditors Arrangement Act, RSC 1985, c. C-36, as amended and in the Matter of a Plan of Compromise or Arrangement of Korite International Inc.* at para 41.
[15] Alberta Template Initial Order at para 39 [**Authorities, Tab 13**].
[16] *Comstock Canada Ltd, Re*, 2013 ONSC 4756 at para 31 [***Comstock***][**Authorities, Tab 14**].

granted an order giving an interim financing charge priority over all existing construction lien and trust claims.

46. Relying on the Supreme Court of Canada's decision in *Sun Indalex Finance, LLC v United Steelworkers*, Comstock argued that the interim financing charge granted in favour of its interim lender should be given priority over existing construction lien and trust claims, advancing the following arguments:

> (a) Comstock was in need of the additional financing in order to support operations during the period of a going concern restructuring;
>
> (b) no creditor would advance funds to Comstock without the priming of the interim facility;
>
> (c) there was a benefit to the breathing space that would be afforded by the DIP facility that would permit Comstock to identify a going concern solution;
>
> (d) there was no other alternative available to Comstock for a going concern solution;
>
> (e) the benefit to stakeholders and creditors of the DIP facility outweighed any potential prejudice to unsecured creditors, secured creditors, and potential trust beneficiaries that may arise as a result of the granting of super-priority secured financing against the assets of the Comstock Group;
>
> (f) the balancing of the prejudice weighed in favour of the approval of the DIP Financing;
>
> (g) a deemed trust arose as a result of a provincial statute; and
>
> (h) the relevant federal and provincial laws were inconsistent as they gave rise to different, and conflicting, priority".[17]

47. Morawetz J. accepted Comstock's arguments, holding that:

> [t]his reasoning is applicable in this case and supports the conclusion that the DIP Charge is to have priority over construction lien claims and

[17] *Comstock* at para 54 [**Authorities, Tab 14**] citing *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 at paras 58-60 [***Indalex***] [**Authorities, Tab 15**].

> various trust claims. […] In my view, the Comstock Group is unlikely to survive without DIP Financing supported by the super priority DIP Charge, which is granted.[18]

48. The arguments accepted by Justice Morawetz in *Comstock* apply equally here, such that the Interim Financing Charge should be given priority over deemed trust claims arising under the BC BLA:

(a) In recent months, the Teck Contract represented the only material contract being performed by the Company, and thus was Tradesmen's most significant source of revenue. Tradesmen is in need of the additional financing in order to pay current expenses and retain critical employees for the purpose of pursuing the Litigation.

(b) BMO, in its capacity as interim lender, will not advance funds without the priming of the Interim Financing Facility.

(c) There is significant benefit to the breathing space afforded by the Interim Financing Facility that will permit Tradesmen to pay its ongoing business costs and retain employees in order to pursue the Litigation.

(d) There is no alternative to the Interim Financing Facility available to Tradesmen to pay its ordinary course expenses and the costs associated with its pursuit of the Litigation, which will ultimately result in recoveries to its creditors, and support the future prospect of continuing in business.

(e) The Interim Financing Facility will allow Tradesmen to pursue the Litigation and maximize its value for the Company's stakeholders. This outweighs any prejudice to creditors that may arise from the Interim Financing Facility and Interim Financing Charge.

(f) If trust claims do arise in favour of Tradesmen's subcontractors, those claims are based on a statutory deemed trust mechanism under a provincial statute, namely the BLA.

(g) The federal and provincial laws are inconsistent as they give rise to different, and conflicting, priority.[19]

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[18] *Comstock* at para 55 [**Authorities, Tab 14**].

49. Although the *Comstock* decision was in the context of CCAA proceedings, Morawetz J.'s findings in that case were not expressly restricted in their application to the CCAA. Further, the language of the relevant provisions of the BIA, together with certain case law decided both before and after *Comstock*, support the application of *Comstock's* principles to BIA proposal proceedings.

50. First, the language of subsection 11.2(2) of the CCAA, which authorizes a court to order a super priority charge to secure interim financing, is substantively identical to subsection 50.6(3) of the BIA. Subsection 11.2(2) provides that "[t]he court may order that the security or charge [granted to secure interim financing] rank in priority over the claim of any secured creditor of the company."

51. With respect to the jurisprudence, *Comstock* was preceded by Morawetz J.'s earlier decision in *Comstock Canada Ltd, Re*, where the Court authorized an interim receiver appointed under the BIA to borrow funds to make certain critical payments. The Court granted a charge to secure the interim receiver's borrowings, and directed that the charge was to "[…] have specific priority over present construction liens and trust claims whether or not perfected or preserved."[20]

52. Further, the Court's reasoning in *Comstock* was adopted in *Mustang GP Ltd., Re*, 2015 ONSC 6562. In *Mustang*, Rady J. cited *Comstock* for the Court's authority to grant a super priority interim financing charge in BIA proposal proceedings, finding that "the *CCAA* is an analogous restructuring statute to the proposal provisions of the *BIA*."[21]

53. The foregoing decisions provide clear authority for this Honourable Court to grant an interim financing charge with priority to deemed trust claims and other claims arising under the BC BLA and other provincial lien legislation. On that basis, Tradesmen respectfully submits it is entitled to that relief in this case.

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[19] *Comstock* at para 54 [**Authorities, Tab 14**].
[20] *Comstock Canada Ltd, Re*, 2013 ONSC 4700 [**Authorities, Tab 16**].
[21] *Mustang GP Ltd.*, 2015 ONSC 6562, at para 31 [**Authorities, Tab 17**].

54. More recently, the Alberta Court of Appeal considered whether court-ordered charges under the CCAA could prime deemed trust claims asserted by the Crown in Right of Canada under the *Income Tax Act*, in *Canada v. Canada North Group Inc.*, 2019 ABCA 314. The Crown advanced the argument (among others) was that it was not a "secured creditor" for the purposes of subsection 11.2(2) of the CCAA, because the definition of "secured creditor" in the CCAA does not expressly include deemed trust claims.[22]

55. The Court of Appeal rejected the Crown's argument on two grounds, one of which was that a deemed trust could be characterized as a "charge," and was therefore covered by the opening language of the definition of "secured creditor" in the CCAA.[23]

56. Like the definition of "secured creditor" in the CCAA, the BIA defines that term to include a "charge… against the property of the debtor."[24] Accordingly, any deemed trust claims arising under the BC BLA are "charges" on or against any funds paid to Tradesmen by Teck, and any subcontractor with a deemed trust claim under the BC BLA is a "secured creditor" of Tradesmen for the purposes of subsection 50.6(3) of the BIA.

57. In any event, it is highly unlikely that any deemed trust claims in favour of Tradesmen's subcontractors exist at this time.

58. Since the Project is located in British Columbia, the relevant builders' lien legislation is the BC BLA. The deemed trust provision is found at section 10 of that act:

> 10(1) Money <u>received</u> by a contractor or subcontractor on account of the price of the contract or subcontract constitutes a trust fund for the benefit of persons engaged in connection with the improvement by that contractor or subcontractor and the contractor or subcontractor is the trustee of the fund [<u>emphasis added</u>].[25]

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[22] *Canada North*, *supra* note 6, at paras 40-42 [**Authorities, Tab 4**].
[23] *Ibid*, at para 43 [**Authorities, Tab 4**].
[24] BIA, *supra* note 2, at s. 2(1) [**Authorities, Tab 2]**.
[25] BC BLA, *supra* note 1 at s. 10(1) [**Authorities, Tab 1**]

59. Section 10 applies only to money received by a contractor or subcontractor on account of the price of the contract or subcontract, such that the trust provisions of section 10 of the BC BLA do not apply to any funds retained or held back from the general contractor or any subcontractor by the owner.[26] As Teck has not made any payments to Tradesmen since December 11, 2020, no trust arises with respect to any funds retained or held back by Teck from Tradesmen.

B. Approval of the Administration Charge is Necessary and Appropriate

60. This Honourable Court has jurisdiction under section 64.2 of the *BIA* to grant the Administration Charge and give it super priority:

> 64.2(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 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;
>
> […]
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.[27]

61. Tradesmen seeks an Administrative Charge in an amount up to $300,000 to secure the fees and expenses of its own counsel, of the Proposal Trustee, and of the Proposal Trustee's counsel. Such a charge is necessary and appropriate in the circumstances, to

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[26] *Preferred Steel Construction Inc v the College of New Caledonia*, 2014 BCSC 1137 at paras 13-14 [**Authorities, Tab 18**], appeal allowed on other grounds in *Preferred Steel Construction Inc v M3 Steel (Kamloops) Ltd*, 2015 BCCA 16 at para 41 [**Authorities, Tab 19**].
[27] *BIA, supra* note 2, section 64.2 [**Authorities, Tab 1]**.

ensure that Tradesmen has access to professional advisors throughout the course of these Proceedings.

62. Similar to interim financing charges, Courts in Alberta also routinely grant priority to administration charges in BIA proposal proceedings. In the proceedings previously referenced as precedent for granting super priority to interim financing charges, this Honourable Court also granted super priority to the administration charges approved in those cases:

(a) In the Matter of the Notice of Intention to Make a Proposal of Manitok Energy Inc. and In the Matter of the Notice of Intention to Make a Proposal of Raimount Energy Corp.;[28]

(b) In the Matter of the Division I Proposal Proceedings of Aspen Air Corporation and Aspen Air U.S. Corp.;[29]

(c) In the Matter of Accel Energy Canada Limited,[30] and In the Matter of Accel Canada Holdings Limited;[31]

(d) In the Matter of the Notice of Intention to Make a Proposal Under the *Bankruptcy and Insolvency Act* of Cabot Energy Inc.;[32]

(e) In the Matter of the Bankruptcy and Insolvency Act and In the Matter of the Notice of Intention to Make a Proposal of Zargon Oil & Gas Ltd., Zargon Oil & Gas Partnership and Zargon U.S. Holdings Ltd.[33]

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[28] Order (Interim Financing) pronounced January 12, 2018, *supra* note 7, at para 19 [**Authorities, Tab 6**].
[29] Order pronounced June 26, 2018, *supra* note 8, at para 14 [**Authorities, Tab 7].**
[30] Interim Financing Order pronounced November 7, 2019, *supra* note 9, at para 12 [**Authorities, Tab 8]**.
[31] Interim Financing Order pronounced November 7, 2019, s*upra* note 10, at para 12 [**Authorities, Tab 9**].
[32] Order pronounced July 27, 2020, *supra* note 11, at para 8 [**Authorities, Tab 10**].
[33] Order (Approval of Administration Charge, Interim Financing, Interim Financing Charge and Extension of Time to File a Proposal) pronounced on October 1, 2020, *supra* note 12, at para 8 [**Authorities, Tab 11**]

(f) In the Matter of the *Bankruptcy and Insolvency Act*, and In the Matter of the Notice of Intention to Make a Proposal of Greenfire Hangingstone Operating Corporation and In the Matter of the Notice of Intention to Make a Proposal of Greenfire Oil & Gas Ltd.[34]

63. Finally, as noted above, the Alberta Template CCAA Initial Order provides for an administrative charge with super priority over all other secured creditors of the debtor. [35]

64. This Honourable Court has the jurisdiction to grant, and frequently does grant, orders conferring super priority on administration charges in NOI proceedings under the BIA. Such an order is necessary and appropriate in this case, to allow Tradesmen to retain professional advisors to assist it in the Proceedings.

V. CONCLUSION

65. For the reasons above, Tradesmen respectfully requests that this Honourable Court grant:

(g) the Order substantially in the form attached as Schedule "A" to Tradesmen's Originating Application delivered on February 1, 2021; and

(h) such further or ancillary relief sought by Tradesmen at the hearing of the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS ~~27th~~ 1st DAY OF ~~JANUARY~~ FEBRUARY, 2021

LAWSON LUNDELL LLP

Solicitors for the Applicants,
Tradesmen Enterprises Limited Partnership
and Tradesmen Enterprises Inc.

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[34] Order (Approval of Interim Financing and Interim Financing Charge, Sealing) pronounced December 17, 2020, *supra* note 13, at para 8 [**Authorities Tab 12**].
[35] Alberta Template Initial Order, *supra* note 15 at para 39 [**Authorities, Tab 13**].

TABLE OF AUTHORITIES

TAB	DOCUMENT
1.	*Builders' Lien Act*, SBC 1997, c 45
2.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended
3.	*Timminco Limited (Re)*, 2012 ONSC 948
4.	*Canada v Canada North Group Inc.* 2019 ABCA 314
5.	*Edmonton (City) v Alvarez & Marsal Canada Inc.*, 2019 ABCA 109
6.	Order (Interim Financing) pronounced January 12, 2018 by the Honourable Madam Justice K.M. Horner, *In the Matter of the Notice of Intention to Make A Proposal of Manitok Energy Inc. and In the Matter of the Notice of Intention to Make a Proposal of Raimount Energy Corp.*
7.	Order pronounced June 26, 2018 by the Honourable Madam Justice G.A. Campbell, *In the Matter of the Division 1 Proposal Proceedings of Aspen Air Corporation and Aspen Air U.S. Corp.*
8.	Interim Financing Order pronounced November 7, 2019 by the Honourable Madam Justice J.H. Goss, *In the Matter of Accel Energy Canada Limited*
9.	Interim Financing Order pronounced November 7, 2019 by the Honourable Madam Justice J.H. Goss, *In the Matter of Accel Canada Holdings Limited*
10.	Order pronounced July 27, 2020 by the Honourable Madam Justice K.M. Homer, *In the Matter of the Notice of Intention to Make a Proposal Under the Bankruptcy and Insolvency Act of Cabot Energy Inc.*
11.	Order (Approval of Administration Charge, Interim Financing, Interim Financing Charge and Extension of Time to File a Proposal) pronounced on October 1, 2020 by the Honourable Justice D.R. Mah, *In the Matter of the Bankruptcy and Insolvency Act and In the Matter of the Notice of Intention to Make a Proposal of Zargon Oil & Gas Ltd., Zargon Oil & Gas Partnership and Zargon U.S. Holdings Ltd*
12.	Order (Approval of Interim Financing and Interim Financing Charge, Sealing) pronounced December 17, 2020 by the Honourable Justice D.B. Nixon, *In the Matter of the Bankruptcy and Insolvency Act, RSC 9185, C B-3, As Amended and in the Matter of the Notice of Intention to Make a Proposal of Greenfire Hangingstone Operating Corporation and in the Matter of the Notice of Intention to Make a Proposal of Greenfire Oil & Gas Limited*
13.	Alberta Template CCAA Initial Order
14.	*Comstock Canada Ltd., Re*, 2013 ONSC 4756
15.	*Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6
16.	*Comstock Canada Ltd., Re*, 2013 ONSC 4756
17.	*Mustang GP Ltd., Re*, 2015 ONSC 6562
18.	*Preferred Steel Construction Inc. v the College of New Caledonia*, 2014 BCSC 1137
19.	*Preferred Steel Construction Inc. v M3 Steel (Kamloops) Ltd*, 2015 BCCA 16

TAB 1

B.C. Statutes
Builders Lien Act

Most Recently Cited in: Bear Creek Contracting Ltd. v. Pretium Exploration Inc., 2020 BCSC 1523, 2020 CarswellBC 2527 | (B.C. S.C., Oct 14, 2020)

S.B.C. 1997, c. 45, s. 10

s 10. Contract money received constitutes trust fund

Currency

10.Contract money received constitutes trust fund
10(1) Money received by a contractor or subcontractor on account of the price of the contract or subcontract constitutes a trust fund for the benefit of persons engaged in connection with the improvement by that contractor or subcontractor and the contractor or subcontractor is the trustee of the fund.

10(2) Until all of the beneficiaries of the fund referred to in subsection (1) are paid, a contractor or subcontractor must not appropriate any part of the fund to that person's own use or to a use not authorized by the trust.

10(3) If the liens of a class of lien claimants are discharged under this Act by the payment of an amount that is less than the amount owing to the person who engaged the class, the members of the class are subrogated to the rights under subsections (1) and (2) of the person who engaged the class.

10(4) Subsections (1) and (2) do not apply to money received by an architect, engineer or material supplier.

Currency
British Columbia Current to B.C. Reg. 235/2020 (September 18, 2020)

End of Document

TAB 2

Canada Federal Statutes
Bankruptcy and Insolvency Act
Interpretation

R.S.C. 1985, c. B-3, s. 2

s 2. Definitions

Currency

2.Definitions
In this Act

"affidavit" includes statutory declaration and solemn affirmation; *("affidavit")*

"aircraft objects" [Repealed 2012, c. 31, s. 414.]

"application", with respect to a bankruptcy application filed in a court in the Province of Quebec, means a motion; *(Version anglaise seulement)*

"assignment" means an assignment filed with the official receiver; *("cession")*

"bank" means

(a) every bank and every authorized foreign bank within the meaning of section 2 of the *Bank Act*,

(b) every other member of the Canadian Payments Association established by the *Canadian Payments Act*, and

(c) every local cooperative credit society, as defined in subsection 2(1) of the Act referred to in paragraph (b), that is a member of a central cooperative credit society, as defined in that subsection, that is a member of that Association;

("banque")

"bankrupt" means a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person; *("failli")*

"bankruptcy" means the state of being bankrupt or the fact of becoming bankrupt; *("faillite")*

"bargaining agent" means any trade union that has entered into a collective agreement on behalf of the employees of a person; *("agent négociateur")*

"child" [Repealed 2000, c. 12, s. 8(1).]

"claim provable in bankruptcy,""provable claim" or **"claim provable"** includes any claim or liability provable in proceedings under this Act by a creditor; *("réclamation prouvable en matière de faillite"* ou *"réclamation prouvable")*

"collective agreement", in relation to an insolvent person, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the insolvent person and a bargaining agent; *("convention collective")*

”common-law partner”, in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year; *(”conjoint de fait”)*

”common-law partnership” means the relationship between two persons who are common-law partners of each other; *(”union de fait”)*

”corporation” means a company or legal person that is incorporated by or under an Act of Parliament or of the legislature of a province, an incorporated company, wherever incorporated, that is authorized to carry on business in Canada or has an office or property in Canada or an income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, insurance companies, trust companies or loan companies; *(”personne morale”)*

”court”, except in paragraphs 178(1)(a) and (a.1) and sections 204.1 to 204.3, means a court referred to in subsection 183(1) or (1.1) or a judge of that court, and includes a registrar when exercising the powers of the court conferred on a registrar under this Act; *(”tribunal”)*

”creditor” means a person having a claim provable as a claim under this Act; *(”créancier”)*

”current assets” means cash, cash equivalents — including negotiable instruments and demand deposits — inventory or accounts receivable, or the proceeds from any dealing with those assets; *(”actif à court terme”)*

”date of the bankruptcy”, in respect of a person, means the date of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment in respect of the person, or

(c) the event that causes an assignment by the person to be deemed;

(”date de la faillite”)

”date of the initial bankruptcy event”, in respect of a person, means the earliest of the day on which any one of the following is made, filed or commenced, as the case may be:

(a) an assignment by or in respect of the person,

(b) a proposal by or in respect of the person,

(c) a notice of intention by the person,

(d) the first application for a bankruptcy order against the person, in any case

(i) referred to in paragraph 50.4(8)(a) or 57(a) or subsection 61(2), or

(ii) in which a notice of intention to make a proposal has been filed under section 50.4 or a proposal has been filed under section 62 in respect of the person and the person files an assignment before the court has approved the proposal,

(e) the application in respect of which a bankruptcy order is made, in the case of an application other than one referred to in paragraph (d); or

(f) proceedings under the *Companies’ Creditors Arrangement Act*;

(”ouverture de la faillite”)

”debtor” includes an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada and, where the context requires, includes a bankrupt; *(”débiteur”)*

"director" in respect of a corporation other than an income trust, means a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever name called; *("administrateur")*

"eligible financial contract" means an agreement of a prescribed kind; *("contrat financier admissible")*

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

("réclamation relative à des capitaux propres")

"equity interest" means

(a) in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

("intérêt relatif à des capitaux propres")

"executing officer" includes a sheriff, a bailiff and any officer charged with the execution of a writ or other process under this Act or any other Act or proceeding with respect to any property of a debtor; *("huissier-exécutant")*

"financial collateral" means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

(b) securities, a securities account, a securities entitlement or a right to acquire securities, or

(c) a futures agreement or a futures account;

("garantie financière")

"General Rules" means the General Rules referred to in section 209; *("Règles générales")*

"income trust" means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event;

("fiducie de revenu")

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

whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

("personne insolvable")

"legal counsel" means any person qualified, in accordance with the laws of a province, to give legal advice; *("conseiller juridique")*

"locality of a debtor" means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated;

("localité")

"Minister" means the Minister of Industry; *("ministre")*

"net termination value" means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; *("valeurs nettes dues à la date de résiliation")*

"official receiver" means an officer appointed under subsection 12(2); *("séquestre officiel")*

"person" includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person; *("personne")*

"prescribed"

(a) in the case of the form of a document that is by this Act to be prescribed and the information to be given therein, means prescribed by directive issued by the Superintendent under paragraph 5(4)(e), and

(b) in any other case, means prescribed by the General Rules;

("prescrit")

"property" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property; *("bien")*

"proposal" means

(a) in any provision of Division I of Part III, a proposal made under that Division, and

(b) in any other provision, a proposal made under Division I of Part III or a consumer proposal made under Division II of Part III

and includes a proposal or consumer proposal, as the case may be, for a composition, for an extension of time or for a scheme or arrangement; *("proposition concordataire"* ou *"proposition")*

"public utility" includes a person or body who supplies fuel, water or electricity, or supplies telecommunications, garbage collection, pollution control or postal services; *("entreprise de service public")*

"resolution" or **"ordinary resolution"** means a resolution carried in the manner provided by section 115; *("résolution"* ou *"résolution ordinaire")*

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes

> (a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or
>
> (b) any of
>
> > (i) the vendor of any property sold to the debtor under a conditional or instalment sale,
> >
> > (ii) the purchaser of any property from the debtor subject to a right of redemption, or
> >
> > (iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,
>
> if the exercise of the person's rights is subject to the provisions of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights;

("créancier garanti")

Editor's Note: S.C. 2001, c. 4, s. 25 replaced the definition of "secured creditor". S.C. 2001, c. 4, s. 177(1) provides as follows:

> *(1) The definition of "secured creditor" in subsection 2(1) of the* Bankruptcy and Insolvency Act, *as enacted by section 25 of this Act [i.e. 2001, c. 4], applies only to bankruptcies or proposals in respect of which proceedings are commenced after the coming into force of that section, but nothing in this subsection shall be construed as changing the status of any person who was a secured creditor in respect of a bankruptcy or a proposal in respect of which proceedings were commenced before the coming into force of that section.*

Immediately before the replacement, the definition of ***"secured creditor"*** *read as follows:*

> *"secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable.*

"settlement" [Repealed 2005, c. 47, s. 2(1).]

"shareholder" includes a member of a corporation — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; *("actionnaire")*

"sheriff" [Repealed 2004, c. 25, s. 7(3).]

"special resolution" means a resolution decided by a majority in number and three-fourths in value of the creditors with proven claims present, personally or by proxy, at a meeting of creditors and voting on the resolution; *("résolution spéciale")*

”Superintendent” means the Superintendent of Bankruptcy appointed under subsection 5(1); *(”surintendant”)*

”Superintendent of Financial Institutions” means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; *(”surintendant des institutions financières”)*

”time of the bankruptcy”, in respect of a person, means the time of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment by or in respect of the person, or

(c) the event that causes an assignment by the person to be deemed;

(”moment de la faillite”)

”title transfer credit support agreement” means an agreement under which an insolvent person or a bankrupt has provided title to property for the purpose of securing the payment or performance of an obligation of the insolvent person or bankrupt in respect of an eligible financial contract; *(”accord de transfert de titres pour obtention de crédit”)*

”transfer at undervalue” means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor; *(”opération sous-évaluée”)*

”trustee” or **”licensed trustee”** means a person who is licensed or appointed under this Act. *(”syndic”* ou *“syndic autorisé”)*

R.S.C. 1985, c. 31 (1st Supp.), s. 69; 1992, c. 27, s. 3; 1995, c. 1, s. 62(1)(a); 1997, c. 12, s. 1; 1999, c. 28, s. 146; 1999, c. 31, s. 17; 2000, c. 12, s. 8; 2001, c. 4, s. 25; 2001, c. 9, s. 572; 2004, c. 25, s. 7(1), (3)-(8), (10); 2005, c. 3, s. 11; 2005, c. 47, s. 2(1), (3)-(5); 2007, c. 29, s. 91; 2007, c. 36, s. 1; 2012, c. 31, s. 414; 2018, c. 10, s. 82

Note:

S.C. 2000, c. 12, s. 8, amended s. 2(1) by repealing the definition of “child”, and adding definitions of “common law partner” and “common law partnership”. Pursuant to S.C. 2000, c. 12, s. 21, the amendments apply only to bankruptcies, proposals and receiverships commenced after the coming into force of S.C. 2000, c. 12, s. 21 on July 31, 2000. Prior to its repeal, the definition of “child” read as follows:

”child” includes a child born out of marriage;

Currency
Federal English Statutes reflect amendments current to December 10, 2020
Federal English Regulations are current to Gazette Vol. 154:25 (December 9, 2020)

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 December 10, 2020
Federal English Regulations are current to Gazette Vol. 154:25 (December 9, 2020)

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. 64.2

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 December 10, 2020
Federal English Regulations are current to Gazette Vol. 154:25 (December 9, 2020)

TAB 3

CITATION: Timminco Limited (Re), 2012 ONSC 948
COURT FILE NO.: CV-12-9539-00CL
DATE: 20120209

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **A. J. Taylor and M. Konyukhova, for the Applicants**

K. Stuebing and D. Wray, for Communications, Energy and Paperworkers' Union of Canada ("CEP")

L. Rogers, for FTI Consulting Canada Inc.

D. Bish, for QSI Partners Ltd.

C. Sinclair, for United Steelworkers' Union ("USW")

S. Scharbach and D. McPhail, for FSCO

H. Meredith, for AMG Advance Metallurgical Group NV

B. Boake, for Dow Corning

A. Kauffman, for Investissement Quebec

J. Orr and M. Spencer, for Class Action Plaintiffs

HEARD: **January 27 and February 6, 2012**

ENDORSEMENT

[1] Timminco Limited and Bécancour Silicon Inc. (together, the "Timminco Entities") brought this motion for an order approving the DIP Facility (defined below) and granting a priority charge on the current and future assets, undertakings and properties of the Timminco Entities in favour of the DIP Lender (defined below).

[2] CEP and USW opposed the motion, especially the request to grant super priority to the DIP Lender.

[3] By way of background, the Timminco Entities stated that they attempted to secure DIP financing prior to commencing the CCAA proceeding, but were unable to do so. The affidavit of Mr. Kalins sworn January 20, 2012 states that the Timminco Entities had approached their existing stakeholders and third-party financing lenders in order to obtain a suitable DIP facility. Investissement Quebec ("IQ"), Bank of America, N.A. ("Bank of America"), AMG Advanced Metallurgical Group NV ("AMG") and two third-party lenders declined to advance any funds to the Timminco Entities. The affidavit also states that negotiations with another third-party lender failed to result in a DIP facility with mutually agreeable terms.

[4] Mr. Kalins went on to state that in light of the Timminco Entities precarious cash position, it was imperative that the Timminco Entities secured DIP financing as soon as possible after commencement of the CCAA proceedings. Following the grant of the stay of proceedings, the Timminco Entities, with the assistance of the Monitor, expanded their efforts to secure DIP financing by contacting parties who could not be contacted in advance of the filing.

[5] Mr. Kalins stated that the Timminco Entities pursued the arrangement of a DIP facility with a number of parties and five parties submitted indicative terms for a DIP facility. Following further discussion and negotiations, the Timminco Entities negotiated a DIP Agreement with QSI Partners Ltd. ("QSI" or the "DIP Lender") dated January 18, 2012 (the "DIP Agreement").

[6] The DIP Agreement is conditional, among other things, upon the issuance of a court-order approving the DIP Facility and granting the DIP Lender a priority charge in favour of the DIP Lender (the "DIP Lenders' Charge") over all of the assets, property and undertaking of the Timminco Entities (the "Property"), ranking ahead in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise (collectively, the "Encumbrances") in favour of any person, notwithstanding the order of perfection or attachment, including without limitation any deemed trust created under the *Ontario Pension Benefits Act* ("OPBA"), or the *Quebec Supplemental Pension Plans Act* ("QSPPA"), other than the Administration Charge and the KERP Charge (as granted by my order dated January 16, 2012), and any valid purchase money security interests.

[7] Mr. Kalins stated that the DIP Lender was specifically asked whether it would advance under the DIP Facility if the DIP Lenders' Charge was not granted priority over the Encumbrances (other than any valid purchase money security interest), including without limitation any deemed trust created under the OPBA or the QSPPA. The DIP Lender indicated that they would not advance under the DIP Facility; and further, the DIP Lenders' Charge is not intended to secure obligations incurred prior to the CCAA proceeding.

[8] The DIP Agreement provides for a period of exclusivity during which the Timminco Entities may not negotiate with or accept any proposal of any person other than the DIP Lender for the acquisition of substantially all of the assets of the Timminco Entities until January 31, 2012 (the "Exclusivity Period") in order to provide the DIP Lender with an opportunity to prepare a "stalking horse bid" for consideration by the Timminco Entities.

[9] Mr. Kalins went on to state that, if the order approving the DIP Facility was not granted in a form and substance satisfactory to the DIP Lender and the Timminco Entities, or if the DIP obligations are declared to be immediately due and payable, the Exclusivity period shall immediately terminate.

[10] Mr. Kalins also stated that the financial terms of the DIP Agreement are better than or not materially worse than those proposed in the competing term sheets. Some of the other term sheets provided were for an inadequate amount of funding, contained other disadvantageous terms or would not be available in a timely manner. Mr. Kalins states that, in the opinion of management, the DIP Agreement is the best available option. The special committee of the board has approved the execution of the DIP Agreement and the seeking of court approval.

[11] The Monitor filed its Third Report which addresses the request for approval of the DIP Agreement and the DIP Lenders' Charge. The Monitor has been providing the Timminco Entities with assistance in their attempts to obtain DIP financing. The Monitor reported that four of the indications of interests with respect to a DIP facility were either for an amount that was insufficient to provide the necessary liquidity, added more onerous financial terms than those contained in the DIP Agreement, or contained terms and conditions that, in the opinion of the Timminco Entities and the Monitor, made it unlikely that a binding agreement could successfully be negotiated within the time frame necessary to be able to access the funding when required, or a combination of these factors.

[12] The Monitor reports that the DIP Lender is a Cayman Islands company that the Monitor has been informed is a subsidiary of a major company with a strategic interest in the business and assets of the Timminco Entities. Pursuant to a non-disclosure agreement entered into between the Timminco Entities and the DIP Lender, neither the Timminco Entities nor the Monitor is at liberty to disclose the name of the ultimate parent company of QSI, although that information is known to the Timminco Entities and the Monitor. However, the Monitor does report that the DIP Lender has confirmed that the corporate group of which it is part is neither a shareholder nor a creditor of the Timminco Entities.

[13] The Monitor also reports that subject to the terms and conditions of the DIP Agreement, the DIP Lender has agreed to lend up to U.S. $4.25 million (the "Maximum Amount"). The Maximum Amount will be deposited in a segregated interest-bearing account of the Monitor within one business day of the granting of this order, with advances to draw from the Maximum Amount in accordance with the terms of the DIP Agreement.

[14] The DIP Facility is to bear interest at the Bank of Canada prime rate plus 5% per annum payable monthly in arrears. A commitment fee of U.S. $100,000 is payable from the first DIP

advance. In addition, the Timminco Entities are obligated to pay all reasonable out of pocket expenses.

[15] The Timminco Entities' obligations under the DIP Facility (the "DIP Obligations") are repayable in full on the earlier of:

(a) the occurrence of an event of default which is continuing and has not been cured; and

(b) June 20, 2012.

[16] The DIP Agreement does provide for the mandatory repayment of the DIP Obligations from the net proceeds of any sale of collateral, subject to the first $1,269,000 of such net proceeds being paid to and held by the Monitor as the Priority Charge reserve.

[17] The Monitor is of the view that the DIP Agreement contains affirmative covenants, negative covenants, events of default and conditions customary for this type of financing, including the granting of the DIP Lenders' Charge having priority over all other Encumbrances against the assets of the Timminco Entities other than the Administration Charge, the KERP charge and purchase money security interests that are permitted Encumbrances.

[18] The Monitor specifically notes that the DIP Agreement provides that DIP advances cannot be used to make special payments in respect of pension plans. During the negotiation of the DIP Agreement, the Monitor reports that the DIP Lender was asked whether it would allow DIP advances to be used to pay special payments and whether it would allow DIP advances to be used for claims in respect of pension plans ranked in priority to the DIP Lenders' Charge. The Monitor states that the DIP Lender was not prepared to do so.

[19] The revised Cash Flow Forecast filed in the Second Report indicates that the Timminco Entities become cash flow negative during the third week of February 2012. Mr. Kalins states that without additional funding, the Timminco Entities will be forced to cease operating in February.

[20] Further, Mr. Kalins states that the DIP Facility is expected to provide sufficient liquidity to conduct an orderly marketing process of the Timminco Entities' business following expiry of the Exclusivity Period, whether or not a "stalking horse bid" is negotiated.

[21] The motion materials have been served on, among others:

(a) IQ, Bank of America, Dow Corning, all registrants shown on searches of the personal property security and real property registers in Ontario and in Quebec;

(b) the members of the pension plan committees for the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan, Financial Services Commission of Ontario; Régie de rentes du Québec, the USW and the Bécancour Union; and

(c) various government entities, including Ontario and Quebec environmental agencies and federal and provincial taxing authorities.

[22] In addition, all of the directors and officers of the Timminco Entities were served with the motion record in connection with the request for the DIP Lenders' Charge to rank ahead of, among other things, the D&O Charge.

[23] The Monitor recommended that the requested relief be granted. The motion was not opposed by IQ or any other secured creditor.

[24] The motion was opposed by CEP and the USW.

[25] The financial positions of the various pension plans for the benefit of members of CEP and USW have been set out in previous decisions and are not repeated here.

[26] Mr. Simoneau, President of CEP, Local 184, states in his affidavit that since the commencement of the CCAA proceedings, CEP and the pension committee have been excluded from all aspects of the Applicant's restructuring activities, details of which are contained at paragraphs 7 – 15 of his affidavit.

[27] The CEP also takes the position that neither the pension committee nor the CEP were consulted during the negotiation of the DIP Agreement and that the Applicants have not disclosed specific reasons for their electing not to pursue negotiations with any of the other parties that expressed interest in entering into a DIP agreement.

[28] The issue on this motion is whether the court should approve the DIP Facility and grant the DIP Lenders' Charge.

[29] In respect of this issue, counsel to the Timminco Entities submits that to the extent that the request for the DIP Lenders' Charge is a request for the court to override the provisions of the QSPPA or the OPBA, the court has the jurisdiction to do so. I agree with this submission. This issue was analyzed in *Timminco Limited (Re)* 2012 ONSC 506, which considered the court's jurisdiction to grant super priority to the Administration Charge and D&O Charge, and is incorporated by reference to this decision and attached as Appendix A. The analysis of the court's jurisdiction in that case is also applicable here.

[30] The Timminco Entities seek approval of the DIP Facility in the amount of U.S. $4,250,000. The Timminco Entities also seek a granting of the DIP Lenders' Charge securing the DIP Facility ranking immediately behind the Administration Charge and the KERP Charge.

[31] Section 11.2 of the CCAA provides the court with the express jurisdiction to grant a DIP financing charge and provides, in part, as follows:

> 11.2(1) Interim Financing – 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.
>
> 11.2(2) Priority – Secured Creditors – the court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[32] Subsection 11.2(4) sets out the factors to be considered by the court in deciding whether to grant a DIP Financing Charge:

> 11.2(4) – 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 company is expected to be subject to proceedings under the CCAA;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report.

[33] Counsel to the Timminco Entities referenced *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.) (Commercial List)), where Pepall J. stressed the importance of meeting the criteria set out in s. 11.2(1), namely:

> (a) whether notice has been given to secured creditors likely to be affected by the security charge or charge;
>
> (b) whether the amount to be granted under the DIP Facility is appropriate and required having regard to the debtor's cash-flow statement; and
>
> (c) whether the DIP Charge secures an obligation that existed before the order was made (which it should not).

[34] Counsel to the Timminco Entities submits that a number of factors support the granting of the DIP Lenders' Charge and satisfy the criteria set out in s. 11.2(1) of the CCAA and the factors to be considered as outlined in s. 11.2(4) of the CCAA:

(a) the Timminco Entities expect to continue operating during the term of the DIP Facility and attempt to negotiate a "stalking horse bid" and complete a bidding procedure or, if a "stalking horse bid" cannot be negotiated, complete a stand-alone sales process and return to court for approval, which the Timminco Entities expect to complete before June 2012;

(b) the management of the Timminco Entities' business will be overseen by the Monitor. In this respect, counsel submits that neither IQ nor any other major creditor has expressed any concern in respect of the Timminco Entities' management;

(c) without the DIP Facility, the Timminco Entities will not have the funding necessary to meet their obligations and will have to cease operations by the third week of February. Counsel further submits that the Timminco Entities and the Monitor are of the view that the continuation of operations would likely enhance the prospects of the sales process succeeding and would maximize recoveries for stakeholders;

(d) secured creditors have been given notice of the motion and IQ is not opposed to the granting of the DIP Lenders' Charge;

(e) directors and officers of Timminco, as beneficiaries of the D&O Charge, received notice of the request for an order granting the DIP Lenders' Charge ranking in priority to the D&O Charge;

(f) the Monitor is supportive of the requested relief and is of the view that any potential detriment caused to the Timminco Entities' creditors by the DIP Lenders' Charge should be outweighed by the benefits that it creates;

(g) the DIP Lender indicated that it will not provide the DIP Facility if the DIP Lenders' Charge is not granted; and

(h) the DIP Lenders' Charge does not secure an obligation that existed before the granting of the Initial Order.

[35] Counsel to IQ does not oppose the requested relief, but did make submissions to oppose the outcome sought by CEP, on the basis that such an outcome would provide enhanced priority to CEP and USW, at the expense of IQ.

[36] Not surprisingly, counsel for CEP takes a different approach and submits that in order to resolve the issue, consideration must be given to whether the evidentiary record discloses that the DIP Agreement is the result of a negotiation process that was fair and reasonable and that

satisfies the statutory and common law obligations to act in the best interests of the union pension plans and their beneficiaries.

[37] Counsel to CEP submits that in addition to the listed factors noted above, it is incumbent upon the court to consider whether the Applicants, as members of the pension committee, have satisfied their fiduciary duties to the union pension plans both under the statute and at common law during the negotiation of the DIP Agreement. Counsel submits that a failure of the Timminco Entities in this regard would render the DIP Agreement itself unfair and unreasonable and the product of an unlawful process in which the Timminco Entities breached their duties to the union pension plans.

[38] Counsel to CEP submits that the Applicants, as members of the pension committee, are subject to fiduciary obligations in respect of the plan members and beneficiaries and that these obligations arise both at common law and by virtue of the QSPPA.

[39] Counsel to CEP contends that at the time the Applicants initiated the CCAA proceedings, the evidence confirmed that the union pension plans and the Haley pension plan were underfunded. The decisions that the Timminco Entities have made since the commencement of the CCAA proceedings have the potential to affect the plan members and beneficiaries at a time when they are peculiarly vulnerable. Counsel contends that the Timminco Entities have failed to consider their fiduciary obligations or consider the best interests of the plan members or beneficiaries and that this includes the negotiation of the DIP Agreement.

[40] A key component of the argument is the contention that the Timminco Entities were not at liberty to resolve the conflict by simply ignoring their role as a fiduciary to the pension plan. Counsel argues that when the Applicants' duty to the corporation conflicted with their fiduciary duties, including the negotiation of the DIP Agreement, it was incumbent on the Applicants to take steps to address the conflict and they failed to do so.

[41] Counsel to CEP also submits that there was insufficient evidence to justify the requested order.

[42] There is no doubt that the position of those represented by CEP and USW is impaired. However, the effect of acceding to the arguments put forth by counsel to CEP and supported by USW will do nothing, in my view, to improve the position of the members they represent.

[43] The stark reality of the situation facing the Timminco Entities is that without the approval of the DIP Facility and the granting of the DIP Charge, there simply will be no money available.

[44] The uncontradicted evidence is clear:

(i) in the third week of February 2012, the Timminco Entities will become cash flow negative;

(ii) without additional funding, the Timminco Entities will be forced to cease operating;

(iii) the Timminco Entities, with the assistance of the Monitor, have attempted to secure DIP financing, both prior to and after commencement of CCAA proceedings;

(iv) there was insufficient liquidity or unfavourable terms associated with the rejected DIP proposals;

(v) the DIP Lender will not permit DIP advances to be used to pay special payments or for claims in respect of pension plans ranked in priority to the DIP Lenders' Charge;

(vi) the DIP Facility is expected to provide sufficient liquidity to conduct an orderly marketing process of the Timminco Entities' business.

[45] I have taken the above findings into consideration, as well as the factors set out at [34] above. A review of these factors leads to the conclusion that the DIP Facility is necessary. The requirements of s. 11.2 of the CCAA have, in my view, been satisfied.

[46] It is unrealistic to expect that any commercially motivated DIP Lender will advance funds without receiving the priority that is being requested on this motion. It is also unrealistic to expect that any commercially motivated party would make advances to the Timminco Entities for the purpose of making special payments or other payments under the pension plans.

[47] The alternative proposed by CEP – of a DIP Charge without super priority – is not, in my view, realistic, nor is directing the Monitor to investigate alternative financing without providing super priority. If there is going to be any opportunity for the Timminco Entities to put forth a restructuring plan, it seems to me that it is essential and necessary for the DIP Financing to be approved and the DIP Charge granted. The alternative is a failed CCAA process.

[48] This underscores the lack of other viable options that was fully considered in the first Timminco endorsement (*Timminco Limited (Re)* 2012 ONSC 506). The situation has not changed. The reality, in my view, is that there is no real alternative. The position being put forth by CEP does not, in my view, satisfactorily present any viable alternative. In this respect, it seems to me that the challenge of the unions to the position being taken by the Timminco Entities is suspect, as the only alternative is a shutdown. It is impossible for me to reach any conclusion other than the fact that there simply is no other viable alternative.

[49] In the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated. It is neither reasonable nor realistic to expect a commercially motivated DIP lender to advance funds in a DIP facility without super priority. The outcome of a failure to grant super priority would, in all likelihood, result in the Timminco Entities having to cease operations, which would likely result in the CCAA proceedings coming to an abrupt halt, followed by bankruptcy proceedings. Such an outcome would be prejudicial to all stakeholders, including CEP and USW.

[50] The analysis in the present motion is the same as that set out in *Timminco Limited (Re)*, 2012 ONSC 506. The outcome of this motion is consistent with that analysis. I am satisfied that bankruptcy is not the answer and, in order to ensure that the objectives of the CCAA are fulfilled, it is necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of the QSPPA and the OPBA.

[51] On the facts before me, I am satisfied that it is both necessary and appropriate to approve the DIP Facility. It is also, in my view, both necessary and appropriate to grant the D&O Charge and to provide that the D&O Charge has priority over the Encumbrances, including without limitation any deemed trust created under the OPBA or the QSPPA.

[52] The motion is, therefore, granted. The DIP Facility is approved and the DIP Charge is granted with the requested super priority.

MORAWETZ J.

Date: February 9, 2012

TAB 4

2019 ABCA 314
Alberta Court of Appeal

Canada v. Canada North Group Inc.

2019 CarswellAlta 1815, 2019 ABCA 314, [2019] 12 W.W.R. 635, [2019] A.W.L.D. 3632, [2019] A.W.L.D. 3690, 11 P.P.S.A.C. (4th) 157, 2019 D.T.C. 5111, 309 A.C.W.S. (3d) 464, 437 D.L.R. (4th) 122, 72 C.B.R. (6th) 161, 93 Alta. L.R. (6th) 29, 95 B.L.R. (5th) 222

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

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

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

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

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

Counsel: G.F. Bódy, C. Davidson, for Appellant
S. Norris, for Respondents, Canada North Group Inc., Canada North Camps Inc., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd.
D.R. Bieganek, Q.C., for Respondent and Ernst & Young Inc. in its capacity as Monitor
M.I.A. Buttery, Q.C., J.L. Oliver, J. Enns, for Respondent, Business Development Bank of Canada
K.J. Bourassa, for Intervenor, Insolvency Institute of Canada
R.S. Van de Mosselaer, for Intervenor, Canadian Association of Insolvency and Restructuring Professionals

***Patricia Rowbotham J.A.*:**

Introduction

1 The issue on this appeal is one of statutory interpretation, and whether the chambers judge correctly interpreted s. 227(4.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (*ITA*) and ss. 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*).

2 Leave to appeal was granted on a single issue: whether the chambers judge erred in law in determining that the "super-priority" charges made in favour of the interim financier, the directors of the debtor companies, and the Monitor and its counsel under the *CCAA* (the "Priority Charges" or "Priming Charges") have priority over statutory deemed trusts in favour of the Crown for unremitted source deductions as created by the *ITA*, the *Canada Pension Plan*, RSC 1985, c C-8 (*CPP*) and the *Employment Insurance Act*, SC 1996, c 23 (*EIA*) (collectively, the "Fiscal Statutes"): *Canada v. Canada North Group Inc.*, 2017 ABCA 363 (Alta. C.A.) at para 5.

3 This appeal pits two of Parliament's objectives against each other: avoiding the social and economic costs of a debtor liquidating its assets (*Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 15; *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.) at para 205); and the collection of source deductions, which lie "at the heart" of income tax collection (*First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49 (S.C.C.) at para 22). What charges have priority: court-ordered Priority Charges in favour of those who participate in *CCAA* restructuring proceedings or unremitted source deductions in favour of the Crown?

4 The chambers judge held that the *CCAA* gives the court the ability to rank court-ordered Priority Charges ahead of the Crown's interest arising out of statutory deemed trusts.

5 The Crown, as represented by the Minister of National Revenue (CRA), appeals, claiming that Parliament's intention to give paramount priority to the Crown's claims for unremitted source deductions over claims of those involved in *CCAA* proceedings is clear from the language of the *CCAA* and the Fiscal Statutes.

6 The respondent interim lender (Business Development Bank of Canada) and the respondent court-appointed Monitor (Ernst & Young Inc.) argue that the chambers judge's interpretation is correct as it gives effect to the policy objectives of both the Fiscal Statutes and the *CCAA*. The intervenors (the Canadian Association of Insolvency and Restructuring Professionals and the Insolvency Institute of Canada) also argue that the appeal should be dismissed.

7 All parties acknowledge the chilling effect on commercial restructuring that will result if the Crown's position prevails.

8 For the reasons that follow I dismiss the appeal.

Background Facts

Initial Order

9 On July 5, 2017, the Court of Queen's Bench issued an order granting the Debtors [1] protection under the *CCAA* (the "Initial Order"). The Initial Order provided for a total of $1,650,000 in Priming Charges in the following priority:

- Administration Charge of $500,000 in favour of the court-appointed Monitor;
- Interim Lender's Charge of $1,000,000 in favour of the interim financier; and
- Directors' Charge of $150,000.

10 The Interim Lender's Charge was later increased to $3,500,000 and the Administration Charge to $950,000.

11 The court's authority to order these Priming Charges is found in the *CCAA*. Parliament has afforded the court the discretion to order Priming Charges in an amount that the court considers appropriate: ss. 11.52(1), 11.51(1) and 11.2(1) of the *CCAA*. Sections 11.52(2), 11.2(2) and 11.51(2) of the *CCAA* (the "Priming Provisions") each provide as follows:

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

12 Consistent with the discretionary authority of the court, paragraph 44 of the Initial Order provides that the Priming Charges have priority over the claims of secured creditors:

> Each of the Directors' Charge, Administration Charge and the Interim Lender's Charge ... shall constitute a charge on the Property and subject always to section 34(11) of the *CCAA* such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise ... in favour of any Person.

13 Paragraph 46(d) of the Initial Order provides that the Priming Charges "shall not otherwise be limited or impaired in any way by...(d) the provisions of any federal or provincial statutes".

Crown's Application to Vary the Initial Order

14 On July 31, 2017, the Crown applied to vary the Priming Charges in the Initial Order on the grounds that paragraphs 44 and 46(d) of the Initial Order failed to recognize the Crown's legislative proprietary interest in unremitted source deductions (i.e., employees' income tax, employees' CPP

contributions and employees' EI premiums). At the time of the Initial Order, two of the Debtor corporations had failed to remit to the Crown a total of $685,542.93 in source deductions.

15 The Crown argued that s. 227(4.1) of the *ITA*, s. 23(4) of the *CPP* and s. 86(2.1) of the *EIA* provide that the Crown's claims for unremitted source deductions have priority over the claims of all other creditors of a debtor, notwithstanding any other federal statute, including the *CCAA*.

16 Sections 227(4) and (4.1) of the *ITA* provide:

> 227(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.
>
> (4.1) **Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law,** where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests. [Emphasis added]

17 In *First Vancouver* at para 3, Iacobucci J explained the effect of these provisions:

> Section 153(1) of the *ITA* requires employers to deduct and withhold amounts from their employees' wages ("source deductions") and remit these amounts to the Receiver General by a specified due date. By virtue of s. 227(4), when source deductions are made, they are deemed

> to be held separate and apart from the property of the employer in trust for Her Majesty. If the source deductions are not remitted to the Receiver General by the due date, the deemed trust in s. 227(4.1) of the *ITA* becomes operative and attaches to property of the employer to the extent of the amount of the unremitted source deductions. As well, the trust is deemed to have existed from the moment the source deductions were made.

18 Sections 23(4) of the *CPP* and s. 86(2.1) of the *EIA* are identical to s. 227(4.1) of the *ITA*.

19 The chambers judge dismissed the Crown's application. She rejected the Crown's argument that the trust provisions in the Fiscal Statutes create a proprietary rather than secured interest. She preferred the analysis of Romaine J in *Temple City Housing Inc., Re*, 2007 ABQB 786 (Alta. Q.B.), leave to appeal to CA refused, 2008 ABCA 1 (Alta. C.A.) over that of Moir J in *Rosedale Farms Limited, Hassett Holdings Inc., Resurgam Resources (Re)*, 2017 NSSC 160 (N.S. S.C.). The chambers judge held that the definition of a "security interest" in s. 224(1.3) of the *ITA* includes a "deemed or actual trust". The *ITA* is the enabling statute of the Crown's deemed trusts. It would be inconsistent to characterize the deemed trusts in a way contrary to their enabling statutes.

20 She then held that the Crown's statutorily deemed trusts could be subordinated by court-ordered Priming Charges. In her view, the Crown's position implied that the Fiscal Statutes and the *CCAA* are in conflict. While it appeared that Parliament had drafted provisions that purport to grant super-priority to court-ordered Priming Charges under the *CCAA* while at the same time granting super-priority to the Crown's deemed trusts under the Fiscal Statutes, she held that this apparent conflict could be avoided by interpreting the statutes harmoniously. The chambers judge stated at para 96, citing *Thibodeau c. Air Canada*, 2014 SCC 67 (S.C.C.) [footnotes omitted]:

> [T]here is a conflict between two provisions of the same legislature "**only** when the existence of the conflict, in the restrictive sense of the word, **cannot be avoided by interpretation**" (emphasis added). Nothing in these *CCAA* sections directly conflict with s. 227(4.1) [of the *ITA*] and thus, one must attempt to interpret these provisions without conflict.

21 Applying the principle of statutory interpretation that legislation should be construed in a manner that preserves the harmony, coherence, and consistency of the entire legislative scheme, she held that the Crown's statutory deemed trusts have priority over all security interests, except those ordered under the Priming Provisions of the *CCAA*. She concluded that ss. 11.2, 11.51 and 11.52 of the *CCAA* gave the court the ability to grant priority to charges necessary for restructuring ahead of the Crown's security interest arising out of the deemed trusts.

Leave to Appeal

22 As there are sufficient assets in the estate to satisfy both the Priming Charges and the Crown's claim, the issues on appeal are moot. Nevertheless, leave to appeal was granted given the importance of the issue: *Canada v. Canada North Group Inc.*

Analysis

23 The main issue on appeal is whether the Crown's deemed trusts under the Fiscal Statutes can be subordinated to the Priming Charges by a court order under ss. 11.2, 11.51 and 11.52 of the *CCAA*? The Crown asked the court first to determine whether its deemed trust is a proprietary interest or a security interest.

24 These are questions of law, reviewable for correctness: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at para 8.

25 Before turning to these questions, I review the applicable principles of statutory interpretation.

The Correct Approach to Statutory Interpretation

26 The guiding rule of statutory interpretation is this:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> (*Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para 21, (1998), 36 O.R. (3d) 418 (headnote only) (S.C.C.))

27 A governing principle of statutory interpretation is the presumption of coherence:

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal.
>
> (R Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (LexisNexis Canada, 2014) at para 11.2)

28 Courts presume that legislation passed by Parliament does not contain contradictions or inconsistencies, and that each provision is capable of operating without coming into conflict with any other: *Thibodeau* at para 93 citing R Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (2008) at 325. As the majority explained in *Lévis (Ville) c. Côté*, 2007 SCC 14 (S.C.C.) at para 47:

> The starting point in any analysis of legislative conflict is that legislative coherence is presumed, and an interpretation which results in conflict should be eschewed unless it is unavoidable.

29 If a conflict is unavoidable, meaning it cannot be resolved by adopting an interpretation that would remove the inconsistency, the court is faced with the question of which provision should prevail having regard to the legislature's intent: *Lévis* at para 58.

1. Is the Crown's deemed trust a proprietary interest or a security interest?

30 Do the statutory deemed trust provisions of the Fiscal Statutes create a security interest over the debtor's property, rendering the Crown a "secured creditor" for the purposes of the Priming Provisions in the *CCAA*, or does the Crown have a proprietary interest in the debtor's property that is subject to the deemed trust, thereby removing assets from the debtor's estate?

31 The chambers judge held that the former interpretation was correct. The Crown argues for the latter interpretation.

32 I conclude that the chambers judge correctly interpreted the nature of the Crown's interest. The Crown's interest under the deemed statutory trust provisions of the Fiscal Statutes is akin to that of a secured creditor, but ranking ahead of all other secured creditors. The Crown does not hold a proprietary interest. Section 227(4.1) of the *ITA* does not elevate the Crown's claim to a proprietary interest. This is consistent with prior case law and the definitions of "secured creditor" and "security interest" in the Fiscal Statutes and the *CCAA*.

Prior Case Law

33 The Crown advances the same argument that was rejected by Romaine J in *Temple City*. The Crown's argument is also inconsistent with the Supreme Court of Canada's characterization of the Crown's deemed trust under the *ITA* as a "floating charge over all of the assets of the tax debtor in the amount of the default": *First Vancouver* at para 40.

34 Deemed trusts are not true trusts: *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.) at para 31, (1997), 143 D.L.R. (4th) 385 (S.C.C.); *First Vancouver* at para 37. They do not attach to particular assets: *First Vancouver* at para 40. While the trust is focussed on the tax debtor's property, it attaches to the proceeds from realization of the estate of the tax debtor: *First Vancouver* at para 41. It follows that their character will change over time: *First Vancouver* at para 41.

35 As noted by Iacobucci J, this interpretation gives effect to legislative intent. Parliament did not intend for the statutory deemed trusts to attach to particular assets thus freezing the debtor's assets and preventing the debtor from carrying on business: *First Vancouver* at para 41. I agree with the chambers judge that "the fact that a floating charge permits alienation of secured property resonates in all *CCAA* restructurings": at para 86.

36 It follows that I do not adopt the conclusion of Moir J in *Rosedale Farms* who found the deemed trust to have priority over the security for debtor in possession financing.

Definitions

37 Further, the Crown's interest falls squarely within the definition of "secured interest" in both the *ITA* and the *CCAA*.

ITA

38 Section 224(1.3) of the *ITA* defines "secured creditor" as "a person who has a security interest in the property of another person." Where a "security interest" includes "any interest in ... property that secures payment ... and includes an interest ... created by or arising out of a ... deemed or actual trust ..." The *EIA* and the *CPP* cross-reference the *ITA* definitions.

39 The Crown concedes that s. 224(1.3) of the *ITA* provides that deemed or actual trusts are security interests, but argues that this definition does not apply when the Crown is asserting its deemed trust claim. I reject this argument for the same reason as the chambers judge: it is illogical to interpret the statutory deemed trust interests in a way contrary to their enabling statutes.

CCAA

40 The Crown's main argument relates to the definition of "secured creditor" in section 2(1) of the *CCAA*. The Crown proposes a reading of the section which it says supports a finding that the Crown is not a secured creditor. The definition reads as follows:

> **secured creditor** means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds.

41 The Crown argues that under the *CCAA* there are two "classes" of secured creditors: (i) holders of direct security, and (ii) holders of secured bonds. This interpretation requires that the definition be read as follows [indentation and emphasis added]:

> **secured creditor** means
>
> > a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company,

> **or a holder of any bond of a debtor company secured by**
>
> > a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or **a trust in respect of, all or any property of the debtor company,**
>
> whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds. [Emphasis added]

42 According to the Crown's interpretation, the reference to "a trust" is nested within the reference to bonds; the reference to "trust" is only in relation to an instrument securing *a bond* of a debtor company. If Parliament intended for "secured creditor" to include holders of trusts, the Crown argues there would be a third reference to "a holder of a trust" drafted in parallel to the first two classes. The Crown also points to the phrase "a trustee under any trust deed or other instrument *securing any of those bonds*" as evidence that this is the intended meaning.

43 Neither the chambers judge nor Romaine J in *Temple Housing* specifically addressed this argument. Although the Crown's analysis is initially attractive, it ignores two things: (1) the Crown's interest could be characterized as a "charge" so is covered by the opening words of the definition; and (2) if we read the statutes harmoniously, as we must, Parliament has defined "security interest" in the *Income Tax Act* as including a deemed trust.

2. Can the deemed trust be subordinated to the Priming Provisions under the CCAA?

44 The Crown argues that the language of the Fiscal Statutes is clear: Parliament intended that the Crown's interest in unremitted source deductions cannot be subordinated to any other secured interest, including court-ordered Priming Charges. It relies on the opening words of s. 227(4.1) of the *ITA*: "Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law ..." The Crown submits, and my colleague finds, that these words lead to one conclusion: the deemed trust supersedes all.

45 I disagree with this conclusion for a number of reasons. First, while a conflict may appear to exist at the level of the "black letter" wording of the Priming Provisions of the *CCAA* and the Fiscal Statutes, the presumption of statutory coherence requires that the provisions be read to work together to achieve the intended goal. The *CCAA* and the Fiscal Statutes are part of a larger statutory scheme that must be considered as a whole: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 (S.C.C.) at para 49. In my view, the chambers judge's harmonious interpretation is correct.

46 The crux of the chambers judge's reasoning is that the Crown failed to reconcile the objective of tax collection with Parliament's commitment to facilitate *CCAA* restructurings. The Crown's position ignores that *CCAA* restructurings facilitate the survival of companies, the production of goods and services, and ultimately jobs, all of which serve as fuel for the fiscal base.

47 In *Century Services*, the Supreme Court provided an extensive history of the *CCAA*, its function amidst the body of insolvency legislation, and the principles that have been recognized by the jurisprudence. The Supreme Court explained the remedial purpose of the *CCAA* at para 18:

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

48 This remedial purpose has been recognized time and again in the jurisprudence: *Century Services* at para 59. Not only does the Crown's position undermine the objective of the *CCAA*, it will also result in fewer restructurings which will necessarily result in reduced tax revenue. Undermining the remedial objective of the *CCAA* for the sake of tax collection disregards the obvious benefit for the government of successful corporate restructurings. In other words, the Crown is biting off the hand that feeds it. Indeed, in this case, the Priming Charges allowed the debtor to continue to operate its business and raise sufficient funds to satisfy both the Priming Charges and the Crown's claim. When the statutes are read harmoniously, as the chambers judge did, the objectives of both the Fiscal Statutes and the *CCAA* can be achieved.

49 Second, the harmonious interpretation avoids absurd consequences. The presumption that the legislature does not intend absurd consequences was explained in *Rizzo* at para 27:

> It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté [P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)], an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render

some aspect of it pointless or futile ([R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994)], at p. 88).

50 If the Crown's position prevailed, absurd consequences could follow. Interim financing of *CCAA* restructurings would simply end. Interim financing is necessary to achieve the purposes of the *CCAA*, with approximately 75% of restructurings requiring the aid of interim lenders: Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 199; *Indalex* at para 59. The chambers judge rightly recognized the important role played by the court-appointed monitors who cannot resign without leave of the court, and the directors of the debtor company who steer the sinking ship.

51 The chamber's judge's interpretation is also consistent with *Edmonton (City) v. Alvarez & Marsal Canada Inc*, 2019 ABCA 109 (Alta. C.A.) at para 17, leave to appeal to SCC requested where this court recognized the modern commercial reality that professional services and interim lending in *CCAA* proceedings are provided in reliance on super priorities. Moreover, since the value of unremitted source deductions is often unknown at the outset of *CCAA* proceedings, the Crown's position would inject an unacceptable level of uncertainty into the insolvency process. As noted in the Report of the Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: 2003) at p 6:

> [C]anadian insolvency laws must be drafted in a manner that ensures a high level of predictability for all stakeholders, domestic and international. Everyone should have a clear understanding of how the insolvency process operates and the options that are available; consistency should enable the likely outcomes to be predicted with a relatively high degree of accuracy. Predictability will enable stakeholders to make the best possible choices given their particular circumstances: debtors to decide between bankruptcy and a consumer proposal or commercial reorganization, suppliers and creditors to assess the likely outcome of debtor default as a contributing factor in their decision about whether to supply and extend credit and at what cost, domestic and foreign investors about whether to make an investment, and judges to determine the most appropriate orders to be made and actions to be taken in particular circumstances, among others.

52 The consequences of a proposed interpretation are properly considered as part of the interpretive exercises. Courts are not engaged in academic exercises; the application of legislation to facts affects the well-being of society and the legislature is presumed to act to protect the public interest: Sullivan at para 10.4. The Crown's interpretation is incompatible with the intended goal of the *CCAA*.

53 Third, s. 6(3) of the *CCAA* prohibits the court from sanctioning a compromise or arrangement unless the plan of compromise or arrangement provides for payment in full to the Crown, within

six months of the sanction of the plan, of all amounts that could be subject to a demand under the Fiscal Statutes. If the Crown's statutory deemed trusts had absolute priority, s. 6(3) would be unnecessary because the Crown would always be paid first. The legislature avoids tautology: every provision serves a purpose.

54 Fourth, this interpretation is supported by the court's authority to displace the Crown's claim in order to facilitate a restructuring. Section 11.09(1) of the *CCAA* grants courts the power to stay the Crown's garnishment right under s. 224(1.2) of the *ITA*, just as the court can stay the enforcement mechanisms of other secured creditors. This power is illustrative of Parliament's intent to authorize courts to exercise control over the Crown's interests while monitoring restructuring proceedings. An implication of the Crown's position is that a court ordered stay would not apply to the Crown's claim.

55 Fifth, even if there was a conflict, the implied exception rule (*generalia specialibus non derogant*) supports the chambers judge's interpretation. This principle is described by R Sullivan at para 11.58:

> When two provisions are in conflict and one of them deals specifically with the matter in question while the other has a more general application, the conflict may be resolved by applying the specific provision to the exclusion of the more general one. The specific prevails over the general; it does not matter which was enacted first.

56 See also *Schnarr v. Blue Mountain Resorts Limited*, 2018 ONCA 313 (Ont. C.A.) at paras 41-42, 52, 61-64, leave to appeal to SCC refused, (2019), [2018] S.C.C.A. No. 187 (S.C.C.).

57 The *CCAA* applies in special circumstances while the Fiscal Statutes are of general application. At the level of the provisions, the Priming Provisions in the *CCAA* are narrow, precise, limited to only those charges necessary for restructuring, and subject to ongoing judicial oversight. The court is typically balancing multiple interests as it moves the *CCAA* process forward. In contrast, the *ITA* deals generally with income tax collection, giving the Minister a mechanism to recover employee tax deductions that employers fail to remit to the Minister.

58 The intended effect of s. 227(1.4) of the *ITA* is not diminished by giving effect to the *CCAA*. The Crown's interest remains specially protected as against all other secured creditors save those charges that are necessary to implement restructurings. This interpretation recognizes that the *CCAA* carves out a discretion for the court to achieve the intended legislated purpose of the *CCAA*.

59 For these reasons, I dismiss the appeal and uphold the chambers judge's ruling that ss. 11.2, 11.51 and 11.52 of the *CCAA* give the court the ability to grant priority to charges necessary for restructuring ahead of the Crown's security interest arising out of the statutory deemed trusts under the Fiscal Statutes.

Costs

60 The respondents argue that since the appeal was brought by the Crown as a test case on a moot point, it is just and equitable for the Crown to pay the respondents' costs on a full indemnity basis. The respondent Monitor notes that the costs of the appeal will only serve to reduce the amounts available for distribution to creditors in the subject *CCAA* proceedings. The intervenors do not seek costs.

61 I am not persuaded that the respondents are entitled to enhanced costs. Although moot, the issue is significant to insolvency law. The default Rule (Rule 14.88) applies. The respondents are entitled to party and party costs. There will be no costs payable to the intervenors.

***Frederica Schutz J.A.*:**

I concur:

***Thomas W. Wakeling J.A.* (dissenting):**

I. Introduction

62 This is an important statutory interpretation case involving priorities created under s. 227 (4.1) of the *Income Tax Act*[2] and under ss. 11.2(2), 11.51(2) and 11.52(2) of the *Companies' Creditors Arrangement Act*.[3]

63 The Crown, relying on s. 227(4.1) of the *Income Tax Act*, claims that it is the beneficial owner of an amount equal to the unremitted employment income tax withholdings[4] made by Canada North Group Inc. and the other applicants seeking relief under the *Companies' Creditors Arrangement Act*. It asserts that its claim to these funds is superior to that of the Business Development Bank Canada, the insolvency professionals and the directors of the Canada North companies. The respondents rely on the provisions of the *Companies' Creditors Arrangement Act*.

64 The Insolvency Institute of Canada predicts that validation of the Crown's position will "result in fewer restructurings [under the *Companies' Creditors Arrangement Act*], negating the primary purpose of ... [the *Act*] and, arguably, the tax collection purposes of the ... [*Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act*]."[5]

II. Questions Presented

65 Section 227(4.1) of the *Income Tax Act*[6] states that

TAB 5

In the Court of Appeal of Alberta

Citation: Edmonton (City) v Alvarez & Marsal Canada Inc, 2019 ABCA 109

Date: 20190325
Docket: 1803-0050-AC
Registry: Edmonton

Between:

City of Edmonton

Respondent
(Applicant)

- and -

Alvarez & Marsal Canada Inc., in its capacity as Court-appointed Receiver of the current and future assets, undertakings and properties of Reid-Built Homes Ltd, 1679775 Alberta Ltd, Reid Worldwide Corporation, Builder's Direct Supply Ltd, Reid Built Homes Calgary Ltd, Reid Investments Ltd, and Reid Capital Corp.

Appellants
(Defendants)

- and –

Royal Bank of Canada

Not a Party to the Appeal
(Plaintiff)

- and -

Reid-Built Homes Ltd and Emilie Reid

Not Parties to the Appeal
(Defendants)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Sheila Greckol
The Honourable Madam Justice Ritu Khullar

Memorandum of Judgment

Appeal from the Order of
The Honourable Mr. Justice R.A. Graesser
Dated the 21st day of February, 2018
Filed the 11th day of April, 2018
(2018 ABQB 124, Docket: 1703 21274)

Memorandum of Judgment

The Court:

Introduction and Standard of Review

[1] The issue on this appeal is whether the chambers judge properly exercised his discretion under s 243(6) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] when he refused to prioritize a receiver's charge for fees and disbursements over a municipality's claim for unpaid property taxes: *Royal Bank of Canada v Reid-Built Homes Ltd*, 2018 ABQB 124 [*Decision*].

[2] The exercise of discretion is given deference on appeal unless the judge proceeded arbitrarily or on a wrong principle, or failed to consider or properly apply the applicable test: *Secure 2013 Group Inc v Tiger Calcium Services Inc*, 2017 ABCA 316 at para 34, 58 Alta LR (6th) 209.

Background

[3] The appellant, Alvarez & Marsal Canada Inc, was the court-appointed receiver (the Receiver) for seven companies, collectively referred to as Reid-Built, a residential home builder. Reid-Built was placed in receivership and the Receiver appointed under the *BIA* by court order on November 2, 2017. The receivership order gives priority to the Receiver's charges over other claims.

[4] On November 24, 2017, the Receiver applied for an order granting it the authority to repair, maintain and complete Reid-Built's properties, and a corresponding first priority charge as against each specific property for any expenses incurred (Property Powers Order). Such expenses are included in the Receiver's claim for fees and disbursements (Receiver's Charge). The Receiver's application was heard on November 29, 2017. At the same time, the chambers judge heard applications filed by two secured creditors of Reid-Built, both of which disputed the priority for the Receiver's Charge. Before those applications were disposed of, the respondent Edmonton applied to modify the Property Powers Order, or alternatively for a declaration that its special lien for unpaid property taxes ranks ahead of the Receiver's Charge.

[5] The chambers judge dismissed the applications of the secured creditors (that part of his order has not been appealed), but granted Edmonton's application. The Receiver appeals.

Issues on appeal

[6] The issue on appeal is whether the chambers judge erred in principle in his approach to the applications before him. The Receiver submits that the chambers judge erred in the exercise of his discretion under s 243(6) by relying on considerations that were incorrect in fact or in law.

[7] The Receiver also submits that the chambers judge failed to provide the parties with a proper opportunity to make submissions on the point, thereby breaching the duty of fairness.

[8] For the reasons that follow, we have decided that the first ground of appeal must be allowed. The chambers judge improperly exercised his discretion in deciding that the Receiver's Charge ought not to rank ahead of Edmonton's property tax claim. Given our decision on the first issue, it is not necessary for us to consider the procedural fairness issue, and we have not done so.

Analysis

[9] Section 243 of the *BIA* deals with the appointment of a receiver by the court on the application of a secured creditor. This appeal concerns the discretion granted the court by s 243(6), which governs the making of orders respecting the payment of the receiver's fees and disbursements and, in particular, gives the court the discretion to grant a super priority to a receiver's claim for fees and disbursements. It provides:

> (6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

[10] The standard receivership order template provides for such a priority. The intended purpose of the template, which was developed as a joint project of the insolvency bar and bench, is to standardize receivership practice. It has provided guidance for practitioners and the judiciary since its inception. The standard receivership order does not bind the court, but serves as a standard form from which deviations must be blacklined before the court grants the initial receivership order. The receivership order issued in this matter included the following provision with respect to the Receiver's accounts:

> Any expenditure or liability which shall properly be made or incurred by the Receiver … shall be allowed to it in passing its accounts and shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person (the "Receiver's Charge")

[11] Edmonton objected to the Receiver's Charge being granted priority over its claim to unpaid property taxes. It pointed out that s 348 of the *Municipal Government Act*, RSA 2000, c M-26 [*MGA*], grants to Edmonton a special lien over land and any improvements on it for property tax amounts owing. Section 348 provides:

Tax becomes debt to municipality

> 348 Taxes due to a municipality
>
> (a) are an amount owing to the municipality,
>
> (b) are recoverable as a debt due to the municipality,
>
> (c) take priority over the claims of every person except the Crown, and
>
> (d) *are a special lien*
>
> > (i) *on land and any improvements to the land, if the tax is a property tax*, a community revitalization levy, a special tax, a clean energy improvement tax, a local improvement tax or a community aggregate payment levy, or
> >
> > (ii) on goods, if the tax is a business tax, a community revitalization levy, a well drilling equipment tax, a community aggregate payment levy or a property tax imposed in respect of a designated manufactured home in a manufactured home community. [emphasis added]

[12] Edmonton argued that its lien for unpaid property taxes should rank ahead of the Receiver's Charge, as Edmonton, whose claim is fully secured and in first position, will not gain any benefit from the receivership. In short, as Edmonton's claim will be paid out in full regardless of the receivership, it should not have to bear the cost of the receivership.

[13] In addition to Edmonton's application, the chambers judge had before him two other applications from secured creditors—a mortgagee and a builders' lien claimant. The first, ICI Capital Corporation (ICI), had a first mortgage on certain of the debtor's properties and sought to have the stay lifted so that it could take proceedings to enforce those mortgages. ICI also argued that, as a first mortgagee, it should not yield its priority position to the Receiver, a position similar to that taken by Edmonton. In the absence of evidence of prejudice to ICI, the chambers judge declined to lift the stay, although he gave ICI leave to reapply should circumstances materially change. The other applicant, Standard General Inc (Standard General), a contractor to Reid-Built that had filed builders' liens against certain lands, argued that Alberta's builders' lien legislation establishes its priority position ahead of the Receiver. That argument was dismissed. The chambers judge ultimately determined that it was appropriate for the Receiver's Charge related to the assets in question to take priority over the builders' liens.

[14] The chambers judge exercised his discretion to grant the Receiver's Charge priority over the claims of both the mortgagee and builders' lien claimant. Relevant to his consideration was the

decision in *Robert F Kowal Investments Ltd v Deeder Electric Ltd* (1975), 59 DLR (3d) 492, 9 OR (2d) 84 (CA) [*Kowal*], applied in *Royal Bank v Vulcan Machinery & Equipment Ltd*, [1992] 6 WWR 307, 13 CBR 69 (ABQB). *Kowal* refers to a general rule that secured creditors may not be subject to the charges and expenses of a receivership. This is so because, "the general purpose of a general receivership is to preserve and realize the property for the benefit of creditors in general. No receivership may be necessary to protect or realize the interests of lienholders": *Kowal*, quoting Ralph Ewing Clark, *Clark On Receivers*, 3rd ed, vol 1, s 22, p 25. There are, however, exceptions to that general rule, three of which were enumerated in *Kowal*:

1. if a receiver has been appointed at the request or with the consent or approval of the holders of security, the receiver will be given priority over the security holders;

2. if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred; or

3. if the receiver has expended money for the necessary preservation or improvement of the property, the receiver may be given priority for those expenditures over secured creditors.

[15] These principles are well accepted and proper considerations for a court in exercising its discretion under s 243(6). The principles are also expressly incorporated in the explanatory notes to the template receivership order, which also states that the order should be modified so as not to provide for priority over a security interest holder if none of the exceptions apply.

[16] In his discussion of the applications by ICI and Standard General, the chambers judge made several pertinent observations with respect to the policy considerations relevant to the prioritization of the fees and disbursements of receivers (*Decision* at paras 136-137):

> [136] The difficulty with making a determination at the outset of a receivership (even a liquidating receivership) is that the nature and extent of the work necessary to preserve, protect, maintain, and eventually liquidate a particular asset is unknown. I do not see that claimants with a proprietary claim are entitled to a free ride in a receivership, such that they should be responsible for payment of the costs of the receivership as they relate to the claimants' claims and the cost of monetizing the claim. Those costs may include a part of the Receiver's general costs as well as those that can be specifically tied to the specific assets in question.
>
> [137] Up front, it is appropriate to have the Receiver's charges rank ahead of claimants who will benefit from the Receivership, to the extent that they have benefitted from the Receivership. That means that for creditors who may benefit from the Receivership, the super priority is generally appropriate for the Receiver's

> fees and disbursements, on the expectation that these fees and disbursements will ultimately be fairly apportioned.

[17] In making these observations, the chambers judge rightly recognized the modern commercial realities that affect receiverships. The super priority is necessary to protect receivers; without security for their fees and disbursements they would be understandably concerned about taking on receiverships. This is in keeping with the decision in *CCM Master Qualified Fund v blutip PowerTechnologies*, 2012 ONSC 1750, where it was noted that in *CCAA* proceedings, "professional services are provided ... in reliance on super priorities contained in initial orders".[1] We agree with the observation of Brown J at para 22 that:

> … comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA*…

[18] The chambers judge also noted that the creditor who brings the application for the receivership should not be left to bear the entire financial burden of the process. Rather, those costs should be shared equitably amongst all the creditors. As was noted in *JP Morgan Chase Bank NA v UTTC United Tri-Tech Corp* (2006), 25 CBR (5th) 156 at para 45 (and cited in *Caisse v River*, 2013 ONSC 6809 at para 22), where a receiver is "appointed for the benefit of interested parties to ensure that all creditors are treated fairly and to ensure a fair process to deal with the assets, there is no valid reason for a secured creditor to avoid paying its fair share of the receivership costs".

[19] Finally, the chambers judge noted that "[f]or creditors who have little if anything to benefit from a receivership, or who see their security eroding because of the passage of time or the costs of the receivership, their remedy is to apply to lift the stay" (para 141).

[20] The chambers judge reasonably applied these principles in declining to give priority to the claims of ICI and Standard General over the Receiver's Charge. In our view, those observations and policy considerations were equally apposite to the application by Edmonton. However, the chambers judge approached Edmonton's application differently. Having decided that Edmonton's position "may be properly subordinate to the Receiver's fees, disbursements, and borrowings", the chambers judge held that this was not an appropriate case in which to subordinate the municipal tax claims to the costs of the receivership.

---

[1] *First Leaside Wealth Management Inc (Re)*, 2012 ONSC 1299 at para 51.

[21] There is, in our view, no principled reason for drawing this distinction between Edmonton's position and that of the mortgage and lien holders. The chambers judge's reasons for granting Edmonton's application are summarized at para 171:

> On the facts of this case, it being a liquidating process and there being no apparent benefit to Edmonton arising out of the Receivership, Edmonton's priority for property taxes is not subordinate to the Receiver's fees or approved borrowings.

[22] We agree with the Receiver that the chambers judge's conclusion that "there is a less convincing case for secured creditors to participate in the Receiver's costs when the intent is to liquidate" is not supported by the law. The use of the term "liquidating receivership" suggests that there is some other type of receivership with a different intent. As is stated in *Bennett on Receivership*, "the purpose of the receivership is to enhance and facilitate the preservation and realization, if necessary, of the debtor's assets for the benefit of all creditors". A court-appointed receiver of an insolvent company is expected "to realize on the debtor's assets and pay the security holders and the other creditors who are owed money": Frank Bennett, *Bennett on Receiverships*, 3d ed (Toronto: Carswell, 2011) at 6.

[23] The policy behind receiverships is that collective action is preferable to unilateral action. The receiver maximizes the returns for the benefit of all creditors and streamlines the process of liquidation. As was noted recently in *Royal Bank v Delta Logistics*, 2017 ONSC 368 at para 26:

> The whole point of a court-appointed receivership is that one person ... is appointed to deal with all of the assets of an insolvent debtor, realize upon them, and then distribute the proceeds of that realization to the creditors.

[24] With respect to ICI's claim, the chambers judge held:

> I do not see that it is appropriate at this stage to exempt ICI from potential liability for whatever portion of the Receiver's fees, disbursements, and approved borrowings may be apportioned to ICI on any of the properties it holds mortgages on. ICI does stand to benefit from the Receivership in that the Receiver will preserve and protect the properties, collect rents and ultimately monetize the security. ICI would have to be doing these things themselves if the Receiver were not doing so. (para 159)

[25] This is a reasonable conclusion. However, the same could be said for Edmonton's claim for priority. There is nothing on the record to suggest that Edmonton will receive no benefit from the process undertaken by the Receiver on behalf of all creditors. What is known is that Edmonton would have to run individual auction proceedings for each property over which it has a municipal tax claim, and would incur costs in doing so. Under the receivership process, Edmonton's outstanding taxes are being paid out as properties are sold in an orderly fashion. Edmonton acknowledges its security is not at risk in this process. There is no evidence that the running of

individual auctions would serve to maximize the value of the properties; rather, it is likely that the opposite is the case.

[26] Although the court has discretion under s 243(6) with respect to the priority to be given to receiver's charges, the exercise of discretion must be on a principled basis. For the foregoing reasons, we have concluded that the appeal with respect to Edmonton's application for priority must be allowed. The Receiver has a super priority for its fees and disbursements in accordance with the original receivership order. As was noted by the chambers judge, the amount of those costs to be paid by Edmonton, and the other secured creditors, will ultimately be the subject of an apportionment exercise. Issues raised by Edmonton in this appeal regarding the extent to which it benefits from the receivership process may be relevant at the apportionment phase.

Appeal heard on February 7, 2019

Memorandum filed at Edmonton, Alberta
this 25th day of March, 2019

Authorized to sign for: Paperny J.A.

Greckol J.A.

Authorized to sign for: Khullar J.A.

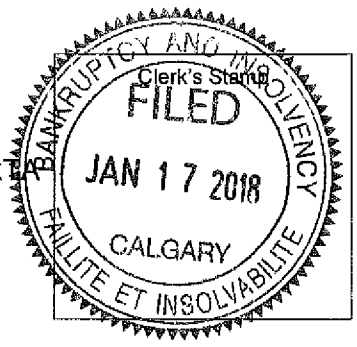
Appearances:

H.A. Gorman, Q.C./A.M. Badami
for the Appellants

A. Turcza-Karhut/C.N. Androschuk
for the Respondent

TAB 6

ESTATE NUMBER	25-2332583 25-2332610
COURT	COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY
PROCEEDING	IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF MANITOK ENERGY INC. IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF RAIMOUNT ENERGY CORP.
DOCUMENT:	**ORDER (Interim Financing)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	Gowling WLG (Canada) LLP 1600, 421 – 7th Avenue S.W. Calgary, AB T2P 4K9 Telephone (403) 298-1938 Facsimile (403) 263-9193 File No. A151243 **Attention: Tom Cumming / Cliff Prophet**



I hereby certify this to be a true copy of the original Order of which it purports to be a copy.

Dated this 17 day of Jan 2018

Registrar at Calgary
Bankruptcy Division of the
Court of Queen's Bench of Alberta

Date On Which Order Was Pronounced:	January 12, 2018
Name Of Judge Who Made This Order:	Madam Justice K.M. Horner
Location Of Hearing:	Calgary, Alberta

UPON the application (the "**Application**") of Manitok Energy Inc. ("**Manitok**"); **AND UPON** having read the Affidavit of Audrey Ng, sworn on January 11, 2018 (the "**First Ng Affidavit**"), filed; **AND UPON** having read Confidential Exhibits "I", "J", "AA", "DD", "EE", and "FF" to the First Ng Affidavit (collectively, the "**Confidential Exhibits**"), unfiled; **AND UPON** having read the Notice of Intention to Make a Proposal filed by both Manitok and Raimount Energy Corp. ("**Raimount**", Raimount and Manitok are collectively referred to as, the "**Companies**") on January 10, 2017, pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act*, SC 1985, c B-3 (the "**BIA**"); **AND UPON** having read the Affidavit of Massimo Geremia, sworn on January 11, 2018, filed; **AND UPON** having read the First Report to Court of FTI Consulting Canada Inc. (the

"**Proposal Trustee**"), as proposal trustee of the Companies, dated January 12, 2018; **AND UPON** having read the Bench Brief of Manitok, filed; **AND UPON** having read the Bench Brief of National Bank of Canada ("**NBC**"), filed; **AND UPON** having read the Affidavit of Service of Katie Doran, sworn on January 11, 2018 (the "**Service Affidavit**"), filed; **AND UPON** hearing counsel for NBC, the Companies, the Proposal Trustee, and any other persons present;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the Notice of Application for this Order is hereby abridged and deemed good and sufficient and the Application is properly returnable today.

ADJOURNMENT OF RECEIVERSHIP APPLICATION

2. NBC's application, originally returnable on January 12, 2018 (the "**Receivership Application**"), seeking to appoint a receiver and manager over the Companies' property, assets, and undertakings, is hereby adjourned, *sine die*.

PROPOSAL TRUSTEE'S POWERS

3. The Proposal Trustee is hereby empowered and authorized to take all steps required to implement the Definitive Documents (as hereinafter defined) including, without limitation, to:

   (a) assist the Companies, to the extent required, in their dissemination, to the DIP Lender (as hereinafter defined) of financial and other information as agreed to between the Companies and the DIP Lender;

   (b) assist the Companies in the preparation of their rolling cash-flow forecasts (the "**Cash-Flow Statements**") contemplated by the Definitive Documentation (as hereinafter defined) and reporting required by the DIP Lender, which information shall be reviewed with the Proposal Trustee and delivered to the DIP Lender in accordance with the Definitive Documents or as otherwise agreed to by the DIP Lender;

(c) report to this Court at such times and intervals as the Proposal Trustee may deem appropriate with respect to matters relating to the Charged Property (as hereinafter defined), and such other matters as may be relevant to the proceedings herein;

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

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

4. In addition to the rights and protections afforded the Proposal Trustee under the BIA or as an officer of this Court, the Proposal Trustee shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Proposal Trustee under the BIA or any other applicable legislation.

ADMINISTRATION CHARGE

5. The Proposal Trustee, legal counsel for the Proposal Trustee and the Companies' Counsel, shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements), in each case at their standard rates and charges, by the Companies, as part of the costs of these proceedings. The Companies are hereby authorized and directed to pay the accounts of the Proposal Trustee, counsel for the Proposal Trustee and the Companies' Counsel for work performed in connection with the Companies' NOI proceedings, on a periodic basis.

6. The Proposal Trustee, counsel for the Proposal Trustee and the Companies' Counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on all assets, rights, undertakings and properties of the Companies, of every nature and kind whatsoever, and wherever situated including all proceeds thereof (the "**Charged Property**"), which Administration Charge shall not exceed an aggregate amount of $300,000, as security for their professional fees and disbursements incurred at

their standard rates and charges, both before and after making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 16 and 18 hereof.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

7. The Companies shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Companies after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of such director's or officer's gross negligence or wilful misconduct.

8. The directors and officers of the Companies shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Charged Property, which charge shall not exceed an aggregate amount of $500,000, as security for the indemnity provided in paragraph 7 of this Order. The Directors' Charge shall have the priority set out in paragraphs 16 and 18 herein.

9. Notwithstanding any language in any applicable insurance policy to the contrary,

   (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and

   (b) the Companies' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 7 of this Order.

DIP FINANCING

10. That the execution by the Companies of the DIP Term Sheet (as hereinafter defined) is hereby approved and the Companies are hereby authorized and empowered to perform its obligations under the DIP Term Sheet and to obtain and borrow funds pursuant to the DIP Term Sheet between the Companies, as borrowers, and NBC (referred to as the "**DIP Lender**", when acting in such a capacity), as lender, in order to finance the Companies' working capital requirements (including payment of the fees and disbursements of the Proposal Trustee, counsel for the Proposal Trustee, and the Companies' Counsel, in

connection with these proceedings) and other general corporate purposes and capital expenditures, in accordance with the Definitive Documents (as hereinafter defined), provided that borrowing under such credit facility shall not exceed $3,000,000, unless permitted by further Order of this Court.

11. Such credit facility shall be on substantially the terms and subject to the conditions set forth in the interim financing term sheet, dated effective as of January 12, 2018 and attached as Schedule "**A**" hereto (the "**DIP Term Sheet**"), together with any such modifications or amendments as may be agreed upon by the Companies and the DIP Lender and consented to by the Proposal Trustee.

12. The Companies and the DIP Lender are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, pledge agreements, security agreements, hypothecs and security documents, guarantees and other definitive documents (such documents, together with the DIP Term Sheet, collectively, the "**Definitive Documents**"), as are contemplated by the DIP Term Sheet or as may be reasonably required by the DIP Lender pursuant to the terms thereof together with such modifications as may be agreed upon by the Companies and the DIP Lender and consented to by the Proposal Trustee, and the Companies are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

13. The DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lender's Court Charge**") on the Charged Property to secure all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount of such obligations on or after the date of this Order under the Definitive Documents. The DIP Lender's Charge shall have the priority set out in paragraphs 16 and 18 hereof.

14. Notwithstanding any other provision of this Order:

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

(b) upon the occurrence of an event of default under the Definitive Documents or the DIP Lender's Charge, the DIP Lender, upon 10 days' notice to the Companies and the Proposal Trustee, may exercise any and all of its rights and remedies against the Companies or the Charged Property under or pursuant to the DIP Term Sheet, the Definitive Documents and the DIP Lender's Charge, including without limitation, ceasing to make advances to the Companies and setting off and/or consolidating any amounts owing by the DIP Lender to the Companies against the obligations of the Companies to the DIP Lender under or secured by the DIP Term Sheet, the Definitive Documents, the NBC Charge (as defined below), or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Companies and for the appointment of a trustee in bankruptcy of the Companies; and,

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

15. All claims of the DIP Lender pursuant to the Definitive Documents are not claims that may be compromised pursuant to any Proposal filed by the Companies in these proceedings or any Plan filed by the Companies under the *Companies' Creditors Arrangement Act* (a "**CCAA Plan**") without the consent of the DIP Lender and, except as contemplated in the Definitive Documents, the DIP Lender shall be treated as unaffected in any Proposal or CCAA Plan or other restructuring with respect to any obligations outstanding to the DIP Lender under or in respect of the Definitive Documents.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

16. The priorities of the Administration Charge, the Directors' Charge, the DIP Lender's Charge, and the security previously granted by the Companies in favour of NBC (the "**NBC Charge**"), as among them, shall be as follows:

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

Second – DIP Lender's Charge;

Third – the NBC Charge (subject to the Proposal Trustee's review and report on the security of NBC); and

Fourth – Directors' Charge (to the maximum amount of $500,000).

17. The filing, registration or perfection of the Administration Charge, the DIP Lender's Charge or the Directors' Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

18. Each of the Administration Charge and the DIP Lender's Charge shall constitute a charge on the Charged Property and shall rank in priority to all other security interests, trusts, liens, levies, charges, encumbrances, and claims of any and all other creditors, statutory or otherwise.

19. The Directors' Charge shall constitute a charge on the Charged Property and shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person but subordinate to the NBC Charge (subject to the Proposal's Trustee review and report on the security of NBC).

20. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Companies shall not grant any Encumbrances over any Charged Property that rank in priority to, or *pari passu* with, any of the Administration Charge, the DIP Lender's Charge, the NBC Charge, or the Directors' Charge, unless the Companies also obtain the prior written consent of the Proposal Trustee, the DIP Lender and the beneficiaries of the Administration Charge, the NBC Charge, and the Directors' Charge, or upon further Order of this Court.

21. The Administration Charge, the Directors' Charge, the Definitive Documents and the DIP Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made herein;

(b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(d) any deemed bankruptcy pursuant to the BIA;

(e) the provisions of any federal or provincial statutes; or

(f) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Companies or the DIP Lender, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof including the Definitive Documents shall create or be deemed to constitute a breach by the Companies or the DIP Lender of any Agreement to which any one of them is a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Companies entering into the Definitive Documents, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

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

22. Any of the Charges created by this Order over leases of real property in Canada shall only be a charge in the Companies' interest in such real property leases.

SERVICE AND NOTICE

23. The Companies, the DIP Lender, NBC, and the Proposal Trustee shall be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile transmission or e-mail to the Companies' creditors or other interested Persons at their respective addresses and that any such service or notice by courier, personal delivery, facsimile transmission or e-mail shall be deemed to be received on such business day as forwarded, or if sent by ordinary mail, on the third business day after mailing.

24. The Proposal Trustee shall establish and maintain a website in respect of these proceedings and shall post there as soon as practicable:

    (a) all materials prescribed by statue or regulation to be made publically available; and

    (b) all applications, reports, affidavits, orders or other materials filed in these proceedings by or behalf of the Proposal Trustee, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

GENERAL

25. The Companies, the DIP Lender, or the Proposal Trustee may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

26. Nothing in this Order shall prevent the Proposal Trustee from acting as an interim receiver, a receiver, a receiver and manager, monitor or a trustee in bankruptcy of the Companies or the Charged Property.

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

to the Proposal Trustee in any foreign proceeding, or to assist the Companies and the Proposal Trustee and their respective agents in carrying out the terms of this Order.

28. Each of the Companies, the DIP Lender, and the Proposal Trustee are at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and for assistance in carrying out the terms of this Order and any other Order issued in these proceedings.

29. Any interested party (including the Companies, NBC, the DIP Lender, or the Proposal Trustee) may apply to this Court to vary or amend this Order or to reschedule the Receivership Application, on not less than five (5) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order, provided however that the DIP Lender shall be entitled to rely on this Order as issued for all advances made under the Definitive Documents up to and including the date this Order may be varied or amended.

30. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.

31. The requirement that counsel attending this application, other than Counsel to the Companies and the DIP Lender, approve the form of this Order, is dispensed with.

"Justice K.M. Horner"

J.C.Q.B.A.

SCHEDULE "A"

THE DIP TERM SHEET

TAB 7

COURT FILE NUMBER	25-2386427 25-2386434
COURT	COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY
APPLICANT	IN THE MATTER OF THE DIVISION I PROPOSAL PROCEEDINGS OF ASPEN AIR CORPORATION and ASPEN AIR U.S. CORP.
DOCUMENT	**ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

McMillan LLP
Suite 1700, 421 - 7 Avenue S.W.
Calgary, AB T2P 4K9
Phone: 403-531-4700
Fax: 403-531-4720
Attention : Adam Maerov
Phone: 403-215-2752
Email: adam.maerov@mcmillan.ca

Kourtney Rylands
Phone: 403-355-3326
Email: kourtney.rylands@mcmillan.ca

File No. 258090

DATE ON WHICH ORDER WAS PRONOUNCED: **June 26, 2018**

LOCATION OF HEARING OR TRIAL: **Calgary, Alberta**

NAME OF MASTER/JUDGE WHO MADE THIS ORDER: G A Campbell

UPON THE APPLICATIONS of Aspen Air Corporation ("**Aspen Air** ") and Aspen Air U.S. Corp. ("**Aspen Air US**") (collectively, the "**Aspen Companies**"), **AND UPON** having read the Affidavit of Onkar Dhaliwal, sworn on June 21, 2018 and the Supplemental Affidavit of Onkar Dhaliwal, sworn June 22, 2018 (together, the "**Dhaliwal Affidavits**"), filed; **AND UPON** having read the First Report of Deloitte Restructuring Inc. (the "**Proposal Trustee**"), filed; **AND UPON** having read the Affidavit of Service of David Tsumagari, sworn June 25, 2018 and the Affidavit of Service of David Tsumagari, sworn June 26, 2018 (together, the "**Affidavits of Service**"), filed; **AND UPON** hearing counsel to the Aspen Companies, counsel to the Proposal Trustee, and any counsel present for other parties;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the corresponding Applications and the Dhaliwal Affidavits is abridged to the date parties were served, the Applications are properly returnable today, service of the Applications and the Dhaliwal Affidavits on the service list prepared by the Aspen Companies and maintained in these proceedings (the "**Service List**"), in the manner described in the Affidavits of Service, is validated, good and sufficient and no other persons are entitled to service of the Dhaliwal Affidavits or the Applications.

FILING EXTENSION

2. The period of time within which the Aspen Companies are required to file a proposal to their creditors, under section 50.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**"), shall be and is hereby extended up to and including August 20, 2018.

ADMINISTRATION CHARGE

3. The Proposal Trustee, counsel to the Proposal Trustee, and Canadian and U.S. counsel to the Aspen Companies shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements), in each case at their standard rates and charges, by the Aspen Companies as part of the costs of these proceedings (the "**Proposal Proceedings**"). The Aspen Companies are hereby authorized and directed to pay the accounts of the Proposal Trustee,

counsel for the Proposal Trustee and Canadian and U.S. counsel to the Aspen Companies for work performed in connection with these Proposal Proceedings, on a periodic basis.

4. The Proposal Trustee (including in its capacity as trustee in bankruptcy, if applicable), counsel to the Proposal Trustee (including in its capacity as counsel for the trustee in bankruptcy, if applicable) and Canadian and U.S. counsel to the Aspen Companies, shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on all of the assets, rights, undertakings and properties of the Aspen Companies, of every nature and kind whatsoever, and wherever situated including all proceeds thereof (the "**Property**") as security for their professional fees and disbursements incurred at their standard rates and charges, both before and after the making of this Order in respect of these Proposal Proceedings, provided that such charge shall not exceed an aggregate amount of CAD $150,000. The Administration Charge shall have the priority set out in paragraph 12 of this Order.

DIP FINANCING

5. The execution of the term sheet (the "**DIP Term Sheet**"), dated June 21, 2018, between the Aspen Companies and CF Capital Corporation (the "**DIP Lender**") is hereby approved, and the Aspen Companies are hereby authorized and empowered to perform their obligations under the DIP Term Sheet and to obtain and borrow funds pursuant to the DIP Term Sheet, in order to finance the Aspen Companies' working capital requirements and other general corporate purposes and capital expenditures. Borrowings under the credit facility granted pursuant to the DIP Term Sheet (the "**DIP Facility**") shall not exceed the principal amount of CAD $250,000 unless permitted by further Order of this Court. The DIP Term Sheet is attached hereto as Schedule "A".

6. The DIP Facility shall be on substantially the same terms and subject to the conditions set out in the DIP Term Sheet, together with any such modifications or amendments as may be agreed upon by the Aspen Companies and the DIP Lender and consented to by the Proposal Trustee.

7. The Aspen Companies and the DIP Lender are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, pledge agreements, security

agreements, hypothecs and security documents, guarantees and other definitive documents (such documents, together with the DIP Term Sheet, collectively, the "**Definitive Documents**"), as are contemplated by the DIP Term Sheet or as may be reasonably required by the DIP Lender pursuant to the terms thereof together with such modifications as may be agreed upon by the Companies and the DIP Lender and consented to by the Proposal Trustee, and the Aspen Companies are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

8. The DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lender's Charge**") on the Property to secure all obligations under the Definitive Documents incurred on or after the date of this Order in an amount not to exceed CAD $250,000. The DIP Lender's Charge shall have the priority set out in paragraph 12 of this Order.

DIRECTORS' AND OFFICERS' CHARGE

9. The Aspen Companies shall indemnify their directors and officers from all claims relating to any obligations or liabilities they may incur and which have accrued after the commencement of the Proposal Proceedings by reason of or in relation to their respective capacities as directors or officers of the Aspen Companies, except where such obligations or liabilities were incurred as a result of such directors' or officers' gross negligence, willful misconduct or gross or intentional fault.

10. The directors and officers of the Aspen Companies shall be entitled to the benefit of and are hereby granted a charge against the Property (the "**D&O Charge**") in an amount not to exceed CAD $150,000, as security for the indemnity provided in paragraph 9 of this Order as it relates to obligations and liabilities the directors or officers may incur in such capacity after the commencement of the Proposal Proceedings. The D&O Charge shall have the priority set out in paragraph 12 of this Order.

11. Notwithstanding any language in any applicable insurance policy to the contrary: (a) no insurer shall be subrogated to or claim the benefit of the D&O Charge and (b) the directors and

officers of the Aspen Companies shall only be entitled to the benefit of the D&O Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts for which the directors or officers are entitled to be indemnified in accordance with paragraph 9 of this Order.

PRIORITY AND VALIDTY OF CHARGES

12. The priorities of the Administration Charge, the DIP Lender's Charge and the D&O Charge (collectively, the "**Charges**"), as among them, shall be as follows:

(a) First– the Administration Charge (to the maximum amount of CAD $150,000);

(b) Second-the DIP Lender's Charge (to the maximum amount of CAD $250,000); and

(c) Third – the D&O Charge (to the maximum amount of CAD $150,000).

13. The filing, registration or perfection of the Charges shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any failure to file, register, record or perfect.

14. Each of the Charges shall constitute a charge on the Property and shall rank in priority to all other security interests, trusts, deemed trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, in favour of any person, notwithstanding the order of perfection or attachment (collectively, the "**Encumbrances**").

15. The Aspen Companies shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Aspen Companies also obtain the prior written consent of the Proposal Trustee, the DIP Lender and the beneficiaries of the Administration Charge and the D&O Charge, or upon further Order of this Court.

16. The Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (the "**Chargees**") thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made herein;

(b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications; the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(c) any deemed bankruptcy pursuant to the BIA;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Aspen Companies or the DIP Lender, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof including the Definitive Documents shall create or be deemed to constitute a breach by the Aspen Companies or the DIP Lender of any Agreement to which any one of them is a party;

(ii) none of the Chargees shall have any liability to any person whatsoever as a result of any breach of any Agreement caused by or resulting from the Companies entering into the Definitive Documents, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(iii) any payments made by the Aspen Companies pursuant to this Order, the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at under value, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

(f) Any of the Charges created by this Order over leases of real property shall only be a charge in the Aspen Companies' interest in such real property leases.

ALLOCATION

17. Any interested party may apply to this Court on notice to any other party likely to be affected, for an order allocating the Charges amongst the various assets comprising the Property.

CRITICAL SUPPLIERS

18. Each of the entities listed in Schedule "B" hereto is a critical supplier of the Aspen Companies (each, a "**Critical Supplier**"). The Aspen Companies are authorized to pay to each Critical Supplier amounts owing to such Critical Supplier for goods and services supplied by such Critical Supplier and received by the Aspen Companies prior to June 6, 2018, to a maximum aggregate amount not to exceed CAD $250,000, or the U.S. equivalent to such amount.

SALE AND INVESTOR SOLICITATION PROCESS

19. The Aspen Companies and the Proposal Trustee are hereby authorized and empowered to implement the Sale and Investor Solicitation Process attached hereto as Schedule "C", and to proceed, carry out, and implement any corresponding sales, marketing, or tendering processes, including any and all actions related thereto, substantially in accordance with the proposed SISP, and, furthermore, the Aspen Companies are hereby authorized to enter into any resulting agreement(s) or transaction(s) (collectively, the "**SISP Agreements**") which may arise in connection thereto, as the Aspen Companies and the Proposal Trustee determine are necessary or advisable in connection with or in order to complete any or all of the various steps, as contemplated by the SISP.

20. Nothing herein shall act as authorization or approval of the transfer or vesting of any or all of the Aspen Companies' property, assets, or undertakings under any SISP Agreements, or otherwise. Such transfer and vesting shall be dealt with and shall be subject to further Order of this Honourable Court.

21. The Aspen Companies and the Proposal Trustee are hereby authorized and empowered to apply to this Honourable Court to amend, vary, or seek any advice, directions, or the approval or vesting of any transactions, in connection with the SISP.

RECOGNITION OF PROPOSAL PROCEEDINGS

22. The Aspen Companies or the Proposal Trustee are authorized to apply as they may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement this order and any subsequent orders of this Court and without limitation to the foregoing, any orders under Chapter 15 of the United States Bankruptcy Code, including for an order for recognition of these proceedings as "Foreign Main Proceedings" in the United States of America (the "**Chapter 15 Relief**") and for which the Aspen Companies or the Proposal Trustee shall be the foreign representative of the Aspen Companies (in such capacity, the "**Foreign Representative**"). All courts and administrative bodies of all such jurisdictions are hereby respectively requested to make such orders and to provide such assistance as may be deemed necessary or appropriate for that purpose.

23. This Court requests the aid and recognition of any Court, tribunal, regulatory or administrative body in any Province of Canada and any Canadian federal court or in the United States of America and any court or administrative body elsewhere, to give effect to this Order and to assist the Aspen Companies, the Proposal Trustee and their respective agents in carrying out the terms of this Order. All Courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Aspen Companies and the Proposal Trustee as may be necessary or desirable to give effect to this Order, including by recognizing the present proceedings as "Foreign Main Proceedings" for the purpose of the Chapter 15 Relief, to grant representative status to the Foreign Representative in any foreign proceeding, to assist the Aspen Companies and the Proposal Trustee, and to act in aid of and to be complementary to this Court, in carrying out the terms of this Order.

24. For the purpose of the Chapter 15 Relief, and/or any applications authorized pursuant to this Order, the centre of main interest of the Aspen Companies is located in the Province of Alberta, Canada.

PROCEDURAL CONSOLIDATION

25. The Notice of Intention Proceedings of Aspen Air Corporation and Aspen Air U.S. Corp. be and the same are hereby administratively consolidated. The Clerk of the Court is hereby directed to open a single, consolidated file for both proceedings.

SERVICE AND NOTICE

26. Service of this Order by email, facsimile, registered mail, courier or personal delivery to the persons listed on the Service List shall constitute good and sufficient service of this Order, and no persons other than those listed on the Service List are entitled to be served with a copy of this Order.

27. The Proposal Trustee shall establish and maintain a website in respect of these proceedings at www.insolvencies.deloitte.ca and shall post there as soon as practicable:

(a) all materials prescribed by statue or regulation to be made publically available; and

(b) all applications, reports, affidavits, orders or other materials filed in these Proposal Proceedings by or behalf of the Proposal Trustee, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

GENERAL

28. The Aspen Companies or the Proposal Trustee may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

29. Nothing in this Order shall prevent the Proposal Trustee from acting as an interim receiver, a receiver, a receiver and manager, monitor or a trustee in bankruptcy of the Aspen Companies or the Property.

30. Any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Aspen Companies, the Proposal Trustee, the DIP Lender, and to any other

party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

J.C.Q.B.A.

SCHEDULE "A"

DIP TERM SHEET

SCHEDULE "B"

LIST OF CRITICAL SUPPLIERS

1. WAPPO Information Services
2. TKT Trailers
3. CVA Leasing
4. Jack B Kelley
5. Talon Energy
6. Northwestern Energy
7. Lockwood Water & Sewer District
8. Airgas
9. ChemTreat
10. Dataonline
11. Hawkins
12. Norco

SCHEDULE "C"

SALE AND INVESTOR SOLICITATION PROCESS

TAB 8

I hereby certify this to be a true copy of the original Order of which it purports to be a copy.

Dated this 8 day of Nov 2019

for Registrar in Bankruptcy
Registrar in Calgary
Bankruptcy Division of the
Court of Queen's Bench of Alberta

Clerk's Stamp:

COURT FILE NUMBER	25-2573420
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF	CALGARY

IN THE MATTER ACCEL ENERGY CANADA LIMITED

APPLICANTS:	ACCEL ENERGY CANADA LIMITED
DOCUMENT	**INTERIM FINANCING ORDER**
CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	LAWSON LUNDELL LLP Barristers and Solicitors Suite 1100, 225 – 6th Avenue SW Brookfield Place Calgary AB T2G 4Y8 Tel: (403) 269-6900 Fax: (403) 269-9494 File No. 33414-145446 **Attention: William Roberts/Scott Andersen**
DATE ON WHICH ORDER WAS PRONOUNCED:	November 7, 2019
NAME OF JUDGE WHO MADE THIS ORDER:	Honourable Madam Justice J.H. Goss
LOCATION OF HEARING:	Edmonton, AB

UPON the application of **ACCEL Energy Canada Limited** (the "**Applicant**"); **AND UPON** having read the Affidavit of Wayne Chodzicki, sworn on November 5, 2019, filed November 6, 2019, the Affidavit of Sarah Powers, sworn November 5, 2019, filed November 6, 2019, the Affidavit of Mark Horrox, sworn November 5, 2019, filed November 6, 2019, the Affidavit of William Bowlen, Jr., sworn November 6, 2019, unfiled, and the Affidavit of Ryan Dunfield, sworn November 6, 2019; **AND UPON** hearing counsel for the Applicant, and such other counsel who have appeared; **AND UPON** reading the Report of Deloitte Restructuring Inc. dated November 6, 2019; **IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today.

CAPITALIZED TERMS

2. Capitalized terms used but not otherwise defined in this Order shall have the meaning given to such terms in the affidavit of Wayne Chodzicki #1 sworn herein.

ADMINSTRATION CHARGE

3. Applicant's counsel, the Proposal Trustee Deloitte Restructuring Inc., and after the date hereof, PricewaterhouseCoopers Inc., and counsel to the Proposal Trustee, as security for the professional fees and disbursements incurred both before and after the granting of this Order, and before and after the Applicant commenced proceedings under Part III of the *Bankruptcy and Insolvency Act*, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $125,000, as security for their professional fees and disbursements incurred at the normal rates and charges of Applicant's counsel, the Proposal Trustee Deloitte Restructuring Inc., and after the date hereof, PricewaterhouseCoopers Inc., and counsel to the Proposal Trustee Monitor, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 10 through 15 hereof.

INTERIM FINANCING

4. The Applicant is hereby authorized and empowered to obtain and borrow under a credit facility from Third Eye Capital Corporation (as agent) and ICC Credit Holdings Ltd., and other parties as lenders (the "**Interim Lender**") in order to finance the Applicant's working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed $16.475 million unless permitted by further order of this Court.

5. Such credit facility (the "**Interim Credit Facility**") shall be on the terms and subject to the conditions set forth in the term sheet between the Applicant and the Interim Lender (the "**Term Sheet**") substantially in the form attached as Schedule "A".

6. The Applicant is hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs, and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the Term Sheet or as may be reasonably required by the Interim Lender pursuant to the terms thereof, and the Applicant is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities, and obligations to the Interim Lender under and pursuant to the Term Sheet and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

7. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the "**Interim Lender's Charge**") on the Property to secure all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the Definitive Documents. The Interim Lender's Charge shall not secure any obligation existing before the date this Order is made. The Interim Lender's Charge shall have the priority set out in paragraphs 10 through 14 hereof.

8. The Interim Credit Facility contemplates that ACCEL Canada Holdings Limited and ACCEL Energy Canada Limited are jointly and severally liable, and are cross-guaranteeing, all DIP Advances (as defined therein) made by the Interim Lender. The Interim Lender shall be required to first recover repayment of all DIP Advances made to the Applicant (and any proceeds of DIP Advances approved by PricewaterhouseCoopers Inc. to have been allocated to the Applicant) from the property of the Applicant that is subject to the Interim Lender's Charge (the "**Applicant's Charged Property**"). Only in the event that the Interim Lender is unable to fully recover all such amounts from the Applicant's Charged Property, shall the Interim Lender be entitled to recover repayment of such amounts, from the property of ACCEL Canada Holdings Ltd. that is subject to the Interim Lender's Charge granted in the Order respecting the Applicant issued concurrently with this Order.

9. Notwithstanding any other provision of this Order:

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

   (b) upon the occurrence of an event of default under the Definitive Documents or the Interim Lender's Charge, the Interim Lender, upon 3 days notice to the Applicant and the Monitor, may exercise any and all of its rights and remedies against the Applicant or the Property

under or pursuant to the Term Sheet, Definitive Documents, and the Interim Lender's Charge, including without limitation, to cease making advances to the Applicant and set off and/or consolidate any amounts owing by the Interim Lender to the Applicant against the obligations of the Applicant to the Interim Lender under the Term Sheet, the Definitive Documents or the Interim Lender's Charge, to make demand, accelerate payment, and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicant and for the appointment of a trustee in bankruptcy of the Applicant; and

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

10. The Interim Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicant under the CCAA, or any proposal filed by the Applicant under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), with respect to any advances made under the Definitive Documents.

11. The Applicant is hereby directed to include the following amounts in its first draw request on the Interim Credit Facility, and to pay the following amounts from the proceeds of that first draw request:

a) to EPCOR Energy Alberta GP Inc. ("**EPCOR**"), the sum of $292,320, on account of electricity utility services provided to the Applicant by EPCOR for the period of November 5, 2019 to and including November 13, 2019;

b) to EPCOR, the sum of $32,480 shall be paid as a deposit by the Applicant by 4:30 pm each day commencing November 14, 2019 and shall continue until the day that EPCOR ceases to be the electricity utility services provider to the Applicant.

VALIDITY AND PRIORITY OF CHARGES

12. The priorities of the the Administration Charge and the Interim Lender's Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $125,000);

Second – Interim Lenders Charge (to the maximum amount of $16.475 million)

13. The filing, registration or perfection of the Administration Charge and Interim Lender's Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

14. The Charges shall constitute a charge on the Applicant's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"); and shall rank in priority to all other security interests, trusts, liens, charges, encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**").

15. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with the Charges, unless the Applicant also obtains the prior written consent of the the beneficiaries of the Charges (the "**Chargees**"), or by further order of this Court.

16. The Charge shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees thereunder shall not otherwise be limited or impaired in any way by:

    (a) the pendency of these proceedings and the declarations of insolvency made in this Order;

    (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;

    (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

    (d) the provisions of any federal or provincial statutes; or

    (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

        (i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof shall create or be deemed to constitute a new breach by the Applicant of any Agreement to which it is a party;

        (ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the

Charges, or the execution, delivery or performance of the Definitive Documents; and

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

PROPOSAL TRUSTEE

17. PricewaterhouseCoopers Inc. is hereby substituted as Proposal Trustee in these proceedings.

ALLOCATION

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

Justice of the Court of Queen's Bench of Alberta

TAB 9

I hereby certify this to be a true copy of the original Order of which it purports to be a copy.

Dated this 8 day of Nov 2019

for Registrar at Calgary
Bankruptcy Division of the
Court of Queen's Bench of Alberta

Clerk's Stamp:

COURT FILE NUMBER	25-2573419
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF	CALGARY
	IN THE MATTER ACCEL CANADA HOLDINGS LIMITED
APPLICANTS:	ACCEL CANADA HOLDINGS LIMITED
DOCUMENT	**INTERIM FINANCING ORDER**
CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	LAWSON LUNDELL LLP Barristers and Solicitors Suite 1100, 225 – 6th Avenue SW Brookfield Place Calgary AB T2G 4Y8 Tel: (403) 269-6900 Fax: (403) 269-9494 File No. 33414-145446 **Attention: William Roberts/Scott Andersen**
DATE ON WHICH ORDER WAS PRONOUNCED:	November 7, 2019
NAME OF JUDGE WHO MADE THIS ORDER:	Honourable Madam Justice J.H. Goss
LOCATION OF HEARING:	Edmonton, AB

UPON the application of **ACCEL Canada Holdings Limited** (the "**Applicant**"); **AND UPON** having read the Affidavit of Wayne Chodzicki, sworn on November 5, 2019, filed November 6, 2019, the Affidavit of Sarah Powers, sworn November 5, 2019, filed November 6, 2019, the Affidavit of Mark Horrox, sworn November 5, 2019, filed November 6, 2019, the Affidavit of William Bowlen, Jr., sworn November 6, 2019, unfiled, and the Affidavit of Ryan Dunfield, sworn November 6, 2019; **AND UPON** hearing counsel for the Applicant, and such other counsel who have appeared; **AND UPON** reading the Report of Deloitte Restructuring Inc. dated November 6, 2019; **IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today.

CAPITALIZED TERMS

2. Capitalized terms used but not otherwise defined in this Order shall have the meaning given to such terms in the affidavit of Wayne Chodzicki #1 sworn herein.

ADMINSTRATION CHARGE

3. Applicant's counsel, the Proposal Trustee Deloitte Restructuring Inc., and after the date hereof, PricewaterhouseCoopers Inc., and counsel to the Proposal Trustee, as security for the professional fees and disbursements incurred both before and after the granting of this Order, and before and after the Applicant commenced proceedings under Part III of the *Bankruptcy and Insolvency Act*, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $125,000, as security for their professional fees and disbursements incurred at the normal rates and charges of Applicant's counsel, the Proposal Trustee Deloitte Restructuring Inc., and after the date hereof, PricewaterhouseCoopers Inc., and counsel to the Proposal Trustee Monitor, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 10 through 15 hereof.

INTERIM FINANCING

4. The Applicant is hereby authorized and empowered to obtain and borrow under a credit facility from Third Eye Capital Corporation (as agent) and ICC Credit Holdings Ltd., and other parties as lenders (the "**Interim Lender**") in order to finance the Applicant's working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed $16.475 million unless permitted by further order of this Court.

5. Such credit facility (the "**Interim Credit Facility**") shall be on the terms and subject to the conditions set forth in the term sheet between the Applicant and the Interim Lender (the "**Term Sheet**") substantially in the form attached as Schedule "A".

6. The Applicant is hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs, and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the Term Sheet or as may be reasonably required by the Interim Lender pursuant to the terms thereof, and the Applicant is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities, and obligations to the Interim Lender under and pursuant to the Term Sheet and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

7. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the "**Interim Lender's Charge**") on the Property to secure all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the Definitive Documents. The Interim Lender's Charge shall not secure any obligation existing before the date this Order is made. The Interim Lender's Charge shall have the priority set out in paragraphs 10 through 14 hereof.

8. The Interim Credit Facility contemplates that ACCEL Canada Holdings Limited and ACCEL Energy Canada Limited are jointly and severally liable, and are cross-guaranteeing, all DIP Advances (as defined therein) made by the Interim Lender. The Interim Lender shall be required to first recover repayment of all DIP Advances made to the Applicant (and any proceeds of DIP Advances approved by PricewaterhouseCoopers Inc. to have been allocated to the Applicant) from the property of the Applicant that is subject to the Interim Lender's Charge (the "**Applicant's Charged Property**"). Only in the event that the Interim Lender is unable to fully recover all such amounts from the Applicant's Charged Property, shall the Interim Lender be entitled to recover repayment of such amounts, from the property of ACCEL Energy Canada Ltd. that is subject to the Interim Lender's Charge granted in the Order respecting the Applicant issued concurrently with this Order.

9. Notwithstanding any other provision of this Order:

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

   (b) upon the occurrence of an event of default under the Definitive Documents or the Interim Lender's Charge, the Interim Lender, upon 3 days notice to the Applicant and the Monitor, may exercise any and all of its rights and remedies against the Applicant or the Property

under or pursuant to the Term Sheet, Definitive Documents, and the Interim Lender's Charge, including without limitation, to cease making advances to the Applicant and set off and/or consolidate any amounts owing by the Interim Lender to the Applicant against the obligations of the Applicant to the Interim Lender under the Term Sheet, the Definitive Documents or the Interim Lender's Charge, to make demand, accelerate payment, and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicant and for the appointment of a trustee in bankruptcy of the Applicant; and

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

10. The Interim Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicant under the CCAA, or any proposal filed by the Applicant under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), with respect to any advances made under the Definitive Documents.

11. The Applicant is hereby directed to include the following amounts in its first draw request on the Interim Credit Facility, and to pay the following amounts from the proceeds of that first draw request:

a) to EPCOR Energy Alberta GP Inc. ("**EPCOR**"), the sum of $751,680, on account of electricity utility services provided to the Applicant by EPCOR for the period of November 5, 2019 to and including November 13, 2019;

b) to EPCOR, the sum of $83,520 shall be paid as a deposit by the Applicant by 4:30 pm each day commencing November 14, 2019 and shall continue until the day that EPCOR ceases to be the electricity utility services provider to the Applicant.

(c) to Redwater Water Disposal Co. Ltd. the sum of $122,264 on account of services provided to the Applicant by Redwater Water Disposal Co. Ltd. up to and including November 10, 2019.

VALIDITY AND PRIORITY OF CHARGES

12. The priorities of the the Administration Charge and the Interim Lender's Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $125,000);

Second – Interim Lenders Charge (to the maximum amount of $16.475 million)

13. The filing, registration or perfection of the Administration Charge and Interim Lender's Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

14. The Charges shall constitute a charge on the Applicant's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"); and shall rank in priority to all other security interests, trusts, liens, charges, encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**").

15. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with the Charges, unless the Applicant also obtains the prior written consent of the the beneficiaries of the Charges (the "**Chargees**"), or by further order of this Court.

16. The Charge shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees thereunder shall not otherwise be limited or impaired in any way by:

    (a) the pendency of these proceedings and the declarations of insolvency made in this Order;

    (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;

    (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

    (d) the provisions of any federal or provincial statutes; or

    (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

        (i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof shall create or be deemed to constitute a new breach by the Applicant of any Agreement to which it is a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

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

PROPOSAL TRUSTEE

17. PricewaterhouseCoopers Inc. is hereby substituted as Proposal Trustee in these proceedings.

ALLOCATION

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

Justice of the Court of Queen's Bench of Alberta

TAB 10

COURT FILE NUMBER	25-2655526
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
MATTER	IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, OF CABOT ENERGY INC.
APPLICANT	CABOT ENERGY INC.
DOCUMENT	**ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**STIKEMAN ELLIOTT LLP** 4300 Bankers Hall West 888 – 3rd Street S.W. T2P 5C5 Karen Fellowes, Q.C. / Joseph Reynaud Phone Number: (403) 724-9469 / (514) 397-3019 Email: kfellowes@stikeman.com / jreynaud@stikeman.com Fax Number: (403) 266-9034 File No.: 145811-1004 **Counsel for the Applicant, Cabot Energy Inc.**

ENTERED

Clerk's Stamp: FILED JUL 31 2020 CALGARY BANKRUPTCY AND INSOLVENCY FAILLITE ET INSOLVABILITÉ

DATE ON WHICH ORDER WAS PRONOUNCED:	July 27, 2020
NAME OF JUDGE WHO MADE THIS ORDER:	The Honourable Madam Justice K.M. Horner
LOCATION OF HEARING:	Calgary, via Webex

UPON the Application of Cabot Energy Inc. (the **"Applicant"**) to extend the Initial Stay Period provided by the Notice of Intention to Make a Proposal under the Bankruptcy and Insolvency Act, filed by the Applicant on June 30, 2020 (the "**NOI**") and for related relief;

AND UPON reading the Applicant's Notice of Application, the NOI which provided a stay of proceedings to the Applicant for 30 days (the **"Initial Stay Period")**; the Affidavit of D. Kimery,

sworn July 21, 2020 and the Supplemental Affidavit of D. Kimery, sworn July 23, 2020; and the First Report of the Proposal Trustee, Grant Thornton Ltd. (the **"Trustee's First Report"**);

AND UPON HEARING counsel for the Applicant, counsel for the Proposal Trustee, and counsel for High Power Petroleum LLC **("H2P")** the proposed Interim Financing Lender, and other interested parties;

IT IS HEREBY ORDERED THAT:

1. The time for delivery of the Application and supporting materials is hereby abridged and service is deemed to be good and sufficient;

2. The Initial Stay Period is hereby extended for an additional period of forty-three (43) days (i.e. until September 11, 2020);

3. The Applicant is hereby authorized to obtain and borrow under a debtor-in-possession credit facility in an amount of $645,000 (the "**DIP Facility**") in accordance with the terms of the DIP Term Sheet attached as Exhibit A to the Supplemental Affidavit of D. Kimery, and the DIP Lender (as defined in the DIP Term Sheet attached as Exhibit A to the Supplemental Affidavit of D. Kimery) is hereby granted, and is entitled to the benefit of, a priority charge over Cabot's assets in order to secure the performance and payment of all obligations described in the DIP Facility (the **"DIP Charge"**);

4. The following professionals are hereby granted a priority charge over Cabot's assets to secure the payment of their respective fees and disbursements incurred in connection with these proceedings up to an amount of $100,000: (i) Cabot's counsel; (ii) the Proposal Trustee; and (iii) the Proposal Trustee's counsel (the "**Administration Charge**");

5. The Applicant is granted a priority charge over Cabot's assets securing the payment of the amounts for which Cabot may be called upon to indemnify its directors and officers, acting in such capacity during the post-NOI period, when and if D&O insurance coverage is denied or insufficient, in an amount up to $50,000 (the "**D&O Charge**").

6. The priority ranking of the Charges described above (the "**Charges**") shall be as follows:

   (i) Administration Charge;

   (ii) D&O Charge; and

(iii) DIP Charge.

7. The filing, registration or perfection of the Charges shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

8. The Charges shall constitute a charge on the Applicant's assets and such Charges shall rank in priority to all other security interests, trust, liens, charges and encumbrances and claims of secured creditors, statutory or otherwise (collectively "**Encumbrances**") in favour of any person.

9. Except as otherwise expressly provided for herein, or as may be approved by the Court, the Applicants shall not grant any Encumbrances over any assets that rank in priority to, or pari passu with, any of the Charges, unless the Applicants obtain the prior written consent of the beneficiaries of the Charges or further order of this Court.

10. The Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (the "**Chargees**") thereunder shall not otherwise be limited or impaired in any way by:

(i) the pendency of these proceedings and the declarations of insolvency made in this Order;

(ii) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;

(iii) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(iv) the provisions of any federal or provincial statutes; or

(v) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds the Applicants, and notwithstanding any provision to the contrary in any Agreement: (i) neither the creation of the Charges

nor the execution, delivery, perfection, registration or performance of any documents in respect thereof shall create or be deemed to constitute a new breach by the Applicants of any Agreement to which it is a party; (ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and (iii) the payments made by the Applicants pursuant to this Order and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

11. Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the Charges amongst the various assets of the Applicant.

12. The payments made by the Applicant to critical pre-filing creditors as described in paragraph 33(e) of the Trustee's First Report are hereby authorized and approved.

13. Any party to these proceedings may serve any court material in these proceedings by emailing a PDF or other electronic copy of such materials to counsel's email addresses as recorded on the Service List to be maintained by the Proposal Trustee, and the Proposal Trustee shall post a copy of all prescribed materials on its website.

14. Any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sough or upon such other notice, if any, as this Court may order.

Karen Horner

Justice of the Court of Queen's Bench of Alberta

TAB 11

		Clerk's Stamp:
COURT FILE NUMBER	25-2670585	
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY	
	IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ZARGON OIL & GAS LTD., ZARGON OIL & GAS PARTNERSHIP and ZARGON U.S. HOLDINGS LTD.	
DOCUMENT	**Order (Approval of Administration Charge, Interim Financing, Interim Financing Charge and Extension to Time to File Proposal)**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTIES FILING THIS DOCUMENT	**Burnet, Duckworth & Palmer LLP** 2400, 525 - 8 Avenue SW Calgary, Alberta T2P 1G1 Lawyer: David LeGeyt / Ryan Algar Phone Number: (403) 260-0120/ 0126 Fax:(403) 260-0332 Email: dlegeyt@bdplaw.com / ralgar@bdplaw.com File No. 043136-145	

DATE ON WHICH ORDER WAS PRONOUNCED:	October 1, 2020
LOCATION WHERE ORDER WAS PRONOUNCED:	Edmonton, Alberta
JUSTICE WHO MADE THIS ORDER:	The Honourable Justice D. R. Mah

UPON THE APPLICATION of Zargon Oil & Gas Ltd. ("**Zargon O&G**") Zargon Oil & Gas Partnership ("**Zargon Partnership**") and Zargon U.S. Holdings Ltd. ("**Zargon US**" and collectively "**Zargon**") filed September 22, 2020; AND UPON reading Affidavit No. 1 of Craig Hansen sworn September 22, 2020 ("**Hansen Affidavit No. 1**"); AND UPON reading the Report of MNP Ltd., in its capacity as proposal trustee of Zargon (the "**Proposal Trustee**") dated September 25, 2020;

AND UPON hearing submissions by counsel for Zargon and any other counsel or other interested parties present,

IT IS HEREBY ORDERED THAT:

SERVICE

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

ADMINISTRATION CHARGE

2. Legal counsel to Zargon ("**BD&P**") and the Proposal Trustee, as security for their respective professional fees and disbursements (including the professional fees and disbursements of the Proposal Trustee's counsel, McMillan LLP) incurred both before and after the granting of this Order, shall be entitled to the benefit of, and are hereby granted, a first ranking charge (the "**Administration Charge**") on all of Zargon's present and after-acquired assets, property and undertakings (the "**Property**"), which charge shall not exceed $200,000, as security for their professional fees and disbursements incurred at normal rates and charges, both before and after the making of this Order.

INTERIM FINANCING

3. The terms of the interim financing facility, substantially in the form as set out in the term sheet dated as of September 22, 2020 (the "**Interim Financing Facility**") attached as Exhibit "C" to Hansen Affidavit No.1 be and is hereby approved.

4. Zargon be and is hereby authorized to borrow up to $700,000 from Blue Sky Resources Ltd. (the "**Interim Lender**") by way of the Interim Financing Facility to be advanced to Zargon by the Interim Lender.

5. The Property of Zargon shall be, and hereby is, subject to a charge in the amount of $700,000 (the "**Interim Lender's Charge**"), in order to secure repayment to the Interim Lender of amounts advanced under the Interim Financing Facility, which Interim Lender's Charge shall be subordinate only to the Administration Charge in the within proceedings.

6. For clarity, the respective ranking of the charges on the Property and the security interests in the Property shall be as follows:

   (a) First, the Administration Charge; and

   (b) Second, the Interim Lender's Charge.

7. The filing, registration or perfection of the Administration Charge and the Interim Lender's Charge (together, the "**Charges**") shall not be required, and the Charges shall be enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

8. The Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges, encumbrances and claims of secured creditors, statutory or otherwise in favour of any person (collectively, the "**Encumbrances**").

9. Except as otherwise provided herein, or as may be approved by this Honourable Court, Zargon shall not grant any Encumbrances over the Property that rank in priority to, or *pari passu* with, any of the Charges, unless Zargon obtains the prior written consent of the beneficiaries of the Charges (the "**Chargees**") or further order of this Court.

10. The Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees thereunder shall not otherwise be limited or impaired in any way by:

   (a) the pendency of these proceedings and the declarations of insolvency made in this Order;

   (b) any application(s) for bankruptcy order(s) issued pursuant to *Bankruptcy and Insolvency Act* (the "**BIA**"), or any bankruptcy order made pursuant to such applications;

   (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

   (d) the provisions of any federal or provincial statutes; or

   (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing

loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds Zargon, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof, shall create or be deemed to constitute a new breach by Zargon of any Agreement to which it is a party;

(ii) none of the Chargees shall have any liability to any person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, or the execution, delivery or performance of the Interim Financing Facility; and

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

EXTENSION OF TIME TO FILE A PROPOSAL

11. The time within which Zargon is required to file a proposal to its creditors with the Official Receiver, under section 50.4 of the BIA *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, shall be and is hereby extended to November 16, 2020.

12. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

J.C.Q.B.A

TAB 12

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

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

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

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

DOCUMENT: **Order (Approval of Interim Financing and Interim Financing Charge, Sealing)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTIES FILING THIS DOCUMENT

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

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

DATE ON WHICH ORDER WAS PRONOUNCED: DECEMBER 17, 2020

LOCATION WHERE ORDER WAS PRONOUNCED: CALGARY

JUSTICE WHO MADE THIS ORDER: D.B. NIXON

UPON THE APPLICATION of Greenfire Oil and Gas Ltd. ("**GOGL**") and Greenfire Hangingstone Operating Corporation ("**GHOPCO**" and collectively "**Greenfire**" or the "**Applicants**"); AND UPON reading the Order AND UPON reading the Affidavits of Robert B. Logan sworn October 9, 2020, November 2, 2020 December 2, 2020 ("**Logan Affidavit No.6**") and December 11, 2020 and the

Confidential Supplement to Logan Affidavit No.6 (the "**Confidential Supplement**"); AND UPON reading the Fifth Report of Alvarez & Marsal Canada Inc., in its capacity as proposal trustee of Greenfire (the "**Proposal Trustee**") dated December 11, 2020; AND UPON hearing submissions by counsel for Greenfire and any other counsel or other interested parties present,

IT IS HEREBY ORDERED THAT:

SERVICE

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

INTERPREATION

2. Capitalized terms not otherwise defined this Order shall have the meaning set forth the Administration Charge Order.

INTERIM FINANCING

3. The terms of the interim financing facility, substantially in the form as set out in the term sheet attached as **Exhibit "A"** to Logan Affidavit No.6 (the "**Interim Financing Facility**") are hereby approved.

4. Greenfire is hereby authorized to borrow up to $20,000,000 from Trafigura Canada General Partnership (the "**Interim Lender**") by way of the Interim Financing Facility to be advanced to Greenfire by the Interim Lender.

5. All of Greenfire's present and after-acquired assets, property and undertakings (the "**Property**") shall be, and hereby is, subject to a charge in the amount of $20,000,000 (the "**Interim Lender Charge**"), in order to secure repayment to the Interim Lender of amounts advanced under the Interim Financing Facility, which Interim Lender Charge shall be subordinate in priority only to the Administration Charge (as set forth in the Administration Charge Order).

6. For clarity, the respective ranking of the charges on the Property and the security interests in the Property shall be as follows:

(a) first, the Administration Charge granted pursuant to, and as defined in, the Order of Justice D.R. Mah on October 16, 2020; and

(b) second, the Interim Lender Charge, (together, the "**Charges**") .

7. The filing, registration or perfection of the Charges shall not be required, and the Charges shall be enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

8. The Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges, encumbrances and claims of secured creditors, statutory or otherwise in favour of any person (collectively, the "**Encumbrances**").

9. Except as otherwise provided herein, or as may be approved by this Honourable Court, Greenfire shall not grant any Encumbrances over the Property that rank in priority to, or *pari passu* with, any of the Charges, unless Greenfire obtains the prior written consent of the beneficiaries of the Charges (the "**Chargees**") or further order of this Court.

10. The Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds Greenfire, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof, shall create or be deemed to constitute a new breach by Greenfire of any Agreement to which it is a party;

(ii) none of the Chargees shall have any liability to any person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, or the execution, delivery or performance of the Interim Financing Facility; and

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

Authorization to enter into Marketing Agreement

11. Greenfire is hereby authorized to enter into the marketing agreement contemplated by the Interim Financing Facility with the Interim Lender for the purpose of marketing and selling its production, and to take all steps necessary and incidental to completing and fulfilling its obligations under the marketing agreement, as it may determine in its discretion, on terms acceptable to Greenfire and the Interim Lender.

Sealing

12. Notwithstanding the procedural requirements of Rule 6.28 and Division 4, Part 6 of the Alberta Rules of Court, the Confidential Supplement shall be sealed on the Court file and shall not form part of the public record.

13. The Clerk of this Honourable Court shall file the Confidential Supplement in a sealed envelope attached to a notice that sets out the style of cause of these proceedings and states that:

> THIS ENVELOPE CONTAINS CONFIDENTIAL MATERIALS SEALED PURSUANT TO THE SEALING ORDER ISSUED BY THE HONORUABLE JUSTICE D.B. NIXON ON DECEMBER 14, 2020.

14. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

J.C.Q.B.A

TAB 13

Last Revised: January 2019

Clerk's Stamp:

COURT FILE NUMBER	
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF	●
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **[THE DEBTOR(S)]**
APPLICANT:	
RESPONDENT(S):	
DOCUMENT	**ALBERTA TEMPLATE CCAA INITIAL ORDER**
CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	**[LAW FIRM NAME]** [Address] [Address] Solicitor: ● Telephone: ● Facsimile: ● Email: ● File Number: ●
DATE ON WHICH ORDER WAS PRONOUNCED:	
NAME OF JUDGE WHO MADE THIS ORDER:	
LOCATION OF HEARING:	

[*NOTE: DO NOT USE THIS ORDER AS A PRECEDENT WITHOUT REVIEWING THE ACCOMPANYING EXPLANATORY NOTES.]

UPON the application of **[NAME]** (the "**Applicant**"); **AND UPON** having read the Originating Application, the Affidavit of ●; and the Affidavit of Service of ● **[if applicable]**, filed; **AND UPON** reading the consent of **[NAME]** to act as Monitor; **AND UPON** being advised that the secured creditors who are likely to be affected by the charges created herein have been provided notice of this application and either do not oppose or alternatively consent to the within Order **[if applicable]**; **AND UPON** hearing counsel for ●; **AND UPON** reading the Pre-Filling Report of **[Monitor's Name]**; **IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient **[if applicable]** and this application is properly returnable today.

APPLICATION

2. The Applicant is a company to which the *Companies' Creditors Arrangement Act* of Canada (the "**CCAA**") applies.

PLAN OF ARRANGEMENT

3. The Applicant shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicant shall:

   (a) remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

   (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property;

   (c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order; and

   (d) be entitled to continue to utilize the central cash management system currently in place as described in the Affidavit of **[NAME]** sworn **[DATE]** or replace it with another substantially

similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicant of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicant, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.] **[See Explanatory Note]**

5. To the extent permitted by law, the Applicant shall be entitled but not required to make the following advances or payments of the following expenses, incurred prior to or after this Order:

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

   (b) the reasonable fees and disbursements of any Assistants retained or employed by the Applicant in respect of these proceedings, at their standard rates and charges, including for periods prior to the date of this Order.

6. Except as otherwise provided to the contrary herein, the Applicant shall be entitled but not required to pay all reasonable expenses incurred by the Applicant in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

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

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

7. The Applicant shall remit, in accordance with legal requirements, or pay:

   (a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority that are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

(i) employment insurance,

(ii) Canada Pension Plan,

(iii) Quebec Pension Plan, and

(iv) income taxes,

but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

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

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

8. Until such time as a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicant may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicant from time to time for the period commencing from and including the date of this Order ("**Rent**"), but shall not pay any rent in arrears.

9. Except as specifically permitted in this Order, the Applicant is hereby directed, until further order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant to any of its creditors as of the date of this Order;

(b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and

(c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

10. The Applicant shall, subject to such requirements as are imposed by the CCAA **[and such covenants as may be contained in the Definitive Documents (as hereinafter defined in paragraph [33]),]** have the right to:

    (a) permanently or temporarily cease, downsize or shut down any portion of its business or operations and to dispose of redundant or non-material assets not exceeding **[$]** in any one transaction or **[$]** in the aggregate, provided that any sale that is either (i) in excess of the above thresholds, or (ii) in favour of a person related to the Applicant (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;

    (b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Applicant and such employee, or failing such agreement, to deal with the consequences thereof in the Plan;

    (c) disclaim or resiliate, in whole or in part, with the prior consent of the Monitor (as defined below) or further Order of the Court, their arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the Applicant deems appropriate, in accordance with section 32 of the CCAA; and

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

    all of the foregoing to permit the Applicant to proceed with an orderly restructuring of the Business (the "**Restructuring**").

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

12. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:

    (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicant and the Monitor 24 hours' prior written notice; and

    (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicant in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicant of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY

13. Until and including **[DATE – MAX. 30 DAYS]**, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

14. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:

    (a) empower the Applicant to carry on any business that the Applicant is not lawfully entitled to carry on;

    (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;

    (c) prevent the filing of any registration to preserve or perfect a security interest;

    (d) prevent the registration of a claim for lien; or

(e) exempt the Applicant from compliance with statutory or regulatory provisions relating to health, safety or the environment.

15. Nothing in this Order shall prevent any party from taking an action against the Applicant where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH RIGHTS

16. During the Stay Period, no person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicant, except with the written consent of the Applicant and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

17. During the Stay Period, all persons having:

(a) statutory or regulatory mandates for the supply of goods and/or services; or

(b) oral or written agreements or arrangements with the Applicant, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Applicant

are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Applicant or exercising any other remedy provided under such agreements or arrangements. The Applicant shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Applicant in accordance with the payment practices of the Applicant, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicant and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

18. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or

after the date of this Order, nor shall any person, other than the Interim Lender where applicable, be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicant.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

19. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph **[15]** of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicant with respect to any claim against the directors or officers that arose before the date of this Order and that relates to any obligations of the Applicant whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicant, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicant or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

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

21. The directors and officers of the Applicant shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of **[$]**, as security for the indemnity provided in paragraph **[20]** of this Order. The Directors' Charge shall have the priority set out in paragraphs **[37]** and **[39]** herein.

22. Notwithstanding any language in any applicable insurance policy to the contrary:

    (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and

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

APPOINTMENT OF MONITOR

23. **[MONITOR'S NAME]** is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business, and financial affairs and the Applicant with the powers

and obligations set out in the CCAA or set forth herein and that the Applicant and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicant pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

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

(a) monitor the Applicant's receipts and disbursements, Business and dealings with the Property;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicant;

(c) assist the Applicant, to the extent required by the Applicant, in its dissemination to the Interim Lender and its counsel on a **[TIME INTERVAL]** basis of financial and other information as agreed to between the Applicant and the Interim Lender which may be used in these proceedings, including reporting on a basis as reasonably required by the Interim Lender;

(d) advise the Applicant in its preparation of the Applicant's cash flow statements and reporting required by the Interim Lender, which information shall be reviewed with the Monitor and delivered to the Interim Lender and its counsel on a periodic basis, but not less than **[TIME INTERVAL]**, or as otherwise agreed to by the Interim Lender;

(e) advise the Applicant in its development of the Plan and any amendments to the Plan;

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

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

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

(i) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicants and any other Person; and

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

25. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation or regulation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order be deemed to be in possession of any of the Property within the meaning of any federal or provincial environmental legislation.

26. The Monitor shall provide any creditor of the Applicant and the Interim Lender with information provided by the Applicant in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicant is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicant may agree.

27. In addition to the rights and protections afforded the Monitor under the CCAA or as an Officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

28. The Monitor, counsel to the Monitor, and counsel to the Applicant shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements related to these CCAA proceedings), in each case at their standard rates and charges, by the Applicant as part of the costs of these proceedings. The Applicant is hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicant on a **[TIME INTERVAL]** basis and, in

addition, the Applicant is hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Applicant, retainers in the respective amount[s] of $●**,** to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

29. The Monitor and its legal counsel shall pass their accounts from time to time.

30. The Monitor, counsel to the Monitor, if any, and the Applicant's counsel, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of **[$]**, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs **[37]** and **[39]** hereof.

INTERIM FINANCING

31. The Applicant is hereby authorized and empowered to obtain and borrow under a credit facility from **[INTERIM LENDER'S NAME]** (the "**Interim Lender**") in order to finance the Applicant's working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed **[$]** unless permitted by further order of this Court.

32. Such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Applicant and the Interim Lender dated as of **[DATE]** (the "**Commitment Letter**"), filed.

33. The Applicant is hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs, and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the Commitment Letter or as may be reasonably required by the Interim Lender pursuant to the terms thereof, and the Applicant is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities, and obligations to the Interim Lender under and pursuant to the Commitment Letter and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

34. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the "**Interim Lender's Charge**") on the Property to secure all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the Definitive Documents. The Interim Lender's Charge shall not secure any obligation existing before this the date this Order is made. **[see**

Explanatory Notes] The Interim Lender's Charge shall have the priority set out in paragraphs **[37]** and **[39]** hereof.

35. Notwithstanding any other provision of this Order:

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

(b) upon the occurrence of an event of default under the Definitive Documents or the Interim Lender's Charge, the Interim Lender, upon **[●]** days notice to the Applicant and the Monitor, may exercise any and all of its rights and remedies against the Applicant or the Property under or pursuant to the Commitment Letter, Definitive Documents, and the Interim Lender's Charge, including without limitation, to cease making advances to the Applicant and set off and/or consolidate any amounts owing by the Interim Lender to the Applicant against the obligations of the Applicant to the Interim Lender under the Commitment Letter, the Definitive Documents or the Interim Lender's Charge, to make demand, accelerate payment, and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicant and for the appointment of a trustee in bankruptcy of the Applicant; and

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

36. The Interim Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicant under the CCAA, or any proposal filed by the Applicant under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), with respect to any advances made under the Definitive Documents.

VALIDITY AND PRIORITY OF CHARGES

37. The priorities of the Directors' Charge, the Administration Charge and the Interim Lender's Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of **[$]**);

Second – Interim Lender's Charge; and

Third – Directors' Charge (to the maximum amount of **[$]**).

38. The filing, registration or perfection of the Directors' Charge, the Administration Charge or the Interim Lender's Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

39. Each of the Directors' Charge, the Administration Charge, and the Interim Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person. **[See Explanatory Notes.]**

40. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge, the Administration Charge or the Interim Lender's Charge, unless the Applicant also obtains the prior written consent of the Monitor, the Interim Lender, and the beneficiaries of the Directors' Charge and the Administration Charge, or further order of this Court.

41. The Directors' Charge, the Administration Charge, **[the Commitment Letter, the Definitive Documents,]** and the Interim Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the Interim Lender thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof **[, including the**

Commitment Letter or the Definitive Documents,] shall create or be deemed to constitute a new breach by the Applicant of any Agreement to which it is a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, **[the Applicant entering into the Commitment Letter,]** or the execution, delivery or performance of the Definitive Documents; and

(iii) the payments made by the Applicant pursuant to this Order, **[including the Commitment Letter or the Definitive Documents,]** and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

ALLOCATION

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

SERVICE AND NOTICE

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

44. The E-Service Guide of the Commercial List (the "**Guide**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Guide (which can be found on the Commercial List website at: **[●]**) shall be valid and effective service. Subject to Rules 11.25 and 11.26 this Order shall constitute an order for substituted service pursuant to Rule 11.28 of the Rules of Court. Subject to paragraph 13 of the Guide, service of documents in accordance with the Guide will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Guide with the following URL '**[●]**'."

GENERAL

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

46. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Monitor's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.

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

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

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

50. Any interested party (including the Applicant and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

51. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.

Justice of the Court of Queen's Bench of Alberta

TAB 14

CITATION: Comstock Canada Ltd. (Re), 2013 ONSC 4756
COURT FILE NO.: CV-13-10181-00CL
32-1763935
32-1763929
32-1764011
DATE: 20130716

SUPERIOR COURT OF JUSTICE – ONTARIO
(IN BANKRUPTCY AND INSOLVENCY)

RE: **IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF COMSTOCK CANADA LTD.**

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF CCL REALTY INC.

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF CCL EQUITIES INC.

BEFORE: **MORAWETZ J.**

COUNSEL: **A. MacFarlane, F. Lamie and A. McFarlane (Corporate Counsel), for Comstock Canada Ltd., CCL Realty Inc., and CCL Equities Inc., Applicants**

H. Chaiton, for the Bank of Montreal

R. B. Schwill, for PricewaterhouseCoopers Inc.

B. Harrison, for the Board of Directors

K. Plunkett, for TESC Inc.

J. Milton, for Rio Tinto Alcan Inc.

HEARD &
ENDORSED: **JULY 9, 2013**

REASONS: **JULY 16, 2013**

ENDORSEMENT

[1] This motion was brought by Comstock Canada Ltd. ("Comstock"), CCL Realty Inc. ("CCL Realty") and CCL Equities Inc. ("CCL Equities", and together with Comstock and CCL Realty, the "Comstock Group") for an order, *inter alia*:

(a) continuing Comstock Group's restructuring proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), effective as of July 9, 2013;

(b) granting an initial order (the "Initial Order") under the CCAA in respect of the Comstock Group;

(c) declaring that, upon the continuance under the CCAA, the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") proposal provisions shall have no further application;

(d) approving the cost reimbursement agreement entered into by Comstock and Rio Tinto Alcan Inc. ("Rio Tinto");

(e) approving the Commitment Letter (defined below) and the granting of the DIP Lender's Charge (defined below) and corresponding priority in favour of Bank of Montreal ("BMO"); and

(f) discharging PricewaterhouseCoopers Inc. ("PwC") in its capacity as interim receiver (in such capacity, the "Interim Receiver") of Comstock.

[2] At the conclusion of argument, the motion was granted, with reasons to follow. These are those reasons.

Background

[3] Established in 1904, Comstock is one of Canada's largest multi-disciplined contractors, currently employing over 1,000 unionized and non-unionized tradespeople and 80 salaried employees across Canada. For over 100 years, Comstock has provided a broad capability in the completion of large-scale electrical and mechanical contracts to the planning, directing and execution of multi-trade, multi-million dollar commercial, industrial, institutional, automotive, nuclear, oil and gas, overhead and underground, and structural steel assignments. Recent projects include work for Enbridge Pipelines Incorporated, Shell Canada Limited, Petro Canada, Imperial Oil, Ontario Power Generation, Bruce Nuclear Power, Ford Motor Company, Chrysler Canada Inc., Winnipeg Airport Authority Inc. and Cadillac Fairview Corporation. In 2012, Comstock provided services to 130 customers and had several recurring customers.

[4] Comstock experienced financial challenges necessitating a restructuring of the company. While Comstock continues to enjoy a strong market reputation, Comstock's business has experienced liquidity challenges, cost overruns and litigation costs that have imperilled the Comstock Group's business.

[5] Comstock's counsel submits that any serious disruption to Comstock's ability to provide core services would imperil the viability of various projects and have negative effects cascading throughout the trades, subtrades and local economies of these projects. As a result, Comstock's senior management believes that it is imperative to restructure the Comstock Group as soon as reasonably possible with a focus on avoiding disruption to Comstock's operations.

[6] The Comstock Group seeks the Initial Order, at this time, to protect its business and preserve its value while it seeks to complete its restructuring.

[7] Comstock is a privately-held corporation incorporated pursuant to the *Business Corporations Act (Ontario)*, R.S.O. 1990, c. B.16 ("OBCA"), with headquarters located in Burlington, Ontario and a western office located in Edmonton, Alberta. Comstock maintains additional regional facilities in Ontario, Manitoba, Alberta and British Columbia.

[8] Comstock and CCL Realty, a real estate holding company which holds all of the Comstock Group's real property, are the direct and wholly-owned subsidiaries of CCL Equities – a holding company incorporated pursuant to the OBCA with headquarters located in Burlington, Ontario.

[9] In 2011, a management buyout was executed in respect of Comstock. Prior to this time, Comstock was a wholly-owned subsidiary of a U.S. publicly-traded company.

Comstock Debt and Lender Security

[10] Pursuant to a credit agreement dated July 29, 2011 (the "Credit Agreement") among Comstock, as borrower, CCL Equities Inc., CCL Realty Inc., 3072454 Nova Scotia Company, as guarantors (collectively, the "Guarantors") and BMO, as lender, BMO made available to Comstock a credit facility up to a maximum aggregate amount of $29,200,000 (the "Credit Facility" or the "Loan").

[11] Comstock's indebtedness under the Credit Agreement is secured by a general security agreement in favour of BMO; an assignment of insurance policies of Comstock and the Guarantors; an assignment, postponement, and subordination of shareholder loans; guarantees from each of the Guarantors; and mortgages over all of the real property owned by Comstock and CCL Realty (collectively, the "Lender's Security").

[12] A number of entities, including CBSC Capital Inc., Transportation Lease Systems Inc., ATCO Structures and Logistics Ltd., Leavitt Machinery General Partnership, Altruck International Truck Centres, Integrated Distribution Systems LP o/a Wajax Equipment, RCAP Leasing Inc., Horizon North Camp & Catering Inc., also have registered a security interest in respect of certain of Comstock's equipment and vehicles.

[13] According to Comstock's trade accounts payable records, Comstock owed approximately $47 million of unsecured trade debt to approximately 830 vendors as of June 27, 2013.

[14] As of July 9, 2013, Comstock is not in arrears in respect of payroll. Payroll obligations of the previous week had been funded through an Interim Receiver's Borrowing Charge, which was subject of an endorsement reported at *Comstock Canada Ltd. (Re)*, 2013 ONSC 4700.

[15] Comstock had payroll of $1.5 million due on Thursday, July 11, 2013, pertaining to the contracted project in Kitimat, British Columbia. The mechanics enabling this payroll to be met were authorized by the Initial Order.

Comstock's Financial Position

[16] Copies of the consolidated and unaudited balance sheet and income statement of the Comstock Group as at December 31, 2012, and all other audited and unaudited financial statements prepared in the year prior to 2013 (collectively, the "Financial Statements"), are attached to the confidential supplement (the "Confidential Supplement") to the Report of PwC in its capacity as proposal trustee and prospective CCAA monitor of the Comstock Group.

[17] As at December 31, 2012, the Comstock Group had assets with book value of approximately $112 million, with corresponding liabilities of $103.4 million.

[18] Comstock has initiated several ongoing litigation claims against various entities, with a total claim face amount in excess of $120 million. Comstock has been named as defendant in litigation claims, with a face amount in excess of $110 million.

[19] The Comstock Group previously enjoyed financial prosperity due to sustained contracts throughout Canada in respect of various significant engagements. However, counsel advises that Comstock's recent declining economic fortunes have resulted in increasingly severe financial losses, liquidity challenges, cost overruns and litigation costs imperilling the Comstock Group's business.

[20] On June 27, 2013, counsel advises that Chrysler Canada locked out Comstock from the performance of its contract at facilities in Ontario and, on July 2, 2013, threatened to terminate all existing contracts and purchase orders with Comstock. On July 3, 2013, Chrysler Canada issued a formal notice of contract termination to Comstock.

[21] On July 5, 2013, Travellers Insurance Company of Canada provided Comstock with notices of termination, to be effective in 30 days, in respect of certain contracts.

[22] During the week of July 1, 2013, TLS Fleet Management notified Comstock that no further purchases would be authorized in respect of vehicle leases, service and maintenance, and management fees, unless Comstock paid outstanding amounts and provided a security deposit.

[23] Certain entities have registered lien claims against Comstock in respect of labour and material allegedly supplied in relation to Enbridge Pipelines (Athabasca) Inc. in Calgary.

Restructuring and Refinancing Efforts

[24] In February 2013, the Comstock Group engaged Deloitte & Touche Corporate Finance Canada Inc. ("Deloitte") to conduct a market solicitation process with a view to attracting equity investors and/or purchasers of Comstock. Under this market solicitation process, the Comstock Group did not receive any letters of intention.

[25] Comstock's Counsel advised that the Comstock Group's management believes that, in view of cost overruns and the Comstock Group's liabilities, a number of potential purchasers would not submit letters of intention absent the protections afforded by a restructuring vehicle such as the CCAA or BIA.

Filing of Notices of Intention to Make a Proposal

[26] Comstock's counsel advised that in response to Chrysler Canada's lockout and, as a result of unsuccessful negotiations with a potential bridge financer, Comstock's Board of Directors determined that the Comstock Group had no other readily available options but to file Notices of Intention to Make a Proposal (the "NOI") pursuant to section 50.4(1) of the BIA on June 28, 2013 (the "NOI Proceedings") in order to preserve the *status quo* and prepare for a CCAA restructuring.

[27] On July 3, 2013, I issued an order appointing PwC as Interim Receiver for the limited and specific purpose of ensuring Comstock's payroll was funded by July 4, 2013 and granting the Interim Receiver a priority charge, including in priority to construction lien and trust claimants, pursuant to the Interim Receiver's Borrowing Charge under the order.

Anticipated Restructuring

[28] Comstock anticipates conducting a sales and investor solicitation process (the "SISP") to be administered by the monitor. Comstock and the monitor have advised that they will report back to court once the SISP has been fully developed.

[29] In order to avoid disruption to the ongoing operations of one of Comstock's major customers, Rio Tinto, and to minimize enhanced safety risks that would be incurred in the event of such a disruption, Rio Tinto agreed to a cost reimbursement agreement with Comstock in order to ensure that the project continues in an uninterrupted manner. In addition, Rio Tinto and BMO agreed to a cost sharing mechanic which would see Rio Tinto cover portions of the costs for overhead, infrastructure and administrative costs from which they believe they will benefit in relation to the Rio Tinto contracts and their related projects. The material terms of the cost reimbursement agreement are set out at paragraph 61 of Jeffrey Birkbeck's affidavit.

[30] The Comstock Group has secured a commitment for Debtor-In-Possession ("DIP") financing ("DIP Financing") from BMO (in such capacity, the "DIP Lender") in the amount of $7,800,000 under the terms of a DIP Commitment Letter dated July 9, 2013 (the "DIP Loan"), pursuant to which the DIP Financing will provide the Comstock Group with sufficient liquidity

to implement its initial restructuring initiatives pursuant to the CCAA and to continue with its core profitable projects during its restructuring.

[31] The DIP Financing conditions include a priority charge in favour of BMO in its capacity as DIP Lender, in priority to all other charges save and except the administration charge, and in priority to all present construction lien and trust claims, save and except in relation to those construction liens and trust claims arising in respect of the specific contracts and projects to which the DIP Loan is advanced following the date of such contract-specific and project-specific advances.

[32] The proposed DIP Financing contemplates that the DIP Lender will be granted a court-ordered priority charge (the "DIP Lender's Charge"), which is intended to rank in priority to all other charges save and except the administrative charge and will not apply to any holdbacks owing in respect of the Rio Tinto Kitimat, British Columbia project.

[33] Comstock's counsel advises that the DIP Financing is essential to the Comstock Group's restructuring and the maintenance of a substantial portion of the Comstock Group's large-scale construction project.

[34] The Comstock Group's counsel submits that the Comstock Group will not be able to obtain alternative financing and maintain its operations without DIP Financing and, as such, submits that court approval of the DIP Financing, including the DIP Credit Agreement and the DIP Lender's Charge, is necessary and in the best interests of the Comstock Group and its stakeholders.

[35] The 13-week cash flow forecast that was filed projects that, subject to obtaining DIP Financing, Comstock Group will have sufficient cash to fund its projected operating costs during this period. In the absence of the liquidity provided by the proposed DIP Financing, counsel submits that the Comstock Group would be unable to meet its obligations as they come due or continue as a going concern and, accordingly, is insolvent.

Continuation Under the CCAA

[36] Continuations of BIA Part III proposal proceedings under the CCAA are governed by section 11.6(a) of the CCAA which provides:

> 11.6 Notwithstanding the Bankruptcy and Insolvency Act,
>
> (a) proceedings commenced under Part III of the Bankruptcy and Insolvency Act may be taken up and continued under this Act only if a proposal within the meaning of the Bankruptcy and Insolvency Act has not been filed under that Part.

[37] Comstock, CCL Realty and CCL Equities have not filed a proposal under the BIA. I am satisfied that each member of the Comstock Group has satisfied the statutory condition prescribed by section 11.6(a) of the CCAA.

[38] I am also satisfied that the evidence filed by the Comstock Group supports a finding that continuation under the CCAA to permit stabilization of Comstock's projects and to enable a going concern sale of Comstock's business and assets is consistent with the purposes of the CCAA. Counsel submits, and I accept, that such stability and continuation of contracts afforded by a continuation under the CCAA would set the conditions for maximizing recovery for the senior secured creditor, preserve employment for many of the 1,000 independent contractors, and maintain the local economies that are highly integrated into the projects which Comstock services. Further, avoidance of the social and economic losses which would result from the liquidation and the maximization of value would be best achieved outside of bankruptcy.

[39] I am also satisfied that continuation under the CCAA is consistent with the jurisprudence on this issue. In arriving at this conclusion, I have considered the following cases: *Hemosol Corp. (Re)*, 34 B.L.R. (4th) 113, 36 C.B.R. (5th) 286, (Ont. S.C.J.); *(Re) Clothing for Modern Times*, 2011 ONSC 7522; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60; *Re Stelco Inc.* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.); and *Re Nortel Networks Corp.*, 55 C.B.R. (5th) 229 (Ont. S.C.J.).

[40] Comstock Group has also complied with section 10.2 of the CCAA insofar as the required cash flow statements have been filed.

[41] I am satisfied the record establishes that each entity within the Comstock Group is a "company" within the meaning of the CCAA, and that each entity of the Comstock Group is a debtor company within the meaning of the definition of "debtor company" as they are each insolvent and have each committed an act of bankruptcy in filing their respective NOIs.

[42] I am also satisfied that the Comstock Group meets the traditional test for insolvency (BIA, section 2) and the expanded test for insolvency based on a looming liquidity condition (see *Re Stelco Inc.* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J.); leave to appeal to C.A. refused, [2004] O.J. No. 1903; leave to appeal to SCC refused, [2004] S.C.C.A. No. 336 [*Stelco*]). In arriving at this conclusion in respect of the expanded test for insolvency, I have taken into account that there has been a decline in Comstock's financial performance due to cost overruns and litigation claims; Comstock Group has been unable to meet its covenants under the Credit Agreement and is in default under the Credit Facility; Comstock Group was not able to obtain additional or alternative financing outside of a court-ordered or statutory mandated process; there is no reasonable expectation that Comstock Group, in the near term, will be able to generate sufficient cash flow to support its existing debt obligations; and the cash flow forecast indicates that without additional funding, the Comstock Group will exhaust its available cash resources and will, thus, be unable to meet its obligations as they become due.

[43] I am satisfied that it is both necessary and appropriate to grant relief to Comstock under the CCAA. A stay of proceedings is appropriate in order to preserve the *status quo* and enable the Comstock Group to pursue and implement a rationalization of its business.

[44] The Comstock Group's counsel submits that certain suppliers to the Comstock Group are critical to its operations and that they must be paid in the ordinary course in order to avoid

disruption to its operations during the CCAA proceedings. Failure to pay these suppliers would likely result in them discontinuing critical ongoing services, which could ultimately put customer, supplier or Comstock's own personnel at risk on the job site. Accordingly, Comstock seeks authorization in the Initial Order to pay obligations owing to its suppliers, regardless of whether such obligations arise before or after the commencement of the CCAA proceedings, if in the opinion of Comstock and with the consent of the monitor, the supplier is critical to the business and ongoing operations.

[45] I am satisfied that this request is appropriate in the circumstances and it is to be included in the Initial Order.

Priority Charges

[46] Comstock Group seeks approval of certain court-ordered charges over its assets relating to its administrative costs, interim financing and the indemnification of its sole director and officer. The Initial Order contemplates that the Administration Charge, the DIP Charge, and the Director's Charge will rank in priority to all other present and future security interests, trusts, liens, construction liens, trust claims, charges and encumbrances, claims of secured creditors, statutory or otherwise, in favour of any person.

[47] The Administration Charge is contemplated to be in the amount of $1 million. The authority to grant such a charge is contained in section 11.52 of the CCAA. The list of factors to consider in approving an administration charge include:

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

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

(c) whether there is unwarranted duplication of roles;

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

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

(f) the position of the monitor.

See *Re Timminco Ltd.*, 2012 ONSC 106.

[48] Having reviewed the record and considered the foregoing, I am satisfied that the Administration Charge, with the requested priority ranking, is warranted and necessary and the same is granted in the amount of $1 million.

[49] Section 11.52(1) of the CCAA provides that the court may make such an order on notice to the secured creditors who are likely to be affected by the security. Notification of this motion has not been provided to all secured creditors and, accordingly, this issue is to be revisited on the comeback hearing.

[50] Comstock Group also seeks approval of the DIP Commitment Letter providing the DIP Loan of up to $7,800,000 to be secured by a charge over the assets of the Comstock Group. The DIP Lender's Charge is to be subordinate in priority to the Administration Charge.

[51] The authority to grant a DIP financing charge is contained in section 11.2 of the CCAA. The factors to be considered are set out in section 11.2(4) the CCAA.

[52] Counsel submits that the following factors support the granting of the DIP Lender's Charge, many of which incorporate the considerations enumerated in section 11.2(4):

> (a) the cash flow forecast indicates Comstock will require additional borrowing;
>
> (b) Comstock cannot obtain alternative new financing without new liquidity and a reduction of its significant indebtedness;
>
> (c) the proposed DIP Lenders have indicated that they will not provide the DIP Loan if the DIP Lender's Charge is not approved;
>
> (d) the DIP Loan is essential to the initiation of the restructuring;
>
> (e) the Comstock business is intended to continue to operate on a going concern basis during the CCAA proceedings under the direction of management with the assistance of advisors and the monitor;
>
> (f) the DIP Credit Agreement and the DIP Lender's Charge are necessary and in the best interests of the Comstock Group and its stakeholders; and
>
> (g) the proposed monitor is supportive of the DIP Loan and the DIP Lender's Charge.

[53] I am satisfied, having considered the foregoing factors, that the granting of a super-priority for DIP Financing is both necessary and appropriate in these circumstances.

[54] It is also necessary to consider the specific request for the creation of a super-priority in respect of a DIP Charge over construction lien claimants and various trust claimants. This issue was addressed at paragraphs 120-138 of the Comstock factum which reads:

> 120. Granting the Initial Order substantially in the form sought is consistent with the purpose of the CCAA, the leading jurisprudence with respect to priority, and is fair and reasonable to all affected parties under these exigent and urgent circumstances. Over 1,000 jobs are at stake, the progress of major infrastructure projects with national importance is in the balance, the safety of workers is in jeopardy, and the relevant local economies are relying upon the proper application of the CCAA's overriding purpose to effect a constructive solution in order to achieve a position way forward for all stakeholders.

121. In the event the DIP Charge, and the proposed priority thereof, is not authorized by this Honourable Court in the urgent and precarious circumstances confronting the Comstock Group and its stakeholders, the overriding purpose of the CCAA would be frustrated. The CCAA must always be read in light of the CCAA's overriding purpose – the provision of a constructive solution for all stakeholders and the avoidance of the devastating effects of bankruptcy or creditor initiated termination of business operations.

122. In the recent Supreme Court decision *Sun Indalex Finance, LLC v. United Steelworkers*, Chief Justice McLachlin addressed the overarching purpose of the CCAA as being the provision of a constructive solution for all stakeholders and the avoidance of the devastating effects of bankruptcy or creditor initiated termination of business operations:

> "[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 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." [Emphasis added]

Sun Indalex Finance, LLC v. United Steelworkers ("Indalex"), 2013 SCC 7 at para. 205.

123. Parliament has granted the Court powers under the CCAA to preserve the *status quo* in order to enable a company to restructure its affairs and to permit time for a plan of compromise to be prepared, filed, and considered by creditors. Section 11.2 of the CCAA establishes the provision of a super priority for DIP financing as a mechanism for accomplishing this goal.

124. The Ontario Legislature has created a statutory trust as a mechanism for accomplishing purpose of the *Construction Lien Act* (the "CLA"). In *Baltimore Aircoil of Canada Inc. v. ESD Industries Inc*., Justice Wilkins summarized the purpose and intent of the trust provisions of the CLA:

> "[31] The Construction Lien Act is a specific piece of legislation designed to remedy and rectify problems in the construction industry in Ontario. Section 8 creates trusts in respect of moneys in the hands of described persons under subsections 8(1)(a) and (b).
>
> …
>
> [36] The purpose and intent of the trust provisions of the Act is to impose the provisions of a trust on money owing or received, on account of a contract or sub-contract, which is for the benefit of the sub-contractors or other tradespeople who supplied services and materials to a job site. The legislation is clearly remedial in its effect. The legislation is clearly intended to rectify a circumstance in which persons who provide material and services to a job site, might find that money which was due to them in payment, has been used for other purposes."

Baltimore Aircoil of Canada Inc. v. ESD Industries Inc., 2002 CanLII 49492 (ONSC) at paras. 31, 36.

125. The Supreme Court of Canada's 2013 decision in *Indalex* is instructive when the Court is faced with a request for the creation of a super priority in respect of a DIP charge in favour of a DIP lender over a deemed trust.

126. In *Indalex*, the Supreme Court dealt with whether the priority established under s. 11.2 of the CCAA had priority over a deemed trust established provincially under s. 57(3) of the *Pension Benefits Act* RSO 1990, c. P-8. The Court unanimously agreed with the reasons of Deschamps J., who reasoned that:

> "[58] In the instant case, the CCAA judge, in authorizing the DIP charge,… did consider factors that were relevant to the remedial objective of the CCAA and found that Indalex had in fact demonstrated that the CCAA's purpose would be frustrated without the DIP charge. It will be helpful to quote the reasons he gave on April 17, 2009 in authorizing the DIP charge ((2009), 52 C.B.R. (5th) 61):
>
> > (a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring:

> (b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;
>
> (c) there is no other alternative available to the Applicants for a going concern solution;
>
> …
>
> (f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;
>
> …
>
> (h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing.

[59] 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 the 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". 2009 CanLII 37906 (ON SC), (2009 CanLII 37906, at paras. 7 and 8).

[60] In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one

> hand, s. 30(7) of the PPSA required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the CCAA has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

Indalex, at paras. 58-60, concurred with by McLachlin, C.J. at para. 242 and Lebel J. at para. 265.

127. The Supreme Court's approach in *Indalex* is both the correct resolution of the priority issue on the grounds of paramountcy in circumstances where, but for the granting of priority over a statutory deemed trust in favour of the DIP lender, the DIP financing would not be advanced and the distressed company and its stakeholders would see the immediate halt to the restructuring. It is also the practical approach and manifestation of the CCAA's overriding purpose placed into reality.

128. The current case before the Court is analogous to *Indalex* in many respects:

(a) Comstock is in need of the additional financing in order to support operations during the period of a going concern restructuring;

(b) No creditor will advance funds to Comstock without the priming of the DIP facility;

(c) there is a benefit to the breathing space that would be afforded by the DIP facility that will permit Comstock to identify a going concern solution;

(d) there is no other alternative available to Comstock for a going concern solution;

(e) the benefit to stakeholders and creditors of the DIP facility outweighs any potential prejudice to unsecured creditors, secured creditors, and potential trust beneficiaries that may arise as a result of the granting of super-priority secured financing against the assets of the Comstock Group;

(f) the balancing of the prejudice weighs in favour of the approval of the DIP Financing;

(g) a deemed trust arises as a result of a provincial statute; and

(h) the federal and provincial laws are inconsistent as they give rise to different, and conflicting, priority.

129. The failure to continue Comstock as a going concern will result in substantial costs to all parties contracting with Comstock. The transition alone will require parties to, *inter alia*: (a) re-bid on proposals; (b) negotiate new union agreements; (c) endure significant business interruption and resumption costs; (d) risk the viability of projects; (e) significantly disrupt local economies and those connected to them; and (f) place the safety at workers at risk.

130. This case is also similar to *Indalex*, as there has not been the opportunity to provide notice to all affected parties. Comstock proposes that substituted service is a reasonable solution to the problem of providing notice in time-constrained circumstances.

131. In *Royal Oaks Mines Inc. Re*, Justice Blair, as he then was, cautioned against the priming of DIP financing where there had not been notice to affected parties. However, Justice Blair allowed that a super priority could be granted as a means to effect "what is reasonably necessary to meet the debtor company's urgent needs over the sorting-out period".

Royal Oak Mines Inc., Re, 1999 CanLII 14840 at para. 24.

132. In urgent CCAA filings where time compression and logistical constraints result in the limited or non-notification of certain secured creditors on the initial CCAA application, the desire to balance a distressed company's requirement to obtain vital and time-sensitive financing with the protection of other creditors' rights is put to the test. The customary comeback provisions in the Initial order is an appropriate protection afforded to such secured creditors in circumstances where delay of Court intervention would result in the imminent (or in the case of Comstock, immediate) expiry of the company's enterprise.

133. In such circumstances, it is open to secured creditors to seek to review such Court ordering of priorities and parties enjoying such priority in view of their advancement of funds pursuant to such Court-ordered charges may have to ensure such a review and further justify the continued operation of such priority later in the restructuring proceeding. This is a fair and practical result in urgent circumstances. Credit and priority should be given, at least initially, in such exigent circumstances to the "man in the arena" in the commercial conception of the Rooseveltian ethos – the DIP lender who advances funds in the face of limited

notice to interested parties with a view to preventing the otherwise certain peril of a company in distress.

134. The inherent tension that arises between the prescribed notice requirements and the rush to the Court house steps in pan-Canadian CCAA applications is further ameliorated in situations where the secured creditors not receiving notice would not likely be affected when considered against the backdrop of the practical realities of restructuring scenarios and the alternatives to permitting the priming charge in favour of a DIP lender. In the current proceeding, the entities who have registered security interests in the Comstock Group appear to be equipment and vehicle lessors. In a shut-down scenario, their interests would be not likely be [sic] affected differently given that the receivables in such a case would not likely be collected to satisfy such interests.

135. Given the existent circumstances confronting Comstock and its stakeholders, and the large number of affected parties, it is necessary that the DIP loan be given the priority sought in order to allow Comstock to meet its urgent needs during the sorting out period.

136. The Proposal Trustee is of the view that the anticipated DIP Facility represents the only alternative available to the Comstock Group to ensure the continuation of operations. Furthermore, the Proposal Trustee is of the view that the costs associated with the DIP Facility, interest expense, permitted fees and expenses, and facility fees are commercially reasonable.

137. The Proposal Trustee is supportive of the Comstock Group's efforts to obtain the DIP financing so as to avoid liquidation and provide time to attempt to implement a restructuring and going concern sale. Without access to financing under the DIP Facility, the Comstock Group will face an immediate liquidity crisis and would have to cease operations.

138. The purpose of the CCAA, the application of paramountcy in relation to the taking of priority of DIP facilities over provincial deemed trusts, and the commercial realities of this case all militate in favour of the proposed priority of the DIP Loan as set out in the proposal Initial Order.

[55] This reasoning is applicable in this case and supports the conclusion that the DIP Charge is to have priority over construction lien claims and various trust claims. I accept the statements made at paragraph 128 of counsel's factum set out above. In my view, the Comstock Group is unlikely to survive without DIP Financing supported by the super priority DIP Charge, which is granted.

[56] Comstock Group also seeks a charge in the amount of $4.6 million over the assets of the Applicants (the "Director's Charge") to indemnify the sole director of the Comstock Group in respect of liabilities he may incur in his capacity as a director and officer of the Comstock

Group. The Director's Charge is to be subordinate to the Administration Charge and the DIP Lender's Charge.

[57] The authority to grant such a charge is set out in section 11.51 of the CCAA.

[58] I am satisfied that granting the Director's Charge, with the requested priority ranking, is warranted and necessary in the circumstances and is granted in the amount of $4.6 million. Again, I note that section 11.51 requires notice to secured creditors who are likely to be affected by the security or charge. Not all secured creditors have been notified and, accordingly, this issue is to be revisited at the comeback hearing.

Substituted Service

[59] Counsel advises that, in view of the extensive number of potentially interested parties, including contractors, subcontractors and tradespeople, the Comstock Group is of the view that notice of the effect of the proposed DIP Charge on one occasion in the The Globe and Mail (National Edition) and the Daily Commercial News, Ontario's only daily construction news newspaper, in a court-approved form, is reasonably likely to bring this application to the attention of contractors and subcontractors that may be affected. I accept this argument and authorize substituted service in the suggested manner.

Sealing of Documents

[60] Comstock's counsel requested that the Confidential Supplement be sealed in order to protect against the disclosure of sensitive and confidential financial information to third parties, the disclosure of which, it is submitted, could adversely affect the Comstock Group and its stakeholders. The "Confidential Supplement – Financial Statements" is documented as Exhibit J to the affidavit of Mr. Birkbeck sworn on July 9, 2013; paragraph 26 of the Birkbeck Affidavit refers to Financial Statements that will be provided to the court at the return of the motion, and paragraph 43 of the Birkbeck Affidavit requests that Confidential Exhibit "J" be sealed from the public record in its entirety.

[61] In my view, having considered section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 and the governing jurisprudence in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra Club*], I am satisfied that the sealing order should be granted and the confidential material is to be sealed.

Discharge of the Interim Receiver

[62] On July 4, 2013, Comstock required $1.5 million in order to meet its payroll and independent contractor obligations. On July 3, 2013, Comstock brought a motion seeking an order authorizing BMO to make an immediate advance on a priority basis in order to permit Comstock to fund its payroll and independent contractor obligations. The motion was granted and on July 3, 2013, an order was issued appointing PwC as Interim Receiver for the limited and specific purpose of ensuring Comstock's payroll was funded by July 4, 2013 and granting the

Interim Receiver a priority charge, including in priority to construction lien and trust claimants, pursuant to the Interim Receiver's Borrowing Charge under the order.

[63] The Interim Receiver has now discharged its duties in connection with its limited purpose appointment and I am satisfied that it is appropriate and reasonable for the interim receivership proceedings to be terminated and to discharge the Interim Receiver. In making this order, I recognize that the contemplated DIP financing will be used, in part, to repay the Interim Receiver's borrowings to BMO, leaving no further purpose for the interim receivership proceedings. The fees and disbursements of the Interim Receiver and its counsel can roll over in to the Administration Charge and be approved as part of the monitor's fee approvals inside the CCAA proceedings.

Disposition

[64] In the result, the motion is granted. Two orders have been signed; namely, the Initial Order under the CCAA, which recognizes a continuation of the restructuring proceedings under the CCAA, and an order discharging PwC in its capacity as Interim Receiver of Comstock.

[65] A comeback hearing, as provided for in paragraph 61 of the Initial Order, is scheduled for Friday, July 19, 2013.

Morawetz J.

Date: July 16, 2013

TAB 15

Sun Indalex Finance, LLC *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*

- and -

George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*

- and -

FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited *Appellant*

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*

- and -

United Steelworkers *Appellant*

Sun Indalex Finance, LLC *Appelante*

c.

Syndicat des Métallos, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie et Fred Granville *Intimés*

- et -

George L. Miller, syndic de faillite des débitrices Indalex É.-U., nommé en vertu du chapitre 7 *Appelant*

c.

Syndicat des Métallos, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie et Fred Granville *Intimés*

- et -

FTI Consulting Canada ULC, en sa qualité de contrôleur d'Indalex Limited désigné par le tribunal, au nom d'Indalex Limited *Appelante*

c.

Syndicat des Métallos, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie et Fred Granville *Intimés*

- et -

Syndicat des Métallos *Appelant*

v.

Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) and Superintendent of Financial Services *Respondents*

and

Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association *Interveners*

Indexed as: Sun Indalex Finance, LLC *v.* United Steelworkers

2013 SCC 6

File No.: 34308.

2012: June 5; 2013: February 1.

Present: McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell and Moldaver JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Pensions — Bankruptcy and Insolvency — Priorities — Company who was both employer and administrator of pension plans seeking protection from creditors under Companies' Creditors Arrangement Act ("CCAA") — Pension funds not having sufficient assets to fulfill pension promises made to plan members — Company entering into debtor in possession ("DIP") financing allowing it to continue to operate — CCAA court granting priority to DIP lenders — Proceeds of sale of business insufficient to pay back DIP lenders — Whether pension wind-up deficiencies subject to deemed trust — If so, whether deemed trust superseded by CCAA priority by virtue of doctrine of federal paramountcy — Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(3), (4), 75(1)(a), (b) — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

c.

Morneau Shepell Ltd. (anciennement connue sous le nom de Morneau Sobeco, société en commandite) et Surintendant des services financiers *Intimés*

et

Surintendant des services financiers, Institut d'insolvabilité du Canada, Congrès du travail du Canada, Fédération canadienne des retraités, Association canadienne des professionnels de l'insolvabilité et de la réorganisation et Association des banquiers canadiens *Intervenants*

Répertorié : Sun Indalex Finance, LLC *c.* Syndicat des Métallos

2013 CSC 6

N° du greffe : 34308.

2012 : 5 juin; 2013 : 1er février.

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

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Pensions — Faillite et insolvabilité — Priorités — Société à la fois employeur et administrateur de régimes de retraite ayant demandé la protection contre ses créanciers en application de la Loi sur les arrangements avec les créanciers des compagnies (« LACC ») — Actif des caisses de retraite insuffisant pour verser les prestations promises aux participants des régimes — Financement obtenu par la société à titre de débiteur-exploitant (« DE ») lui ayant permis de poursuivre ses activités — Tribunal chargé d'appliquer la LACC ayant accordé priorité aux prêteurs DE — Insuffisance du produit de la vente pour rembourser les prêteurs DE — Les déficits de liquidation des régimes de retraite sont-ils visés par la fiducie réputée? — Dans l'affirmative, la prépondérance fédérale fait-elle en sorte que la priorité issue de l'application de la LACC a préséance sur la fiducie réputée? — Loi sur les régimes de retraite, L.R.O. 1990, ch. P.8, art. 57(3), (4), 75(1)a), b) — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36.

Pensions — Trusts — Company who was both employer and administrator of pension plans seeking protection from creditors under CCAA — Pension funds not having sufficient assets to fulfill pension promises made to plan members — Whether pension wind-up deficiencies subject to deemed trust — Whether company as plan administrator breached fiduciary duties — Whether pension plan members are entitled to constructive trust.

Civil Procedure — Costs — Appeals — Standard of review — Whether Court of Appeal erred in costs endorsement concerning one party.

Indalex Limited ("Indalex"), the sponsor and administrator of two employee pension plans, one for salaried employees and the other for executive employees, became insolvent. Indalex sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The salaried plan was being wound up when the *CCAA* proceedings began. The executive plan had been closed but not wound up. Both plans had wind-up deficiencies.

In a series of court-sanctioned steps, the company was authorized to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The *CCAA* court granted the DIP lenders, a syndicate of pre-filing senior secured creditors, priority over the claims of all other creditors. Repayment of these amounts was guaranteed by Indalex U.S.

Ultimately, with the approval of the *CCAA* court, Indalex sold its business but the purchaser did not assume pension liabilities. The proceeds of the sale were not sufficient to pay back the DIP lenders and so Indalex U.S., as guarantor, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority. The *CCAA* court authorized a payment in accordance with the priority but ordered an amount be held in reserve, leaving the plan members' arguments on their rights to the proceeds of the sale open for determination later.

The plan members challenged the priority granted in the *CCAA* proceedings. They claimed that they had priority in the amount of the wind-up deficiency by virtue of a statutory deemed trust under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and a constructive trust arising from Indalex's alleged breaches

Pensions — Fiducies — Société à la fois employeur et administrateur de régimes de retraite ayant demandé la protection contre ses créanciers en application de la LACC — Actif des caisses de retraite insuffisant pour verser les prestations promises aux participants des régimes — Les déficits de liquidation des régimes de retraite sont-ils visés par la fiducie réputée? — La société a-t-elle manqué à ses obligations fiduciaires d'administrateur des régimes? — Les participants des régimes de retraite ont-ils droit à une fiducie par interprétation?

Procédure civile — Dépens — Appels — Norme de contrôle — La décision de la Cour d'appel sur les dépens d'une partie est-elle erronée?

Indalex Limited (« Indalex »), le promoteur et l'administrateur de deux régimes de retraite, l'un pour les salariés, l'autre pour les cadres, est devenue insolvable. Elle a demandé la protection contre ses créanciers sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). Le régime des salariés était en cours de liquidation lorsque la procédure fondée sur la *LACC* a été engagée. Le régime des cadres n'acceptait plus de participants, mais il n'était pas liquidé. Les deux régimes accusaient un déficit de liquidation.

Une série de mesures avalisées par le tribunal a permis à la société d'obtenir un financement de débiteur-exploitant (« DE ») et de poursuivre ses activités. Le tribunal chargé de l'application de la *LACC* a accordé aux prêteurs DE, un consortium composé de créanciers qui bénéficiaient d'une garantie de premier rang avant le début de la procédure, une priorité sur tous les autres créanciers. Le remboursement des sommes empruntées était garanti par Indalex É.-U.

Finalement, sur approbation du tribunal appliquant la *LACC*, Indalex a vendu son entreprise, mais l'acquéreur n'a pas repris à son compte les engagements de retraite. Le produit de la vente n'étant pas suffisant pour rembourser les prêteurs DE, Indalex É.-U., à titre de caution, a payé la différence et a acquis de ce fait la créance prioritaire des prêteurs DE. Le tribunal a autorisé le paiement conformément à l'ordre de priorité, mais il a également ordonné la retenue de fonds en réserve, remettant à plus tard l'examen de l'argumentation des participants relative à leur droit au produit de la vente.

Les participants des régimes ont contesté la priorité accordée dans le cadre de la procédure fondée sur la *LACC*. Ils ont fait valoir qu'ils avaient priorité pour le montant du déficit de liquidation en raison de la fiducie réputée créée par le par. 57(4) de la *Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8 (« *LRR* »), et de la fiducie

of fiduciary duty as administrator of the pension funds. The judge at first instance dismissed the plan members' motions concluding that the deemed trust did not apply to wind up deficiencies. He held that, with respect to the wind-up deficiency, the plan members were unsecured creditors. The Court of Appeal reversed this ruling and held that the pension plan wind-up deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing priority and over other secured creditors. In addition, the Court of Appeal rejected a claim brought by the United Steelworkers, which represented some members of the salaried plan, seeking payment of its costs from the latter's pension fund.

Held (LeBel and Abella JJ. dissenting): The Sun Indalex Finance, George L. Miller and FTI Consulting appeals should be allowed.

Held: The United Steelworkers appeal should be dismissed.

(1) *Statutory Deemed Trust*

Per Deschamps and Moldaver JJ.: It is common ground that the contributions provided for in s. 75(1)(a) of the *PBA* are covered by the deemed trust contemplated by s. 57(4) of the *PBA*. The only question is whether this statutory deemed trust also applies to the wind-up deficiency payments required by s. 75(1)(b). The response to this question as it relates to the salaried employees is affirmative in view of the provision's wording, context and purpose. The situation is different with respect to the executive plan as s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up.

The wind-up deemed trust provision (s. 57(4) *PBA*) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due". Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of

par interprétation résultant de manquements allégués d'Indalex à son obligation fiduciaire d'administrateur des régimes. En première instance, le juge a rejeté les motions des participants, concluant que la fiducie réputée ne s'appliquait pas aux déficits de liquidation. Il a conclu que, pour ce qui était du déficit de liquidation, les participants étaient des créanciers chirographaires. La Cour d'appel a infirmé la décision et statué que les déficits de liquidation des régimes de retraite faisaient l'objet d'une fiducie réputée et d'une fiducie par interprétation qui prenaient rang avant la créance des prêteurs DE bénéficiant d'une priorité et celles des autres créanciers garantis. En outre, elle a rejeté la prétention du Syndicat des Métallos, qui représentait quelques-uns des participants du régime des salariés, à savoir qu'il avait droit au paiement de ses dépens par prélèvement sur la caisse de retraite des salariés.

Arrêt (les juges LeBel et Abella sont dissidents) : Les pourvois interjetés par Sun Indalex Finance, George L. Miller et FTI Consulting sont accueillis.

Arrêt : Le pourvoi interjeté par le Syndicat des Métallos est rejeté.

(1) *La fiducie réputée d'origine législative*

Les juges Deschamps et Moldaver : Il est bien établi que la fiducie réputée créée par le par. 57(4) de la *LRR* s'applique aux cotisations visées à l'al. 75(1)a) de la *LRR*. La seule question est de savoir si cette fiducie réputée d'origine législative s'applique aussi aux paiements au titre du déficit de liquidation exigés par l'al. 75(1)b). Dans le cas des salariés, la réponse est oui, compte tenu du texte, du contexte et de l'objet par. 57(4). Il n'en va pas de même pour le régime des cadres étant donné que cette disposition prévoit que la fiducie réputée en cas de liquidation ne prend naissance qu'à la liquidation du régime.

Le paragraphe 57(4) de la *LRR*, qui crée la fiducie réputée en cas de liquidation, ne comporte aucune limite expresse aux « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues ». L'alinéa 75(1)a) prévoit expressément que l'employeur verse « un montant égal au total de tous les paiements » *accumulés*, même s'ils ne sont pas encore dus à la date de la liquidation, tandis que l'al. 75(1)b) parle d'un « montant » calculé à partir de la valeur de l'actif et du passif *accumulés*, lorsque le régime est liquidé. Puisque le montant des paiements (al. 75(1)a)) et le montant établi en soustrayant l'actif du passif accumulé à la date de la liquidation (al. 75(1)b)) doivent tous les deux être versés à la liquidation à titre de cotisations de l'employeur, ils entrent tous les deux dans le sens ordinaire des mots

s. 57(4) of the *PBA*: "amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations".

The time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind up. The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

It can be seen from the legislative history that the protection has expanded from (1) only the service contributions that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind up. Therefore, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection.

The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. The remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust. In this case, the Court of Appeal correctly held with respect to the salaried plan, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

Per LeBel and Abella JJ.: There is agreement with the reasons of Deschamps J. on the statutory deemed trust issue.

Per McLachlin C.J. and Rothstein and Cromwell JJ.: Given that there can be no deemed trust for the executive plan because that plan had not been wound up at the relevant date, the main issue in connection with the salaried plan boils down to the narrow statutory interpretative question of whether the wind-up deficiency provided for in s. 75(1)(b) is "accrued to the date of the wind up" as required by s. 57(4) of the *PBA*.

When the term "accrued" is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable

employés au par. 57(4) de la *LRR* : « montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ».

La date où s'effectue le calcul est sans importance du moment que le passif est évalué à la date de la liquidation. Le fait que le montant précis des cotisations n'est pas établi au moment de la liquidation ne confère pas aux cotisations un caractère éventuel qui ferait en sorte qu'elles ne seraient pas accumulées d'un point de vue comptable. On peut donc considérer que le passif « accumulé » englobe les cotisations exigées à l'al. 75(1)b) de la *LRR*.

L'historique législatif montre que la protection, qui couvrait d'abord (1) uniquement les cotisations dues, s'est étendue (2) aux montants payables calculés comme s'il y avait liquidation du régime, (3) puis aux montants dus ou accumulés à la liquidation, à l'exclusion des paiements au titre du déficit de liquidation (4) et, enfin, à tous les montants dus ou accumulés à la liquidation. L'historique législatif mène donc à la conclusion qu'une interprétation étroite qui dissocierait le paiement requis de l'employeur par l'al. 75(1)b) de la *LRR* de celui exigé à l'al. 75(1)a) irait à l'encontre de la tendance du législateur ontarien à offrir une protection de plus en plus étendue.

La disposition qui crée une fiducie réputée a une vocation réparatrice. Elle vise à protéger les intérêts des participants. Cette fin réparatrice favorise une interprétation qui inclut tous les paiements à la liquidation dans la valeur de la fiducie réputée. En l'espèce, c'est à bon droit que la Cour d'appel a jugé qu'Indalex était réputée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation du régime des salariés.

Les juges LeBel et Abella : Il y a accord avec les motifs de la juge Deschamps sur la question de la fiducie réputée d'origine législative.

La juge en chef McLachlin et les juges Rothstein et Cromwell : Étant donné qu'il ne peut y avoir de fiducie réputée au bénéfice du régime des cadres, celui-ci n'ayant pas été liquidé à la date considérée, il s'agit donc essentiellement — pour ce qui concerne le régime des salariés — d'interpréter une disposition de la loi et de déterminer si le déficit de liquidation décrit à l'al. 75(1)b) est « accumul[é] à la date de la liquidation » comme l'exige le par. 57(4) de la *LRR*.

Lorsque le terme « accumulé » [et plus encore son équivalent anglais « *accrued* »] est employé de pair avec une somme, il renvoie généralement à un élément

but which may or may not be due. In the present case, s. 57(4) uses the word "accrued" in contrast to the word "due". Given the ordinary meaning of the word "accrued", the wind-up deficiency cannot be said to have "accrued" to the date of wind up. The extent of the wind-up deficiency depends on employee rights that arise only upon wind up and with respect to which employees make elections only after wind up. The wind-up deficiency therefore is neither ascertained nor ascertainable on the date fixed for wind up.

The broader statutory context reinforces the view according to which the most plausible grammatical and ordinary sense of the words "accrued to the date of wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind up. Moreover, the legislative evolution and history of the provisions at issue show that the legislature never intended to include the wind-up deficiency in a statutory deemed trust. Rather, they reinforce the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind up.

The legislation differentiates between two types of employer liability relevant to this case. The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second relates to additional contributions required when a plan is wound up which I have referred to as the wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer's potential future liabilities that arise once the plan is wound up.

In this case, the s. 57(4) deemed trust does not apply to the wind-up deficiency. This conclusion to exclude the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. The legislature has created trusts over contributions that were due or accrued to the date of the wind up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed

dont la valeur est actuellement mesurée ou mesurable, mais qui peut ou non être dû. Dans la présente affaire, au par. 57(4), le terme « accumulées » [« *accrued* »] est utilisé par opposition à « dues ». Suivant le sens ordinaire du mot « accumulé », on ne peut considérer que le déficit l'était à la date de la liquidation. Le montant du déficit de liquidation dépend de droits qui ne prennent naissance qu'à la liquidation et à l'égard desquels les employés ne font des choix qu'après la liquidation. Le déficit de liquidation n'est donc ni déterminé ni déterminable à la date de liquidation prévue.

Le contexte législatif général appuie la thèse que, suivant leur sens ordinaire et grammatical le plus plausible, les mots « accumulées à la date de la liquidation » renvoient aux sommes déterminées de façon précise immédiatement avant la date de prise d'effet de la liquidation du régime. Qui plus est, il appert de l'évolution et de l'historique des dispositions en cause que le législateur n'a jamais voulu que le déficit de liquidation fasse l'objet d'une fiducie réputée d'origine législative. Ils confirment en fait l'intention du législateur d'*exclure* du champ d'application de la fiducie réputée les obligations qui naissent seulement *à la* date même de la liquidation.

La loi établit une distinction entre deux types d'obligation de l'employeur qui sont pertinents en l'espèce. Il y a d'une part les cotisations requises pour acquitter le coût du service courant et d'autres paiements qui sont dus ou qui sont accumulés sur une base quotidienne jusqu'à la date considérée. Il s'agit des paiements prévus à l'actuel al. 75(1)a), à savoir ceux qui sont dus ou accumulés, mais qui n'ont pas été versés. D'autre part, il y a les cotisations supplémentaires exigées lorsque le régime est liquidé (le déficit de liquidation). Ces paiements font l'objet de l'al. 75(1)b). Il appert de l'évolution et de l'historique législatifs que les fiducies réputées des par. 57(3) et (4) devaient seulement englober les cotisations du premier type et que le législateur n'a jamais voulu que les obligations ultérieures éventuelles de l'employeur qui naissent une fois le régime liquidé fassent l'objet d'une fiducie réputée ou d'un privilège.

En l'espèce, la fiducie réputée du par. 57(4) ne vise pas le déficit de liquidation. Pareille exclusion est conforme aux objectifs généraux de la loi. Le législateur a créé des fiducies à l'égard des cotisations qui étaient dues ou accumulées à la date de la liquidation afin de protéger, dans une certaine mesure, les droits des bénéficiaires d'un régime de retraite et ceux des employés contre les réclamations des autres créanciers de l'employeur. Or, il y a de bonnes raisons de penser que c'est en raison d'autres objectifs concurrents que le législateur s'est abstenu d'accroître la portée de la fiducie réputée et d'y

trust to the wind-up deficiency. While the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. The decision as to the level of protection that should be provided to pension beneficiaries under the *PBA* is one to be left to the Ontario legislature.

(2) *Priority Ranking*

Per Deschamps and Moldaver JJ.: A statutory deemed trust under provincial legislation such as the *PBA* continues to apply in federally-regulated *CCAA* proceedings, subject to the doctrine of federal paramountcy. In this case, granting priority to the DIP lenders subordinates the claims of other stakeholders, including the plan members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

Per McLachlin C.J. and Rothstein and Cromwell JJ.: Although there is disagreement with Deschamps J. in connection with the scope of the s. 57(4) deemed trust, it is agreed that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy.

Per LeBel and Abella JJ.: There is agreement with the reasons of Deschamps J. on the priority ranking issue as determined by operation of the doctrine of federal paramountcy.

(3) *Constructive Trust as a Remedy for Breach of Fiduciary Duties*

Per McLachlin C.J. and Rothstein and Cromwell JJ.: It cannot be the case that a conflict of interests arises simply because an employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the beneficiaries of the corporation's pension plan. This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles of employer and pension plan administrator being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. Rather, a situation of conflict of interest occurs

inclure le déficit de liquidation. La protection des régimes de retraite constitue certes un objectif important, mais il n'appartient pas à la Cour de décider de la mesure dans laquelle cet objectif sera poursuivi ou d'autres intérêts en souffriront. Il appartient à l'Assemblée législative de l'Ontario de décider du degré de protection qu'il convient d'accorder aux bénéficiaires d'un régime de retraite sous le régime de la *LRR*.

(2) *Priorité de rang*

Les juges Deschamps et Moldaver : Une fiducie réputée établie par une loi provinciale comme la *LRR* continue de s'appliquer dans les instances régies par la *LACC*, relevant de la compétence fédérale, sous réserve de la doctrine de la prépondérance fédérale. En l'espèce, accorder priorité aux prêteurs DE relègue à un rang inférieur les créances des autres intéressés, notamment les participants. Cette priorité d'origine judiciaire fondée sur la *LACC* a le même effet qu'une priorité d'origine législative. Les dispositions fédérales et provinciales sont inconciliables, car elles produisent des ordres de priorité différents et conflictuels. L'application de la doctrine de la prépondérance fédérale donne à la charge DE priorité sur la fiducie réputée.

La juge en chef McLachlin et les juges Rothstein et Cromwell : Malgré le désaccord avec la juge Deschamps sur la portée de la fiducie réputée du par. 57(4), si une fiducie est réputée exister en l'espèce, la créance DE prend rang avant elle en application de la doctrine de la prépondérance fédérale.

Les juges LeBel et Abella : Il y a accord avec les motifs de la juge Deschamps sur la priorité de rang déterminée par application du principe de la prépondérance fédérale.

(3) *La fiducie par interprétation comme réparation du manquement à l'obligation fiduciaire*

La juge en chef McLachlin et les juges Rothstein et Cromwell : Il ne saurait y avoir conflit d'intérêts uniquement parce que l'employeur, dans l'exercice de son pouvoir de gérer la société au mieux des intérêts de celle-ci, prend une mesure susceptible d'avoir une incidence sur les bénéficiaires du régime de retraite qu'il administre. Telle est la conclusion qui découle nécessairement du contexte législatif. L'existence de conflits apparents qui sont inhérents à la double fonction d'employeur et d'administrateur de régime exercée par une même personne ne peut constituer un manquement à l'obligation fiduciaire, car ces conflits sont expressément autorisés par la loi, laquelle permet à une personne

when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation.

Seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex. Likewise, failure to give notice of the initial *CCAA* proceedings was not a breach of fiduciary duty to avoid conflicts of interest in this case. Indalex's decision to act as an employer-administrator cannot give the plan members any greater benefit than they would have if their plan was managed by a third party administrator.

It was at the point of seeking and obtaining the DIP orders without notice to the plan beneficiaries and seeking and obtaining the sale approval order that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator. However, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plans' beneficiaries would have the opportunity to have their interests protected in the *CCAA* proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

An employer-administrator who finds itself in a conflict must bring the conflict to the attention of the *CCAA* judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest. Accordingly, Indalex breached its fiduciary duty by failing to take steps to ensure that the pension plans had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator, particularly when it sought the DIP financing approval, the sale approval and a motion to voluntarily enter into bankruptcy.

Regardless of this breach, a remedial constructive trust is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. There is no evidence to support the contention that Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings resulted in any such asset. Furthermore, to impose a constructive trust in

d'exercer les deux fonctions. Il y a en fait conflit d'intérêts lorsqu'il existe un risque important que les obligations de l'employeur-administrateur envers la société nuisent de façon appréciable à la défense des intérêts des bénéficiaires d'un régime.

À elle seule, la demande initiale de protection de la société contre ses créanciers ne plaçait pas Indalex en situation de conflit d'intérêts ou d'obligations. De même, l'omission de donner avis de la demande initiale présentée sur le fondement de la *LACC* ne constituait pas un manquement à l'obligation fiduciaire d'éviter tout conflit d'intérêts. La décision d'Indalex d'agir à titre d'employeur-administrateur ne peut conférer aux participants plus d'avantages que si l'administration de leurs régimes avait été confiée à un tiers indépendant.

C'est lors de la demande et de l'obtention des ordonnances DE sans préavis aux bénéficiaires des régimes, ainsi que de la demande et de l'obtention de l'approbation de la vente que les intérêts commerciaux d'Indalex sont entrés en conflit avec ses obligations d'administrateur des régimes de retraite. Cependant, la difficulté résidait en l'espèce non pas dans l'existence du conflit, mais bien dans l'omission d'Indalex de prendre quelque mesure afin que les bénéficiaires des régimes aient la possibilité de veiller à la protection de leurs intérêts dans le cadre de la procédure fondée sur la *LACC* comme si l'administrateur des régimes avait été indépendant. En résumé, le manquement ne tenait pas à l'existence du conflit, mais plutôt à l'omission de prendre les mesures qu'elle commandait.

L'employeur-administrateur qui se trouve en situation de conflit doit en informer le juge saisi sur le fondement de la *LACC*. Il ne suffit pas d'inscrire les bénéficiaires sur la liste des créanciers; le juge doit être informé que le débiteur, en sa qualité d'administrateur de régime, est en conflit d'intérêts ou susceptible de l'être. En conséquence, Indalex a manqué à son obligation fiduciaire en omettant de faire ce qu'il fallait pour que les bénéficiaires des régimes puissent être dûment représentés dans le cadre de cette procédure comme si l'administrateur des régimes avait été indépendant, en particulier lorsqu'elle a demandé l'approbation du financement DE et de la vente, puis présenté une motion en vue de faire faillite.

Indépendamment de ce manquement, l'imposition d'une fiducie par interprétation ne constitue une réparation appropriée que si un actif déterminable résulte des actes de l'auteur du manquement et qu'il serait injuste que ce dernier ou, parfois, un tiers, conserve cet actif. Aucun élément de preuve n'appuie la prétention qu'un tel actif a résulté de l'omission d'Indalex de pallier véritablement les conflits d'intérêts auxquels a donné lieu

response to a breach of fiduciary duty to ensure for the pension plans some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

Per Deschamps and Moldaver JJ.: A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the corporate employer must be prepared to resolve conflicts where they arise. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Specifically, in seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the plan members' priority. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the plan members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the plan members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the plan members.

As for the constructive trust remedy, it is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. There is agreement with Cromwell J. that this condition was not met in the case at bar and his reasoning on this issue is adopted. Moreover, it was unreasonable for the Court of Appeal to reorder the priorities in this case.

la procédure fondée sur la *LACC*. Qui plus est, imposer une fiducie par interprétation par suite du manquement à l'obligation fiduciaire de veiller à ce que les bénéficiaires des régimes jouissent de garanties procédurales, alors qu'ils en ont joui dans les faits, se révèle inéquitable au vu de l'ensemble des circonstances.

Les juges Deschamps et Moldaver : L'employeur constitué en société qui décide d'agir en qualité d'administrateur d'un régime accepte les obligations fiduciaires inhérentes à cette fonction. Puisque les administrateurs d'une société ont aussi une obligation fiduciaire envers la société, l'employeur doit être prêt à résoudre les conflits lorsqu'ils surgissent. L'employeur qui administre un régime de retraite n'est pas autorisé à négliger ses obligations fiduciaires envers les participants au régime et à favoriser les intérêts concurrents de la société sous prétexte qu'il porte le « chapeau » de dirigeant de la société. Ce sont les conséquences d'une décision, et non sa nature qui doivent être prises en compte.

En l'espèce, il y avait bien conflit entre les obligations fiduciaires qui incombaient à Indalex en sa qualité d'administratrice des régimes et les décisions de gestion qu'elle devait prendre dans le meilleur intérêt de la société. Plus précisément, en demandant au tribunal d'autoriser une forme de financement selon laquelle un créancier se verrait accorder priorité sur tous les autres, Indalex demandait au tribunal chargé d'appliquer la *LACC* de faire échec à la priorité dont bénéficiaient les participants. L'intérêt de la société consistait à rechercher la meilleure façon de survivre dans un contexte d'insolvabilité. La poursuite de cet intérêt était incompatible avec le devoir de l'administrateur des régimes envers les participants de veiller à ce que toutes les cotisations soient versées aux caisses de retraite. En l'occurrence, ce devoir de l'administrateur des régimes impliquait, plus particulièrement, qu'il donne à tout le moins aux participants la possibilité d'exposer leurs arguments. Cela signifiait, au minimum, que les participants avaient droit à un avis raisonnable de la motion en autorisation du financement DE. La teneur de cette motion, présentée sans avis convenable, allait à l'encontre des intérêts des participants.

En ce qui concerne la fiducie par interprétation, il est bien établi en droit qu'une réparation de la nature d'un droit de propriété n'est généralement accordée qu'à l'égard d'un bien ayant un lien direct avec un acte fautif ou d'un bien qui peut être rattaché à un tel bien. Il y a accord avec le juge Cromwell sur le fait que cette condition n'était pas remplie en l'espèce et il a été souscrit à ses motifs sur cette question. En outre, il était déraisonnable pour la Cour d'appel de modifier l'ordre de priorité.

Per LeBel and Abella JJ. (dissenting): A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. It follows that before entering into an analysis of the fiduciary duties of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position and characteristics of the pension beneficiaries. In the present case, the beneficiaries were in a very vulnerable position relative to Indalex.

Nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise.

Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a fiduciary in relation to the members and retirees of its pension plans. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

In the present case, the employer not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust.

(4) *Costs in United Steelworkers Appeal*

Per McLachlin C.J. and Rothstein and Cromwell JJ.: There is no basis to interfere with the Court of Appeal's costs endorsement as it relates to United Steelworkers in this case. The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the United Steelworkers, representing only 7 of 169 members of the salaried plan, should not without consultation be

Les juges LeBel et Abella (dissidents) : Une relation fiduciaire s'entend de la relation factuelle et juridique entre un bénéficiaire vulnérable et un fiduciaire qui détient et peut exercer un pouvoir sur le bénéficiaire dans les situations prévues par la loi. Par conséquent, avant d'analyser les obligations fiduciaires de l'employeur à titre d'administrateur d'un régime de retraite visé par la *LRR*, il faut examiner la situation et les caractéristiques des bénéficiaires du régime. En l'espèce, les bénéficiaires se trouvaient dans une position de grande vulnérabilité par rapport à Indalex.

Rien dans la *LRR* ne permet de conclure que l'employeur, en sa qualité d'administrateur, serait assujetti à une norme moindre ou assumerait des fonctions et des obligations moins strictes qu'un administrateur indépendant. L'employeur n'est pas tenu d'assumer le fardeau de l'administration des régimes de retraite qu'il a convenu d'établir ou qui sont le fruit de décisions antérieures. Par contre, s'il choisit de l'assumer, une relation fiduciaire prend naissance et l'on s'attend à ce que l'employeur soit capable d'éviter ou de régler les conflits d'intérêts susceptibles d'intervenir.

Indalex se trouvait en situation de conflit d'intérêts dès qu'elle a envisagé de demander la protection de la *LACC* et de proposer un arrangement à ses créanciers. Du point de vue de l'entreprise, on ne pourrait guère trouver à redire à cette décision. Il s'agissait d'une décision d'affaires. Cependant, Indalex jouait en même temps le rôle de fiduciaire à l'égard des participants aux régimes et des retraités, et c'est là où le bât blesse. La solution consistait non pas à mettre en veilleuse sa fonction d'administrateur avec les obligations fiduciaires en découlant, mais à y renoncer et à la transférer avec diligence à un administrateur indépendant.

En l'occurrence, l'employeur a non seulement manqué à ses obligations envers les bénéficiaires, mais adopté en fait une démarche qui allait à l'encontre de leurs intérêts. La gravité de ces manquements justifiait amplement la décision de la Cour d'appel d'imposer une fiducie par interprétation.

(4) *Dépens dans le pourvoi du Syndicat des Métallos*

La juge en chef McLachlin et les juges Rothstein et Cromwell : Il n'y a en l'espèce aucune raison de revenir sur la décision de la Cour d'appel relative aux dépens en ce qui concerne le Syndicat des Métallos. L'instance engagée portait sur des points de droit nouveaux, son issue était incertaine et les demandeurs couraient le risque d'être déboutés. La Cour d'appel a opiné essentiellement que, représentant seulement 7 des 169 participants du régime des salariés, le syndicat ne devait pas être en

able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. There is no error in principle in the Court of Appeal's refusal to order the United Steelworkers costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court.

Per Deschamps and Moldaver JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

Per LeBel and Abella JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

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mesure, dans les faits, d'imposer à tous les participants du régime, dont la plupart n'en étaient pas membres, les risques inhérents au litige sans les consulter. Il n'y a aucune erreur de principe dans le refus de la Cour d'appel d'ordonner que les dépens du syndicat soient payés à partir de la caisse de retraite, étant donné surtout l'issue du pourvoi devant notre Cour.

Les juges Deschamps et Moldaver : Il y a accord avec les motifs du juge Cromwell sur la question des dépens dans l'appel interjeté par le Syndicat des Métallos.

Les juges LeBel et Abella : Il y a accord avec les motifs du juge Cromwell sur la question des dépens dans l'appel interjeté par le Syndicat des Métallos.

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APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Gillese and Juriansz JJ.A.), 2011 ONCA 578, 81 C.B.R. (5th) 165, 92 C.C.P.B. 277, [2011] O.J. No. 3959 (QL), 2011 CarswellOnt 9077. Appeal dismissed.

Benjamin Zarnett, *Frederick L. Myers*, *Brian F. Empey* and *Peter Kolla*, for the appellant Sun Indalex Finance, LLC.

Harvey G. Chaiton and *George Benchetrit*, for the appellant George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors.

David R. Byers, *Ashley John Taylor* and *Nicholas Peter McHaffie*, for the appellant FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited.

Darrell L. Brown, for the appellant/respondent the United Steelworkers.

Andrew J. Hatnay and *Demetrios Yiokaris*, for the respondents Keith Carruthers, et al.

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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges MacPherson, Gillese et Juriansz), 2011 ONCA 578, 81 C.B.R. (5th) 165, 92 C.C.P.B. 277, [2011] O.J. No. 3959 (QL), 2011 CarswellOnt 9077. Pourvoi rejeté.

Benjamin Zarnett, *Frederick L. Myers*, *Brian F. Empey* et *Peter Kolla*, pour l'appelante Sun Indalex Finance, LLC.

Harvey G. Chaiton et *George Benchetrit*, pour l'appelant George L. Miller, syndic de faillite des débitrices Indalex É.-U., nommé en vertu du chapitre 7.

David R. Byers, *Ashley John Taylor* et *Nicholas Peter McHaffie*, pour l'appelante FTI Consulting Canada ULC, en sa qualité de contrôleur d'Indalex Limited désigné par le tribunal, au nom d'Indalex Limited.

Darrell L. Brown, pour l'appelant/intimé le Syndicat des Métallos.

Andrew J. Hatnay et *Demetrios Yiokaris*, pour les intimés Keith Carruthers, et autres.

Hugh O'Reilly and *Amanda Darrach*, for the respondent Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership).

Mark Bailey, *Leonard Marsello* and *William MacLarkey*, for the respondent/intervener the Superintendent of Financial Services.

Robert I. Thornton and *D. J. Miller*, for the intervener the Insolvency Institute of Canada.

Steven Barrett and *Ethan Poskanzer*, for the intervener the Canadian Labour Congress.

Kenneth T. Rosenberg, *Andrew K. Lokan* and *Massimo Starnino*, for the intervener the Canadian Federation of Pensioners.

Éric Vallières, *Alexandre Forest* and *Yoine Goldstein*, for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

Mahmud Jamal, *Jeremy Dacks* and *Tony Devir*, for the intervener the Canadian Bankers Association.

The judgment of Deschamps and Moldaver JJ. was delivered by

[1] DESCHAMPS J. — Insolvency can trigger catastrophic consequences. Often, large claims of ordinary creditors are left unpaid. In insolvency situations, the promise of defined benefits made to employees during their employment is put at risk. These appeals illustrate the materialization of such a risk. Although the employer in this case breached a fiduciary duty, the harm suffered by the pension plans' beneficiaries results not from that breach, but from the employer's insolvency. For the following reasons, I would allow the appeals of the appellants Sun Indalex Finance, LLC; George L. Miller, Indalex U.S.'s trustee in bankruptcy; and FTI Consulting Canada ULC.

Hugh O'Reilly et *Amanda Darrach*, pour l'intimée Morneau Shepell Ltd. (anciennement connue sous le nom de Morneau Sobeco, société en commandite).

Mark Bailey, *Leonard Marsello* et *William MacLarkey*, pour l'intimé/intervenant le Surintendant des services financiers.

Robert I. Thornton et *D. J. Miller*, pour l'intervenant l'Institut d'insolvabilité du Canada.

Steven Barrett et *Ethan Poskanzer*, pour l'intervenant le Congrès du travail du Canada.

Kenneth T. Rosenberg, *Andrew K. Lokan* et *Massimo Starnino*, pour l'intervenante la Fédération canadienne des retraités.

Éric Vallières, *Alexandre Forest* et *Yoine Goldstein*, pour l'intervenante l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation.

Mahmud Jamal, *Jeremy Dacks* et *Tony Devir*, pour l'intervenante l'Association des banquiers canadiens.

Version française du jugement des juges Deschamps et Moldaver rendu par

[1] LA JUGE DESCHAMPS — L'insolvabilité peut entraîner des conséquences catastrophiques. Les créanciers ordinaires sont souvent laissés impayés. En situation d'insolvabilité, les prestations déterminées promises aux employés pendant leur emploi sont mises en péril. Les présents pourvois illustrent ce qui peut se produire lorsque ce péril se matérialise. Bien que l'employeur en l'espèce ait manqué à son obligation fiduciaire envers les participants aux régimes de retraite, le préjudice qu'ils subissent ne résulte pas de son manquement, mais de son insolvabilité. Pour les motifs qui suivent, je suis d'avis d'accueillir les appels de Sun Indalex Finance, LLC; George L. Miller, syndic de faillite d'Indalex É.-U.; et FTI Consulting Canada ULC.

[2] To improve the prospect of pensioners receiving their full benefits after a pension plan is wound up, the Ontario legislature has protected contributions to the pension fund that have accrued but are not yet due at the time of the wind up by providing for a deemed trust that supersedes all other provincial priorities over certain assets of the plan sponsor (s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*")). The parties disagree on the scope of the deemed trust. In my view, the relevant provisions and the context lead to the conclusion that it extends to contributions the employer must make to ensure that the pension fund is sufficient to cover liabilities upon wind up. In the instant case, however, the deemed trust is superseded by the security granted to the creditor that loaned money to the employer, Indalex Limited ("Indalex"), during the insolvency proceedings. In addition, although the employer, as plan administrator, may have put itself in a position of conflict of interest by failing to give the plan's members proper notice of a motion requesting financing of its operations during a restructuring process, there was no realistic possibility that, had the members received notice and had the *CCAA* court found that they were secured creditors, it would have ordered the priorities differently. Consequently, it would not be appropriate to order an equitable remedy such as the constructive trust ordered by the Court of Appeal.

[2] Pour améliorer les chances des retraités de recevoir toutes les prestations auxquelles ils ont droit après la liquidation d'un régime de retraite, le législateur ontarien a pourvu à la protection des cotisations accumulées, mais qui ne sont pas encore dues, à la date de la liquidation, au moyen d'une fiducie réputée grevant certains biens des promoteurs des régimes et qui a préséance sur toutes les autres priorités établies par une loi provinciale (par. 57(4) de la *Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8 (« *LRR* »), et par. 30(7) de la *Loi sur les sûretés mobilières*, L.R.O. 1990, ch. P.10 (« *LSM* »)). Les parties ne s'entendent pas sur la portée de la fiducie réputée. Les dispositions pertinentes et le contexte mènent selon moi à la conclusion qu'elle englobe les cotisations que doit verser l'employeur afin que la caisse de retraite puisse couvrir le passif du régime à la liquidation. En l'espèce, toutefois, la sûreté accordée au créancier ayant prêté des fonds à l'employeur, Indalex Limited (« Indalex »), pendant l'instance en matière d'insolvabilité a priorité sur la fiducie réputée. En outre, bien que l'employeur ait pu se placer en conflit d'intérêts en tant qu'administrateur du régime, en ne donnant pas dûment avis aux participants d'une motion en vue de financer l'exploitation de l'entreprise pendant la restructuration, il n'est pas réaliste de penser que le tribunal chargé d'appliquer la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), aurait établi un ordre de priorité différent si les participants avaient été avisés et si le tribunal avait conclu qu'ils étaient des créanciers garantis. Par conséquent, il n'y a pas lieu d'accorder une réparation en equity, telle que la fiducie par interprétation imposée par la Cour d'appel.

I. Facts

[3] Indalex is a wholly owned Canadian subsidiary of a U.S. company, Indalex Holding Corp. ("Indalex U.S."). Indalex and its related companies formed a corporate group (the "Indalex Group") that manufactured aluminum extrusions. The U.S. and Canadian operations were closely linked.

I. Les faits

[3] Indalex est une filiale canadienne en propriété exclusive de la société américaine Indalex Holding Corp. (« Indalex É.-U. »). Indalex et ses sociétés affiliées formaient un groupe (le « Groupe Indalex ») qui fabriquait des extrusions d'aluminium. Les activités des sociétés aux États-Unis et au Canada étaient étroitement liées.

[4] In 2009, a combination of high commodity prices and the economic recession's impact on the end-user market for aluminum extrusions plunged the Indalex Group into insolvency. On March 20, 2009, Indalex U.S. filed for Chapter 11 bankruptcy protection in Delaware. On April 3, 2009, Indalex applied for a stay under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), and Morawetz J. granted the stay in an initial order. He also appointed FTI Consulting Canada ULC (the "Monitor") to act as monitor.

[5] At that time, Indalex was the administrator of two registered pension plans. One was for its salaried employees (the "Salaried Plan"), the other for its executives (the "Executive Plan"). Members of the Salaried Plan included seven employees for whom the United Steelworkers ("USW") acted as bargaining agent. The Salaried Plan was in the process of being wound up when the *CCAA* proceedings began. The effective date of the wind up was December 31, 2006. The Executive Plan had been closed but not wound up. Overall, the deficiencies of the pension plans' funds concern 49 persons (members of the Salaried Plan and the Executive Plan are referred to collectively as the "Plan Members").

[6] Pursuant to the initial order made by Morawetz J. on April 3, 2009, Indalex obtained protection under the *CCAA*. Both plans faced funding deficiencies when Indalex filed for the *CCAA* stay. The wind-up deficiency of the Salaried Plan was estimated at $1.8 million as of December 31, 2008. The funding deficiency of the Executive Plan was estimated at $3.0 million on a wind-up basis as of January 1, 2008.

[7] From the beginning of the insolvency proceedings, the Indalex Group's reorganization strategy was to sell both Indalex and Indalex U.S. as a going concern while they were under *CCAA* and Chapter 11 protection. To this end, Indalex and Indalex U.S. sought to enter into a common agreement for debtor-in-possession ("DIP") financing under which the two companies

[4] En 2009, le prix élevé des produits de base et les effets de la récession sur le marché des utilisateurs finaux des extrusions d'aluminium ont entraîné l'insolvabilité du Groupe Indalex. Le 20 mars 2009, Indalex É.-U. s'est placée sous la protection du chapitre 11, au Delaware. Le 3 avril 2009, Indalex a demandé une suspension sous le régime de la *LACC*. Le même jour, le juge Morawetz a rendu une ordonnance initiale lui accordant cette suspension et il a désigné FTI Consulting Canada ULC (le « contrôleur ») comme contrôleur.

[5] Indalex administrait alors deux régimes de retraite enregistrés, l'un à l'intention des salariés (le « régime des salariés »), et l'autre à l'intention des cadres (le « régime des cadres »). Le régime des salariés comptait sept participants dont l'agent négociateur était le Syndicat des Métallos (le « Syndicat »). Ce régime était en cours de liquidation lorsque les procédures sous le régime de la *LACC* ont été engagées. La date de prise d'effet de la liquidation était le 31 décembre 2006. Le régime des cadres n'acceptait plus de participant, mais il n'était pas liquidé. En tout, les déficits des caisses de retraite touchent 49 personnes (les participants au régime des salariés et au régime des cadres sont collectivement appelés les « participants »).

[6] L'ordonnance initiale prononcée par le juge Morawetz, le 3 avril 2009, a accordé à Indalex la protection de la *LACC*. Les deux régimes de retraite accusaient un déficit de capitalisation au moment où Indalex a demandé la suspension des procédures en vertu de la *LACC*. Le déficit de liquidation du régime des salariés, au 31 décembre 2008, était estimé à 1,8 million de dollars. Quant au régime des cadres, sa sous-capitalisation suivant une approche de liquidation était estimée à 3 millions de dollars au 1er janvier 2008.

[7] Dès le début de la procédure d'insolvabilité, la stratégie de réorganisation poursuivie par le Groupe Indalex consistait à vendre Indalex et Indalex É.-U. comme entreprises en exploitation pendant qu'elles jouissaient de la protection de la *LACC* et du chapitre 11. À cette fin, Indalex et Indalex É.-U. voulaient conclure un accord de financement de débiteur-exploitant (« DE »)

could draw from joint credit facilities and would guarantee each other's liabilities.

[8] Indalex's financial distress threatened the interests of all the Plan Members. If the reorganization failed and Indalex were liquidated under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), they would not have recovered any of their claims against Indalex for the underfunded pension liabilities, because the priority created by the provincial statute would not be recognized under the federal legislation: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453. Although the priority was not rendered ineffective by the *CCAA*, the Plan Members' position was uncertain.

[9] The Indalex Group solicited terms from a variety of possible DIP lenders. In the end, it negotiated an agreement with a syndicate consisting of the pre-filing senior secured creditors. On April 8, 2009, the *CCAA* court issued an Amended and Restated Initial Order ("Amended Initial Order") authorizing Indalex to borrow US$24.4 million from the DIP lenders and grant them priority over all other creditors ("DIP charge") in that amount. In his endorsement of the order, Morawetz J. made a finding that Indalex would be unable to achieve a going-concern solution without DIP financing. Such financing was necessary to support Indalex's business until the sale could be completed.

[10] The Plan Members did not participate in the initial proceedings. The initial stay had been granted *ex parte*. The *CCAA* judge ordered Indalex to serve a copy of the stay order on every creditor owed $5,000 or more within 10 days of the initial order of April 3. As of April 8, when the motion to amend the initial order was heard, none of the Executive Plan's members had been served with that order; nor did any of them receive notice of the motion to amend it. The USW did receive short notice, but chose not to attend. Morawetz J. authorized Indalex to proceed on the basis of an abridged time for

conjoint aux termes duquel elles pourraient bénéficier de facilités de crédit communes et chaque société garantirait les obligations de l'autre.

[8] Les problèmes financiers d'Indalex menaçaient les intérêts de tous les participants. Si la réorganisation échouait et si Indalex était liquidée en application de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »), ils ne recouvreraient aucune de leurs créances sur Indalex au titre de la sous-capitalisation des régimes de retraite, parce que la législation fédérale ne permettrait pas que la priorité de rang établie par la loi provinciale soit reconnue : *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453. La *LACC* ne rendait pas la priorité de rang des participants inopérante, mais leur position était incertaine.

[9] Le Groupe Indalex a demandé des offres à divers prêteurs DE et a fini par conclure une entente avec un consortium composé des créanciers qui bénéficiaient d'une garantie de premier rang avant le début de la procédure. Le 8 avril 2009, le tribunal chargé d'appliquer la *LACC* a rendu une ordonnance modifiée et reformulée (l'« ordonnance initiale modifiée ») autorisant Indalex à emprunter 24,4 millions de dollars américains aux prêteurs DE et à leur octroyer une priorité pour le même montant sur tous les autres créanciers (la « charge DE »). Dans les motifs qu'il a déposés au soutien de l'ordonnance, le juge Morawetz a conclu qu'Indalex n'aurait pas pu trouver de solution qui assurait la continuité de l'exploitation sans ce financement DE. Celui-ci était nécessaire pour financer les activités de l'entreprise jusqu'à sa vente.

[10] Les participants n'étaient pas parties à la procédure initiale. La suspension initiale avait été accordée *ex parte*. Le juge chargé de l'application de la *LACC* avait ordonné à Indalex de faire signifier une copie de l'ordonnance de suspension à chaque créancier ayant une créance minimale de 5 000 $ dans les 10 jours suivant l'ordonnance initiale du 3 avril. Le 8 avril, lors de l'audition de la motion visant la modification de l'ordonnance initiale, aucun des participants au régime des cadres n'avait reçu signification de cette ordonnance ni de l'avis de motion visant sa modification. Le Syndicat

service. The Plan Members were given notice of all subsequent proceedings. None of the Plan Members appealed the Amended Initial Order to contest the DIP charge.

[11] On June 12, 2009, Indalex applied for authorization to increase the DIP loan amount to US$29.5 million. At the hearing, the Executive Plan's members initially opposed the motion, seeking to reserve their rights. After it was confirmed that the motion was merely to increase the amount of the DIP charge (without changing the terms of the loan), they withdrew their opposition and the court granted the motion.

[12] On April 22, 2009, the court extended the stay of proceedings and approved a marketing process for the sale of Indalex's assets. The Plan Members did not oppose the application to approve the marketing process. Under the approved bidding procedure, the Indalex Group solicited a wide variety of potential buyers.

[13] Indalex received a bid from SAPA Holding AB ("SAPA"). It was for approximately US$30 million, and SAPA did not assume responsibility for the pension plans' wind-up deficiencies. According to the Monitor's estimate, the liquidation value of Indalex's assets was US$44.7 million. Indalex brought an application for an order approving a bidding procedure for a competitive auction and deeming SAPA's bid to be a qualifying bid. The Executive Plan's members opposed the application, expressing concern that the pension liabilities would not be assumed. Morawetz J. nevertheless issued the order on July 2, 2009; in it, he approved the bidding procedure for sale, noting that the Executive Plan's members could raise their objections at the time of approval of the final bid.

a reçu un préavis écourté, mais a décidé de ne pas se présenter. Le juge Morawetz a autorisé Indalex à procéder même si le délai de signification avait été écourté. Les participants ont reçu avis de toutes les procédures subséquentes. Aucun des participants n'a interjeté appel de l'ordonnance initiale modifiée pour contester la charge DE.

[11] Le 12 juin 2009, Indalex a demandé l'autorisation de porter l'emprunt DE à 29,5 millions de dollars américains. À l'audience, les participants au régime des cadres se sont d'abord opposés à la motion en demandant que leurs droits soient réservés. Après confirmation que la motion avait pour unique but d'augmenter le montant de la charge DE (sans modifier les modalités du prêt), ils ont retiré leur opposition et le tribunal a accueilli la motion.

[12] Le 22 avril 2009, le tribunal a prorogé la suspension et approuvé un processus de mise en vente de l'actif d'Indalex. Les participants ne se sont pas opposés à la demande d'approbation du processus de mise en vente. Conformément au processus approuvé de vente par soumission, le Groupe Indalex a sollicité un vaste éventail d'acheteurs potentiels.

[13] Indalex a reçu une soumission de SAPA Holding AB (« SAPA »). Cette soumission s'élevait à environ 30 millions de dollars américains et SAPA ne prenait pas en charge les déficits de liquidation des régimes de retraite. Le contrôleur estimait la valeur de liquidation de l'actif d'Indalex à 44,7 millions de dollars américains. Indalex a demandé une ordonnance approuvant un processus de soumission pour adjudication sur offres concurrentes et déclarant que la soumission de SAPA était réputée acceptable. Les participants au régime des cadres ont contesté cette demande parce qu'ils s'inquiétaient du fait que le passif du régime de retraite ne serait pas pris en charge. Le 2 juillet 2009, le juge Morawetz a néanmoins rendu une ordonnance approuvant le processus de mise en vente par soumission, en soulignant que les participants au régime des cadres pourraient faire valoir leurs objections au moment de l'homologation de la soumission définitive.

[14] The bidding procedure did not trigger any competing bids. On July 20, 2009, Indalex and Indalex U.S. brought motions before their respective courts to approve the sale of substantially all their assets under the terms of SAPA's bid. Indalex also moved for approval of an interim distribution of the sale proceeds to the DIP lenders. The Plan Members opposed Indalex's motion. First, they argued that it was estimated that a forced liquidation would produce greater proceeds than SAPA's bid. Second, they contended that their claims had priority over that of the DIP lenders because the unfunded pension liabilities were subject to a statutory deemed trust under the *PBA*. They also contended that Indalex had breached its fiduciary obligations by failing to meet its obligations as a plan administrator throughout the insolvency proceedings.

[14] Le processus de mise en vente par soumission n'a pas permis d'obtenir des soumissions concurrentes. Le 20 juillet 2009, Indalex et Indalex É.-U. ont chacune demandé au tribunal dont elles relevaient d'approuver la vente d'essentiellement tous leurs éléments d'actif aux conditions stipulées dans l'offre de SAPA. Indalex a également demandé l'approbation d'une distribution provisoire du produit de la vente aux prêteurs DE. Les participants ont contesté la motion d'Indalex. Ils ont fait valoir, premièrement, que le produit estimatif d'une liquidation forcée serait supérieur à l'offre de SAPA et, deuxièmement, que leur créance avait priorité sur celles des prêteurs DE, parce que le passif non capitalisé au titre des pensions était protégé par une fiducie réputée en vertu de la *LRR*. Ils ont aussi soutenu qu'Indalex avait manqué à ses obligations fiduciaires en ne s'acquittant pas des obligations qui lui incombaient en qualité d'administrateur des régimes de retraite du début à la fin des procédures en matière d'insolvabilité.

[15] The court dismissed the Plan Members' first objection, holding that there was no evidence supporting the argument that a forced liquidation would be more beneficial to suppliers, customers and the 950 employees. It approved the sale on July 20, 2009. The order in which it did so directed the Monitor to make a distribution to the DIP lenders. With respect to the second objection, however, Campbell J. ordered the Monitor to hold a reserve in an amount to be determined by the Monitor, leaving the Plan Members' arguments based on their right to the proceeds of the sale open for determination at a later date.

[15] Le tribunal a écarté la première objection des participants, estimant qu'aucun élément de preuve n'étayait leur prétention que la liquidation forcée serait plus avantageuse pour les fournisseurs, les clients et les 950 employés. Il a approuvé la vente le 20 juillet 2009. Cette ordonnance donnait instruction au contrôleur de procéder à une distribution aux prêteurs DE. Au sujet de la deuxième objection, toutefois, le juge Campbell a ordonné au contrôleur de retenir un fonds de réserve dont le contrôleur déterminerait lui-même le montant, réservant pour plus tard l'examen de l'argumentation des participants fondée sur leur droit au produit de la vente.

[16] The sale to SAPA closed on July 31, 2009. The Monitor collected $30.9 million in proceeds. It distributed US$17 million to the DIP lenders, paid certain fees, withheld a portion to cover various costs and retained $6.75 million in reserve pending determination of the Plan Members' rights. At the closing, Indalex owed US$27 million to the DIP lenders. The payment of US$17 million left a US$10 million shortfall in the amount owed to these lenders. The DIP lenders called on Indalex U.S. to cover this shortfall under the guarantee

[16] La vente à SAPA s'est conclue le 31 juillet 2009, et le contrôleur a recueilli 30,9 millions de dollars comme produit de la vente. Il a distribué 17 millions de dollars américains aux prêteurs DE, acquitté certains frais, retenu des fonds pour couvrir diverses dépenses et réservé 6,75 millions de dollars en attendant la décision relative aux droits des participants. À la date de la vente, Indalex devait 27 millions de dollars américains aux prêteurs DE, de sorte qu'une créance de 10 millions de dollars américains subsistait après le versement des

contained in the DIP lending agreement. Indalex U.S. paid the amount of the shortfall. Since Indalex U.S. was, as a term of the guarantee, subrogated to the DIP lenders' priority, it became the highest ranking creditor of Indalex, with a claim for US$10 million.

[17] Following the sale of Indalex's assets, its directors resigned. Indalex U.S., a part of Indalex Group, took over the management of Indalex, whose assets were limited to the sale proceeds held by the Monitor. A Unanimous Shareholder Declaration was executed on August 12, 2009; in it, Mr. Keith Cooper was appointed to manage Indalex's affairs. Mr. Cooper was an employee of FTI Consulting Inc.

[18] In accordance with the right reserved by the court on July 20, 2009, the Plan Members brought motions on August 28, 2009 for a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable against the proceeds of the sale. They contended that they had priority over the secured creditors pursuant to s. 57(4) of the *PBA* and s. 30(7) of the *PPSA*. Indalex, in turn, brought a motion for an assignment in bankruptcy to secure the priority regime it argued for in opposing the Plan Members' motions.

[19] On October 14, 2009, while judgment was pending, Indalex U.S. converted the Chapter 11 restructuring proceeding in the U.S. into a Chapter 7 liquidation proceeding. On November 5, 2009, the Superintendent of Financial Services ("Superintendent") appointed the actuarial firm of Morneau Sobeco Limited Partnership ("Morneau") to replace Indalex as administrator of the plans.

[20] On February 18, 2010, Campbell J. dismissed the Plan Members' motions, concluding that the deemed trust did not apply to the wind-up deficiencies, because the associated payments were not "due" or "accruing due" as of the date of the wind up. He found that the Executive Plan did

17 millions. Se prévalant de la garantie consentie dans l'accord de financement DE, les prêteurs DE ont demandé à Indalex É.-U. de payer la différence, ce qu'elle a fait. Comme la garantie prévoyait la subrogation d'Indalex É.-U. aux droits de priorité des prêteurs DE, Indalex É.-U. est devenue créancière de premier rang d'Indalex pour la somme de 10 millions de dollars américains.

[17] Le conseil d'administration d'Indalex a démissionné après la vente de l'actif de la société. Indalex É.-U., qui faisait partie du Groupe Indalex, a repris la gestion d'Indalex, dont l'actif se limitait au produit de la vente détenu par le contrôleur. Une convention unanime d'actionnaires nommant M. Keith Cooper comme gestionnaire des affaires d'Indalex a été signée le 12 août 2009. M. Cooper était un employé de FTI Consulting Inc.

[18] Les participants ont exercé le droit que leur avait réservé le tribunal le 20 juillet 2009 et ont présenté des motions, le 28 août 2009, en vue d'obtenir un jugement déclaratoire portant que le produit de la vente était grevé d'une fiducie réputée d'un montant équivalent au passif non capitalisé au titre des pensions. Ils ont soutenu que les par. 57(4) de la *LRR* et 30(7) de la *LSM* leur donnaient préséance sur les créanciers garantis. Indalex a présenté une motion pour faire cession de ses biens en faillite afin de bénéficier de la priorité de rang qu'elle invoquait pour contester les motions des participants.

[19] Le 14 octobre 2009, avant le prononcé du jugement, Indalex É.-U. a transformé l'instance en réorganisation fondée sur le chapitre 11 en instance en liquidation fondée sur le chapitre 7. Le 5 novembre 2009, le surintendant des services financiers (le « surintendant ») a nommé le cabinet d'actuaires Morneau Sobeco, société en commandite (« Morneau »), pour remplacer Indalex comme administrateur des régimes.

[20] Le 18 février 2010, le juge Campbell a rejeté les motions des participants, concluant que la fiducie réputée ne s'appliquait pas aux déficits de liquidation parce que les paiements afférents n'étaient pas [TRADUCTION] « échus » ou « à échoir » à la date de la liquidation. Selon lui, le régime de

not have a wind-up deficiency, since it had not yet been wound up. He thus found it unnecessary to rule on Indalex's motion for an assignment in bankruptcy (2010 ONSC 1114, 79 C.C.P.B. 301). The Plan Members appealed the dismissal of their motions.

[21] The Ontario Court of Appeal allowed the Plan Members' appeals. It found that the deemed trust created by s. 57(4) of the *PBA* applies to all amounts due with respect to plan wind-up deficiencies. Although the court noted that it was likely that no deemed trust existed for the Executive Plan on the plain meaning of the provision, it declined to address this question, because it found that the Executive Plan's members had a claim arising from Indalex's breach of its fiduciary obligations in failing to adequately protect the Plan Members' interests (2011 ONCA 265, 104 O.R. (3d) 641).

[22] The Court of Appeal concluded that a constructive trust was an appropriate remedy for Indalex's breach of its fiduciary obligations. The court was of the view that this remedy did not harm the DIP lenders, but affected only Indalex U.S. It imposed a constructive trust over the reserved fund in favour of the Plan Members. Turning to the question of distribution, it also found that the deemed trust had priority over the DIP charge because the issue of federal paramountcy had not been raised when the Amended Initial Order was issued, and that Indalex had stated that it intended to comply with any deemed trust requirements. The Court of Appeal found that there was nothing in the record to suggest that not applying the paramountcy doctrine would frustrate Indalex's ability to restructure.

[23] The Court of Appeal ordered the Monitor to make a distribution from the reserve fund in order to pay the amount of each plan's deficiency. It also issued a costs endorsement that approved payment of the costs of the Executive Plan's members from that plan's fund, but declined to order the payment of costs to the USW from the fund of the Salaried Plan (2011 ONCA 578, 81 C.B.R. (5th) 165).

retraite des cadres n'étant pas encore liquidé, on ne pouvait parler de déficit de liquidation. Il était donc inutile de statuer sur la motion d'Indalex visant à faire cession de ses biens (2010 ONSC 1114, 79 C.C.P.B. 301). Les participants ont interjeté appel du rejet de leurs motions.

[21] La Cour d'appel de l'Ontario a accueilli les appels des participants, estimant que la fiducie réputée créée au par. 57(4) de la *LRR* s'appliquait à toutes les sommes dues au titre des déficits de liquidation des régimes. Signalant que, selon le sens ordinaire de cette disposition, aucune fiducie réputée ne s'appliquerait au régime des cadres, elle a néanmoins refusé de trancher la question parce que les participants à ce régime pouvaient faire valoir une réclamation contre Indalex pour manquement à son obligation fiduciaire de protéger adéquatement leurs intérêts (2011 ONCA 265, 104 O.R. (3d) 641).

[22] La Cour d'appel a jugé qu'une fiducie par interprétation était une réparation appropriée pour le manquement d'Indalex à ses obligations fiduciaires. Selon elle, cette réparation ne causait pas préjudice aux prêteurs DE et n'avait d'effet que sur Indalex É.-U. Elle a donc imposé une fiducie par interprétation grevant le fonds de réserve au profit des participants. Au sujet de la distribution, elle a aussi jugé que la fiducie réputée avait priorité sur la charge DE parce que la question de la prépondérance fédérale n'avait pas été invoquée lorsque l'ordonnance initiale modifiée avait été rendue et qu'Indalex avait déclaré qu'elle allait se conformer à toutes les exigences d'une fiducie réputée. Elle a conclu que rien au dossier n'indiquait que le fait de ne pas appliquer la doctrine de la prépondérance fédérale compromettrait la capacité de restructuration d'Indalex.

[23] La Cour d'appel a ordonné au contrôleur de combler le déficit de chacun des deux régimes par prélèvement sur le fonds de réserve. Dans sa décision relative à l'adjudication des dépens, elle a également approuvé le paiement des dépens des participants au régime des cadres sur leur caisse de retraite, mais elle a refusé d'ordonner que les dépens du Syndicat soient acquittés sur la caisse de retraite du régime des salariés (2011 ONCA 578, 81 C.B.R. (5th) 165).

[24] The Monitor, together with Sun Indalex, a secured creditor of Indalex U.S., and George L. Miller, Indalex U.S.'s trustee in bankruptcy, appeals the Court of Appeal's order. Both the Superintendent and Morneau support the Plan Members' position as respondents. A number of stakeholders are also participating in the appeals to this Court. In addition, USW appeals the costs endorsement. As I agree with my colleague Cromwell J. on the appeal from the costs endorsement, I will not deal with it in these reasons.

II. Issues

[25] The appeals raise four issues:

1. Does the deemed trust provided for in s. 57(4) of the *PBA* apply to wind-up deficiencies?

2. If so, does the deemed trust supersede the DIP charge?

3. Did Indalex have any fiduciary obligations to the Plan Members when making decisions in the context of the insolvency proceedings?

4. Did the Court of Appeal properly exercise its discretion in imposing a constructive trust to remedy the breaches of fiduciary duties?

III. Analysis

A. *Does the Deemed Trust Provided for in Section 57(4) of the PBA Apply to Wind-up Deficiencies?*

[26] The first issue is whether the statutory deemed trust provided for in s. 57(4) of the *PBA* extends to wind-up deficiencies. This question is one of statutory interpretation, which requires examination of both the wording and context of the relevant provisions of the *PBA*. Section 57(4) of the *PBA* affords protection to members of a pension plan with respect to their employer's contributions upon wind up of the plan. The provision reads:

[24] Le contrôleur, ainsi que Sun Indalex, créancière garantie d'Indalex É.-U., et George L. Miller, syndic de faillite d'Indalex É.-U., interjettent tous trois appel de l'ordonnance de la Cour d'appel. Le surintendant et Morneau appuient la position des participants en tant qu'intimés au pourvoi. D'autres intéressés prennent également part aux pourvois devant notre Cour. Le Syndicat se pourvoit en outre contre l'adjudication des dépens, mais je n'aborderai pas cette question, car je partage l'opinion du juge Cromwell à ce sujet.

II. Les questions en litige

[25] Les pourvois soulèvent quatre questions :

1. La fiducie réputée établie par le par. 57(4) de la *LRR* s'applique-t-elle aux déficits de liquidation?

2. Le cas échéant, cette fiducie réputée a-t-elle préséance sur la charge DE?

3. Indalex avait-elle des obligations fiduciaires envers les participants en ce qui concerne les décisions prises dans le contexte des procédures en matière d'insolvabilité?

4. La Cour d'appel a-t-elle exercé son pouvoir discrétionnaire correctement en imposant une fiducie par interprétation à titre de réparation pour les manquements aux obligations fiduciaires?

III. Analyse

A. *La fiducie réputée établie par le par. 57(4) de la LRR s'applique-t-elle aux déficits de liquidation?*

[26] Il faut d'abord déterminer si la fiducie réputée établie au par. 57(4) de la *LRR* s'applique aux déficits de liquidation. Il s'agit d'une question d'interprétation législative qui exige l'examen du texte et du contexte des dispositions pertinentes de la *LRR*. Le paragraphe 57(4) de la *LRR* accorde aux participants à un régime de retraite une protection applicable aux cotisations de leur employeur en cas de liquidation du régime :

57. . . .

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

[27] The most obvious interpretation is that where a plan is wound up, this provision protects all contributions that have accrued but are not yet due. The words used appear to include the contribution the employer is to make where a plan being wound up is in a deficit position. This quite straightforward interpretation, which is consistent with both the historical broadening of the protection and the remedial purpose of the provision, is being challenged on the basis of a narrow definition of the word "accrued". I do not find that this argument justifies limiting the protection afforded to plan members by the Ontario legislature.

[28] The *PBA* sets out the rules for the operation of funded contributory defined benefit pension plans in Ontario. In an ongoing plan, an employer must pay into a fund all contributions it withholds from its employees' salaries. In addition, while the plan is ongoing, the employer must make two kinds of payments. One relates to current service contributions — the employer's own regular contributions to the pension fund as required by the plan. The other ensures that the fund is sufficient to meet the plan's liabilities. The employees' interest in having the contributions made while the plan is ongoing is protected by a deemed trust provided for in s. 57(3) of the *PBA*.

[29] The *PBA* also establishes a comprehensive scheme for winding up a pension plan. Section 75(1)(a) imposes on the employer the obligation to "pay" an amount equal to the total of all "payments" that are due or that have accrued and have not been paid into the fund. In addition, s. 75(1)(b) sets out a formula for calculating the amount that must be

57. . . .

(4) Si un régime de retraite est liquidé en totalité ou en partie, l'employeur qui est tenu de cotiser à la caisse de retraite est réputé détenir en fiducie pour le compte des bénéficiaires du régime de retraite un montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements.

[27] Selon l'interprétation la plus évidente, toutes les cotisations accumulées, mais non encore dues, lorsqu'un régime est liquidé sont protégées. Ce libellé semble inclure les cotisations qu'un employeur est tenu de verser lorsque la caisse de retraite est déficitaire au moment de la liquidation. Pour contester cette interprétation plutôt simple, qui concorde à la fois avec l'élargissement constant de la protection accordée au fil du temps et avec l'objectif réparateur de cette disposition, on invoque une définition étroite du mot « accumulé ». À mon avis, cet argument ne justifie pas la restriction de la protection accordée aux participants par le législateur ontarien.

[28] La *LRR* énonce les règles de fonctionnement des régimes de retraite contributifs capitalisés à prestations déterminées en Ontario. Pendant toute la durée d'un régime, l'employeur doit verser à la caisse de retraite toutes les cotisations qu'il retient sur la rémunération des employés. Tant que le régime demeure en vigueur, il est en outre tenu à deux types de paiements. L'un se rapporte aux cotisations pour service courant — les cotisations que l'employeur doit verser régulièrement à la caisse de retraite suivant les modalités du régime — et l'autre, au maintien d'une caisse de retraite suffisante pour couvrir le passif au titre des pensions. Le droit des employés au versement des cotisations pendant que le régime est en vigueur est protégé par la fiducie réputée instituée au par. 57(3) de la *LRR*.

[29] La *LRR* établit également un régime complet régissant la liquidation d'un régime de retraite. L'alinéa 75(1)a) oblige l'employeur à « verse[r] » un montant égal au total de tous les « paiements » dus ou accumulés qui n'ont pas été versés dans la caisse de retraite, et l'al. 75(1)b) établit la formule servant à calculer le montant du paiement

paid to ensure that the fund is sufficient to cover all liabilities upon wind up. Within six months after the effective date of the wind up, the plan administrator must file a wind-up report that lists the plan's assets and liabilities as of the date of the wind up. If the wind-up report shows an actuarial deficit, the employer must make wind-up deficiency payments. Consequently, s. 75(1)(a) and (b) jointly determine the amount of the contributions owed when a plan is wound up.

[30] It is common ground that the contributions provided for in s. 75(1)(a) are covered by the wind-up deemed trust. The only question is whether it also applies to the deficiency payments required by s. 75(1)(b). I would answer this question in the affirmative in view of the provision's wording, context and purpose.

[31] It is readily apparent that the wind-up deemed trust provision (s. 57(4) *PBA*) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due", and I find no reason to exclude contributions paid under s. 75(1)(b). Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Section 75(1) reads as follows:

75. (1) Where a pension plan is wound up, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares

à effectuer pour que la caisse de retraite puisse couvrir la totalité du passif à la liquidation. Dans les six mois suivant la date de prise d'effet de la liquidation, l'administrateur du régime doit déposer un rapport de liquidation faisant état de l'actif et du passif du régime à la date de la liquidation. Si le rapport révèle l'existence d'un déficit actuariel, l'employeur doit effectuer des paiements au titre du déficit de liquidation. Par conséquent, les al. 75(1)a) et b) établissent le montant des cotisations dues lors de la liquidation d'un régime.

[30] Il est bien établi que la fiducie réputée en cas de liquidation s'applique aux cotisations visées à l'al. 75(1)a). La seule question à trancher est de savoir si elle s'applique aussi aux paiements au titre du déficit exigés par l'al. 75(1)b). J'y répondrais par l'affirmative, compte tenu du texte, du contexte et de l'objet de cette disposition.

[31] Il est évident que le par. 57(4) de la *LRR* qui crée la fiducie réputée en cas de liquidation ne comporte aucune limite expresse aux « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues » et je ne vois rien qui justifie d'exclure les cotisations prévues à l'al. 75(1)b). L'alinéa 75(1)a) prévoit expressément que l'employeur verse « un montant égal au total de tous les paiements » *accumulés*, même s'ils ne sont pas encore dus à la date de la liquidation, tandis que l'al. 75(1)b) parle d'un « montant » calculé à partir de la valeur de l'actif et du passif *accumulés*, lorsque le régime est liquidé. Voici le texte du par. 75(1) :

75. (1) Si un régime de retraite est liquidé, l'employeur verse à la caisse de retraite :

a) d'une part, un montant égal au total de tous les paiements qui, en vertu de la présente loi, des règlements et du régime de retraite, sont dus ou accumulés, et qui n'ont pas été versés à la caisse de retraite;

b) d'autre part, un montant égal au montant dont :

(i) la valeur des prestations de retraite aux termes du régime de retraite qui seraient garanties par le Fonds de garantie en vertu de la présente loi et des règlements si le

that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

[32] Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of s. 57(4) of the *PBA*: ". . . amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". As I mentioned above, this reasoning is challenged in respect of s. 75(1)(b), not of s. 75(1)(a).

[33] The appellant Sun Indalex argues that since the deficiency is not finally quantified until well after the effective date of the wind up, the liability of the employer cannot be said to have accrued. The Monitor adds that the payments the employer must make to satisfy its wind-up obligations may change over the five-year period within which s. 31 of the *PBA* Regulations, R.R.O. 1990, Reg. 909, requires that they be made. These parties illustrate their argument by referring to what occurred to the Salaried Plan's fund in the case at bar. In 2007-8, Indalex paid down the vast majority of the $1.6 million wind-up deficiency associated with the Salaried Plan as estimated in 2006. By the end of 2008, however, this deficiency had risen back up to $1.8 million as a result of a decline in the fund's asset value. According to this argument, the amount could not have accrued as of the date of the wind up, because it could not be calculated with certainty.

surintendant déclare que le Fonds de garantie s'applique au régime de retraite,

(ii) la valeur des prestations de retraite accumulées à l'égard de l'emploi en Ontario et acquises aux termes du régime de retraite,

(iii) la valeur des prestations accumulées à l'égard de l'emploi en Ontario et qui résultent de l'application du paragraphe 39 (3) (règle des 50 pour cent) et de l'article 74,

dépassent la valeur de l'actif de la caisse de retraite attribué, comme cela est prescrit, pour le paiement de prestations de retraite accumulées à l'égard de l'emploi en Ontario.

[32] Puisque le montant des paiements (al. 75(1)a)) et le montant établi en soustrayant l'actif du passif accumulé à la date de la liquidation (al. 75(1)b)) doivent tous les deux être versés à la liquidation à titre de cotisations de l'employeur, ils entrent tous les deux dans le sens ordinaire des mots employés au par. 57(4) de la *LRR* : « . . . montant égal aux cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ». Comme je l'ai mentionné, ce raisonnement est contesté en ce qui concerne l'al. 75(1)b), mais non l'al. 75(1)a).

[33] L'appelante Sun Indalex avance que, puisque le montant définitif du déficit n'est établi que longtemps après la date de prise d'effet de la liquidation, on ne peut parler de passif accumulé relativement à cette obligation de l'employeur. Le contrôleur souligne en outre que les paiements qu'un employeur doit effectuer pour honorer ses obligations à la liquidation peuvent changer au cours des cinq ans sur lesquels ils peuvent s'échelonner aux termes de l'art. 31 du règlement général pris en application de la *LRR*, R.R.O. 1990, règl. 909. Pour illustrer leur argument, ces parties donnent l'exemple de ce qui s'est produit dans le cas du régime des salariés. En 2007-8, Indalex a comblé la majeure partie du déficit du régime des salariés, qui était estimé à 1,6 million de dollars en 2006. Toutefois, à la fin de 2008, la diminution de la valeur de l'actif de la caisse de retraite avait fait remonter le déficit de liquidation à 1,8 million de dollars. Selon cet argument, il ne peut s'agir d'un montant accumulé à la date de la liquidation, parce qu'il ne pouvait pas être établi avec certitude.

[34] Unlike my colleague Cromwell J., I find this argument unconvincing. I instead agree with the Court of Appeal on this point. The wind-up deemed trust concerns "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". Since the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date. Thus the liabilities of the employer are complete — have accrued — before the wind up. The distinction between my approach and the one Cromwell J. takes is that he requires that it be possible to perform the calculation before the date of the wind up, whereas I am of the view that the time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind up. The date at which the liabilities are *reported* or the employer's *option* to spread its contributions as allowed by the regulations does not change the legal nature of the contributions.

[34] Contrairement à mon collègue le juge Cromwell, j'estime que cet argument n'est pas convaincant. Je souscris plutôt à l'opinion de la Cour d'appel sur ce point. La fiducie réputée s'applique aux « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ». Puisque les employés cessent d'accumuler des droits lorsque le régime est liquidé, les droits qui servent au calcul des cotisations ont tous été accumulés avant la date de la liquidation. Par conséquent, le passif correspondant aux obligations de l'employeur existe en entier — est accumulé — avant la liquidation. La différence entre le raisonnement que j'applique et celui du juge Cromwell réside dans le fait que le sien exige que le calcul puisse s'établir avant la date de la liquidation, tandis que je suis d'avis que la date où s'effectue le calcul est sans importance du moment que le passif est évalué à la date de la liquidation. Ni la date à laquelle le passif est *déclaré* ni l'*option* de l'employeur d'étaler ses cotisations comme le permet le règlement ne changent la nature juridique des cotisations.

[35] In *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306, Duff J. considered the meaning of the word "accrued" in interpreting the scope of a covenant. He found that

[35] Dans *Hydro-Electric Power Commission of Ontario c. Albright* (1922), 64 R.C.S. 306, le juge Duff a examiné le sens du mot « *accrued* », l'équivalent anglais du mot « accumulé », pour interpréter la portée d'un covenant et il a tiré la conclusion suivante :

> the word "accrued" according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted — and it may have this meaning although it appears from the context that the right completely constituted or the liability completely constituted is one which is only exercisable or enforceable *in futuro* — a debt for example which is *debitum in praesenti solvendum in futuro*. [Emphasis added; pp. 312-13.]

> [TRADUCTION] . . . suivant l'usage établi, le mot « accumulé », appliqué à un droit ou une obligation, signifie simplement entièrement constitué — et il peut avoir ce sens bien que le contexte indique que l'exercice de ce droit entièrement constitué ou l'exécution forcée de cette obligation entièrement constituée ne seront possibles que dans l'avenir — une dette, par exemple, qui est *debitum in praesenti solvendum in futuro*. [Je souligne; p. 312-313.]

[36] Thus, a contribution has "accrued" when the liabilities are completely constituted, even if the payment itself will not fall due until a later date. If this principle is applied to the facts of this case, the liabilities related to contributions to the fund allocated for payment of the pension benefits contemplated in s. 75(1)(b) are completely

[36] Ainsi, une cotisation est « accumulée » lorsque le passif est entièrement constitué, même si le paiement lui-même ne devient exigible que plus tard. Cela signifie en l'espèce que le passif au titre des cotisations à la caisse destinée au paiement des prestations de retraite visées à l'al. 75(1)b) est entièrement constitué lorsque la liquidation

constituted at the time of the wind up, because no pension entitlements arise after that date. In other words, no new liabilities accrue at the time of or after the wind up. Even the portion of the contributions that is related to the elections plan members may make upon wind up has "accrued to the date of the wind up", because it is based on rights employees earned before the wind-up date.

[37] The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes (*Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606 (C.A.), at p. 621). The use of the word "accrued" does not limit liabilities to amounts that can be determined with precision. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

[38] The legislative history supports my conclusion that wind-up deficiency contributions are protected by the deemed trust provision. The Ontario legislature has consistently expanded the protection afforded in respect of pension plan contributions. I cannot therefore accept an interpretation that would represent a drawback from the protection extended to employees. I will not reproduce the relevant provisions, since my colleague Cromwell J. quotes them.

[39] The original statute provided solely for the employer's obligation to pay all amounts required to be paid to meet the test for solvency (*The Pension Benefits Act, 1965*, S.O. 1965, c. 96, s. 22(2)), but the legislature subsequently afforded employees the protection of a deemed trust on the employer's assets in an amount equal to the sums withheld from employees as contributions and sums due from the employer as service contributions (s. 23*a*, added by *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113, s. 6). In a later version, it protected not only contributions that were due, but also those that had accrued, with the amounts being calculated as if the plan had been wound up (*The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80).

a lieu, parce qu'aucun droit au titre de la pension ne prend naissance après cette date. Autrement dit, aucun passif ne s'accumule pendant ni après la liquidation. Même la portion des cotisations afférente aux options que les participants peuvent exercer lorsqu'il y a liquidation est « accumulé[e] à la date de la liquidation » parce qu'elle est fondée sur des droits que les employés ont acquis avant la date de la liquidation.

[37] Le fait que le montant précis des cotisations n'est pas établi au moment de la liquidation ne confère pas aux cotisations un caractère éventuel qui ferait en sorte qu'elles ne seraient pas accumulées d'un point de vue comptable (*Canadian Pacific Ltd. c. M.N.R.* (1998), 41 O.R. (3d) 606 (C.A.), p. 621). L'emploi du mot « accumulé » ne limite pas le passif aux seuls montants qui peuvent être établis avec précision. On peut donc considérer que le passif « accumulé » englobe les cotisations exigées à l'al. 75(1)b) de la *LRR*.

[38] L'historique législatif étaye ma conclusion que la disposition établissant une fiducie réputée en cas de liquidation s'applique aux cotisations au titre du déficit de liquidation. Le législateur ontarien a systématiquement élargi la protection applicable aux cotisations aux régimes de retraite. Je ne puis donc retenir une interprétation qui ferait régresser la protection accordée aux employés. Mon collègue le juge Cromwell ayant cité les dispositions législatives pertinentes, je ne les reproduirai pas ici.

[39] La loi initiale obligeait seulement l'employeur à effectuer les paiements nécessaires pour établir la solvabilité selon la norme applicable (*The Pension Benefits Act, 1965*, S.O. 1965, ch. 96, par. 22(2)), mais le législateur a par la suite protégé les employés au moyen d'une fiducie réputée grevant les biens de l'employeur d'un montant égal aux sommes retenues en tant que cotisations des employés et aux sommes dues par l'employeur (al. 23*a*, ajouté par *The Pension Benefits Amendment Act, 1973*, S.O. 1973, ch. 113, art. 6). Dans une version subséquente, ce ne furent pas que les cotisations exigibles, mais également celles qui étaient accumulées qui ont été protégées, et le calcul s'en effectuait comme s'il y avait liquidation (*The Pension Benefits Amendment Act, 1980*, S.O. 1980, ch. 80).

[40] Whereas *all* employer contributions were originally covered by a single provision, the legislature crafted a separate provision in 1980 that specifically imposed on the employer the obligation to fund the wind-up deficiency. At the time, it was clear from the words used in the provision that the amount related to the wind-up deficiency was excluded from the deemed trust protection (*The Pension Benefits Amendment Act, 1980*). In 1983, the legislature made a distinction between the deemed trust for ongoing employer contributions and the one for certain payments to be made upon wind up (ss. 23(4)(a) and 23(4)(b), added by *Pension Benefits Amendment Act, 1983*, S.O. 1983, c. 2, s. 3). In that version, the wind-up deficiency payments were still excluded from the deemed trust. However, the legislature once again made changes to the protection in 1987. The 1987 version is, in substance, the one that applies in the case at bar. In the *Pension Benefits Act, 1987*, S.O. 1987, c. 35, a specific wind-up deemed trust was maintained, but the wind-up deficiency payments were no longer excluded from it, because the limitation that had been imposed until then with respect to payments that were due or had accrued while the plan was ongoing had been eliminated. My comments to the effect that the previous versions excluded the wind-up deficiency payments do not therefore apply to the 1987 statute, since it was materially different.

[41] Whereas it is clear from the 1983 amendments that the deemed trust provided for in s. 23(4)(b) was intended to include only current service costs and special payments, this is less clear from the subsequent versions of the *PBA*. To give meaning to the 1987 amendment, I have to conclude that the words refer to a deemed trust in respect of *all* "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations".

[42] The employer's liability upon wind up is now set out in a single section which elegantly parallels the wind-up deemed trust provision. It can be seen from the legislative history that the protection has expanded from (1) only the service contributions

[40] Alors que *toutes* les cotisations de l'employeur étaient au départ régies par une seule disposition, le législateur a édicté, en 1980, une disposition distincte imposant expressément à l'employeur une obligation de capitalisation du déficit de liquidation. Il ressortait alors du libellé employé que le montant relatif au déficit à la liquidation était exclu de la protection conférée par la fiducie réputée (*The Pension Benefits Amendment Act, 1980*). En 1983, le législateur a établi une distinction entre la fiducie réputée applicable aux cotisations de l'employeur lorsque le régime est en vigueur et celle applicable à certains paiements en cas de liquidation du régime (al. 23(4)a) et 23(4)b), ajoutés par la *Pension Benefits Amendment Act, 1983*, S.O. 1983, ch. 2, art. 3). Dans cette version, les paiements au titre du déficit de liquidation étaient toujours exclus de la fiducie réputée. En 1987, toutefois, le législateur a modifié encore une fois la protection, et c'est cette version qui régit, pour l'essentiel, la présente espèce. La *Loi de 1987 sur les régimes de retraite*, L.O. 1987, ch. 35, crée toujours une fiducie réputée distincte en cas de liquidation, mais cette fiducie n'exclut plus les paiements au titre du déficit parce que la limitation imposée jusqu'alors concernant les paiements dus ou accumulés pendant l'existence du régime a été abolie. Mes commentaires selon lesquels le libellé des anciennes versions excluait les paiements au titre du déficit de liquidation ne s'appliquent donc pas à la loi de 1987, parce que celle-ci est substantiellement différente.

[41] Alors qu'il ressort clairement des modifications faites en 1983 que la fiducie réputée créée par l'al. 23(4)b) ne visait que les coûts afférents au service courant et les paiements spéciaux, cela n'est pas aussi clair dans les versions subséquentes de la *LRR*. Pour donner un sens aux modifications apportées en 1987, il faut conclure que leur libellé renvoie à une fiducie réputée couvrant *toutes* les « cotisations de l'employeur qui sont accumulées à la date de la liquidation, mais qui ne sont pas encore dues aux termes du régime ou des règlements ».

[42] La responsabilité de l'employeur à la liquidation est maintenant établie dans un article unique qui fait élégamment écho à celui qui crée la fiducie réputée à la liquidation. L'historique législatif montre que la protection, qui couvrait d'abord (1)

that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind up.

[43] Therefore, in my view, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection. Since the provision respecting wind-up payments sets out the amounts that are owed upon wind up, I see no historical, legal or logical reason to conclude that the wind-up deemed trust provision does not encompass all of them.

[44] Thus, I am of the view that the words and context of s. 57(4) lend themselves easily to an interpretation that includes the wind-up deficiency payments, and I find additional support for this in the purpose of the provision. The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. This purpose militates against adopting the limited scope proposed by Indalex and some of the interveners. In the case of competing priorities between creditors, the remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust in order to achieve a broad protection.

[45] In sum, the relevant provisions, the legislative history and the purpose are all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. I therefore find that the Court of Appeal correctly held with respect to the Salaried Plan, which had been wound up as of December 31, 2006, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

[46] The situation is different with respect to the Executive Plan. Unlike s. 57(3), which provides that

uniquement les cotisations dues, s'est étendue (2) aux montants payables calculés comme s'il y avait liquidation du régime, (3) puis aux montants dus ou accumulés à la liquidation, à l'exclusion des paiements au titre du déficit de liquidation (4) et, enfin, à tous les montants dus ou accumulés à la liquidation.

[43] Selon moi, l'historique législatif mène donc à la conclusion qu'une interprétation étroite qui dissocierait le paiement requis de l'employeur par l'al. 75(1)b) de la *LRR* de celui exigé à l'al. 75(1)a) irait à l'encontre de la tendance du législateur ontarien à offrir une protection de plus en plus étendue. Puisque la disposition régissant les paiements à la liquidation décrit les montants qui sont alors dus, je ne vois aucune raison historique, juridique ou logique de conclure que la disposition établissant une fiducie réputée en cas de liquidation ne les englobe pas tous.

[44] J'estime donc que le texte et le contexte du par. 57(4) se prêtent facilement à une interprétation qui englobe les paiements au titre du déficit de liquidation, et l'objet de cette disposition me conforte dans cette opinion. La disposition qui crée une fiducie réputée a une vocation réparatrice. Elle vise à protéger les intérêts des participants. Cet objet milite contre l'adoption de la portée limitée que proposent Indalex et certains des intervenants. En présence de priorités concurrentes entre créanciers, cette fin réparatrice favorise une interprétation qui inclut tous les paiements à la liquidation dans la valeur de la fiducie réputée pour que les participants bénéficient d'une vaste protection.

[45] En résumé, le texte, l'historique législatif et l'objet des dispositions pertinentes concordent tous avec l'inclusion du déficit de liquidation dans la protection offerte aux participants à l'égard des cotisations de l'employeur à la liquidation des régimes. Je suis donc d'avis que la Cour d'appel a jugé à bon droit qu'Indalex était réputée détenir en fiducie le montant nécessaire pour combler le déficit de liquidation du régime des salariés dont la liquidation avait pris effet le 31 décembre 2006.

[46] Il n'en va pas de même pour le régime des cadres. Contrairement au par. 57(3), selon lequel

the deemed trust protecting employer contributions exists while a plan is ongoing, s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up. This is a choice made by the Ontario legislature. I would not interfere with it. Thus, the deemed trust entitlement arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future. At the time of the sale, the Executive Plan was in the process of being, but had not yet been, wound up. Consequently, the deemed trust provision does not apply to the employer's wind-up deficiency payments in respect of that plan.

[47] The Court of Appeal declined to decide whether a deemed trust arose in relation to the Executive Plan, stating that it was unnecessary to decide this issue. However, the court expressed concern that a reasoning that deprived the Executive Plan's members of the benefit of a deemed trust would mean that a company under *CCAA* protection could avoid the priority of the *PBA* deemed trust simply by not winding up an underfunded pension plan. The fear was that Indalex could have relied on its own inaction to avoid the consequences that flow from a wind up. I am not convinced that the Court of Appeal's concern has any impact on the question whether a deemed trust exists, and I doubt that an employer could avoid the consequences of such a security interest simply by refusing to wind up a pension plan. The Superintendent may take a number of steps, including ordering the wind up of a pension plan under s. 69(1) of the *PBA* in a variety of circumstances (see s. 69(1)(d) *PBA*). The Superintendent did not choose to order that the plan be wound up in this case.

B. *Does the Deemed Trust Supersede the DIP Charge?*

[48] The finding that the interests of the Salaried Plan's members in all the employer's wind-up contributions to the Salaried Plan are protected by a

la fiducie réputée protégeant les cotisations de l'employeur existe pendant que le régime est en vigueur, le par. 57(4) prévoit que la fiducie réputée en cas de liquidation ne prend naissance qu'à la liquidation du régime. C'est ce que le législateur ontarien a décidé, et je n'interviendrai pas dans cette décision. Les droits résultant de la fiducie réputée ne prennent donc naissance que lorsque se réalise la condition préalable, c'est-à-dire lors de la liquidation du régime, et cela, même s'il est certain que le régime sera liquidé plus tard. Au moment de la vente, le régime des cadres était en voie de liquidation, mais non liquidé. La disposition relative à la fiducie réputée ne s'applique donc pas aux cotisations de l'employeur au titre du déficit de liquidation de ce régime.

[47] La Cour d'appel, ne s'est pas prononcée sur l'existence d'une fiducie réputée à l'égard du régime des cadres, affirmant qu'il n'était pas nécessaire de trancher cette question. Elle a cependant exprimé des réserves au sujet d'un raisonnement qui empêcherait les participants au régime des cadres de bénéficier d'une fiducie réputée, ce qui ferait en sorte qu'une société placée sous la protection de la *LACC* pourrait éviter la priorité établie par la *LRR* à l'égard de la fiducie réputée en s'abstenant simplement de liquider un régime de retraite sous-capitalisé. Indalex aurait ainsi pu tabler sur sa propre inaction pour échapper aux conséquences d'une liquidation. Je ne suis pas convaincue que la crainte exprimée par la Cour d'appel ait une incidence sur la question de savoir si une fiducie réputée existe, et je doute que le simple refus de liquider un régime de retraite puisse permettre à un employeur d'échapper aux conséquences d'une telle sûreté. Le surintendant peut intervenir de diverses façons, notamment en ordonnant la liquidation du régime en application du par. 69(1) de la *LRR* dans diverses circonstances (voir l'al. 69(1)d) de la *LRR*). Le surintendant n'a pas choisi, en l'espèce, d'ordonner la liquidation.

B. *La fiducie réputée a-t-elle préséance sur la charge DE?*

[48] La conclusion qu'une fiducie réputée protège les droits des participants au régime des salariés à l'égard de toutes les cotisations que l'employeur

deemed trust does not mean that part of the money reserved by the Monitor from the sale proceeds must be remitted to the Salaried Plan's fund. This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the DIP charge. Section 30(7) reads as follows:

30. . . .

(7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

The effect of s. 30(7) is to enable the Salaried Plan's members to recover from the reserve fund, insofar as it relates to an account or inventory and its proceeds in Ontario, ahead of all other secured creditors.

[49] The Appellants argue that any provincial deemed trust is subordinate to the DIP charge authorized by the *CCAA* order. They put forward two central arguments to support their contention. First, they submit that the *PBA* deemed trust does not apply in *CCAA* proceedings because the relevant priorities are those of the federal insolvency scheme, which do not include provincial deemed trusts. Second, they argue that by virtue of the doctrine of federal paramountcy the DIP charge supersedes the *PBA* deemed trust.

[50] The Appellants' first argument would expand the holding of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, so as to apply federal bankruptcy priorities to *CCAA* proceedings, with the effect that claims would be treated similarly under the *CCAA* and the *BIA*. In *Century Services*, the Court noted that there are points at which the two schemes converge:

doit verser au régime de retraite des salariés à la liquidation ne signifie pas qu'une partie des sommes retenues par le contrôleur sur le produit de la vente doit être versée à la caisse de retraite des salariés. Ce sera le cas seulement si la priorité de rang accordée par la province aux participants au régime des salariés, au par. 30(7) de la *LSM*, fait en sorte que leur réclamation a préséance sur la charge DE. Le paragraphe 30(7) prévoit ce qui suit :

30. . . .

(7) La sûreté sur un compte ou un stock et le produit de ceux-ci est subordonnée à l'intérêt du bénéficiaire d'une fiducie réputée telle aux termes de la *Loi sur les normes d'emploi* ou de la *Loi sur les régimes de retraite*.

Le paragraphe 30(7) a pour effet de permettre aux participants au régime des salariés de recouvrer leur créance sur le fonds de réserve, dans la mesure où il se rapporte à un compte ou un stock ou au produit de ceux-ci en Ontario, par préséance sur tous les autres créanciers garantis.

[49] Les appelants avancent que toute fiducie réputée d'origine provinciale est subordonnée à la charge DE autorisée par l'ordonnance fondée sur la *LACC*. Ils invoquent deux arguments principaux à cet égard. Premièrement, la fiducie réputée créée par la *LRR* ne s'appliquerait pas dans une instance relevant de la *LACC* parce que les priorités applicables sont celles qui sont établies par le régime fédéral en matière d'insolvabilité et que les fiducies réputées d'origine provinciale n'en font pas partie. Deuxièmement, ils plaident que, selon la doctrine de la prépondérance fédérale, la charge DE a préséance sur la fiducie réputée créée par la *LRR*.

[50] Le premier argument des appelants élargirait la portée de l'arrêt *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, de façon que les priorités fédérales en matière de faillite s'appliquent aux instances fondées sur la *LACC*, ce qui ferait que les créances seraient traitées de façon identique sous le régime de la *LACC* et de la *LFI*. Dans *Century Services*, la Cour a indiqué qu'il existe des points de convergence entre les deux régimes :

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. [para. 23]

[51] In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements. Yet this does not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the *BIA*. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.

[52] The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (*Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*.

Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. [par. 23]

[51] Pour éviter de précipiter une liquidation sous le régime de la *LFI*, les tribunaux privilégieront une interprétation de la *LACC* qui confère des droits analogues aux créanciers. Il ne s'ensuit toutefois pas pour autant que les tribunaux peuvent à leur gré inclure par interprétation dans la *LACC* les priorités applicables en matière de faillite. Les priorités dont bénéficient les créanciers sont définies par la législation provinciale, à moins que ces droits soient écartés par une loi fédérale. Le législateur fédéral n'a pas expressément édicté que toutes les priorités établies en matière de faillite s'appliquent aux instances relevant de la *LACC* ou aux propositions régies par la *LFI*. Bien que les créanciers d'une société tentant de se réorganiser puissent, dans leurs négociations, tenir compte des droits qu'ils pourraient exercer en cas de faillite, ces droits ne constituent rien de plus qu'une considération tant que la faillite n'est pas survenue. Au début des procédures en matière d'insolvabilité, Indalex a choisi un processus régi par la *LACC*, ne laissant aucun doute sur le fait que, bien qu'elle cherchât à protéger les emplois, elle ne demeurerait pas leur employeur. Nous ne sommes pas en présence d'un cas où l'échec d'un arrangement a entraîné la liquidation d'une société sous le régime de la *LFI*. Indalex a atteint l'objectif qu'elle poursuivait. Elle a choisi de vendre son actif sous le régime de la *LACC*, et non sous celui de la *LFI*.

[52] La fiducie réputée créée par la *LRR* continue de s'appliquer dans les instances relevant de la *LACC*, sous réserve de la doctrine de la prépondérance fédérale (*Crystalline Investments Ltd. c. Domgroup Ltd.*, 2004 CSC 3, [2004] 1 R.C.S. 60, par. 43). La Cour d'appel a donc jugé à bon droit que, à l'issue d'un processus de liquidation relevant de la *LACC*, les priorités peuvent être établies selon le régime prévu dans la *LSM*, plutôt que selon le régime fédéral établi dans la *LFI*.

[53] The Appellants' second argument is that an order granting priority to the plan's members on the basis of the deemed trust provided for by the Ontario legislature would be unconstitutional in that it would conflict with the order granting priority to the DIP lenders that was made under the *CCAA*. They argue that the doctrine of paramountcy resolves this conflict, as it would render the provincial law inoperative to the extent that it is incompatible with the federal law.

[54] There is a preliminary question that must be addressed before determining whether the doctrine of paramountcy applies in this context. This question arises because the Court of Appeal found that although the *CCAA* court had the power to authorize a DIP charge that would supersede the deemed trust, the order in this case did not have such an effect because paramountcy had not been invoked. As a result, the priority of the deemed trust over secured creditors by virtue of s. 30(7) of the *PPSA* remained in effect, and the Plan Members' claim ranked in priority to the claim of the DIP lenders established in the *CCAA* order.

[55] With respect, I cannot accept this approach to the doctrine of federal paramountcy. This doctrine resolves conflicts in the application of overlapping valid provincial and federal legislation (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 32 and 69). Paramountcy is a question of law. As a result, subject to the application of the rules on the admissibility of new evidence, it can be raised even if it was not invoked in an initial proceeding.

[56] A party relying on paramountcy must "demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law" (*Canadian Western Bank*, at para. 75). This Court has in fact applied the doctrine of paramountcy in the area of bankruptcy and insolvency to come to the conclusion that a

[53] Selon le deuxième argument des appelants, une ordonnance accordant priorité aux participants en raison de la fiducie réputée créée par le législateur ontarien serait inconstitutionnelle, parce qu'elle entrerait en conflit avec l'ordonnance fondée sur la *LACC* qui donne priorité à la charge DE. La doctrine de la prépondérance fédérale résoudrait ce conflit, en rendant la loi provinciale inopérante dans la mesure de son incompatibilité avec la loi fédérale.

[54] Pour statuer sur l'applicabilité de la doctrine de la prépondérance fédérale dans le présent contexte, il faut d'abord trancher une question préliminaire. Cette question découle de la conclusion de la Cour d'appel selon laquelle, bien que le tribunal fût habilité à autoriser une charge DE ayant priorité de rang sur la fiducie réputée, l'ordonnance du tribunal en l'espèce n'avait pas eu cet effet parce que la doctrine de la prépondérance fédérale n'avait pas été invoquée. Il s'ensuivait que la priorité de rang de la fiducie réputée sur les créanciers garantis établie au par. 30(7) de la *LSM* demeurait applicable et que la créance des participants avait préséance sur celle des prêteurs DE découlant de l'ordonnance rendue sous le régime de la *LACC*.

[55] Avec égards, je ne puis souscrire à cette conception de la doctrine de la prépondérance fédérale. Cette doctrine résout les conflits d'application entre des lois provinciales et fédérales validement adoptées qui empiètent l'une sur l'autre (*Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 32 et 69). La prépondérance est une question de droit, si bien que, sous réserve de l'application des règles régissant l'admissibilité de nouveaux éléments de preuve, elle peut être soulevée même si elle n'a pas été invoquée dans une procédure initiale.

[56] La partie qui invoque la prépondérance fédérale doit « démontrer une incompatibilité réelle entre les législations provinciale et fédérale, en établissant, soit qu'il est impossible de se conformer aux deux législations, soit que l'application de la loi provinciale empêcherait la réalisation du but de la législation fédérale » (*Banque canadienne de l'Ouest*, par. 75). Notre Cour a déjà appliqué la doctrine de la prépondérance au domaine de la

provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation (*Husky Oil*).

[57] None of the parties question the validity of either the federal provision that enables a *CCAA* court to make an order authorizing a DIP charge or the provincial provision that establishes the priority of the deemed trust. However, in considering whether the *CCAA* court has, in exercising its discretion to assess a claim, validly affected a provincial priority, the reviewing court should remind itself of the rule of interpretation stated in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 (at p. 356), and reproduced in *Canadian Western Bank* (at para. 75):

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

[58] In the instant case, the *CCAA* judge, in authorizing the DIP charge, did not consider the fact that the Salaried Plan's members had a claim that was protected by a deemed trust, nor did he explicitly note that ordinary creditors, such as the Executive Plan's members, had not received notice of the DIP loan motion. However, he did consider factors that were relevant to the remedial objective of the *CCAA* and found that Indalex had in fact demonstrated that the *CCAA*'s purpose would be frustrated without the DIP charge. It will be helpful to quote the reasons he gave on April 17, 2009 in authorizing the DIP charge ((2009), 52 C.B.R. (5th) 61):

> (a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring;

faillite et de l'insolvabilité, et elle a conclu que des mesures législatives provinciales, comme la création d'une fiducie réputée, ne peuvent porter atteinte à des priorités établies par le législateur fédéral (*Husky Oil*).

[57] Ni la validité de la disposition fédérale habilitant le tribunal chargé d'appliquer la *LACC* à rendre une ordonnance autorisant une charge DE, ni celle de la disposition provinciale créant la priorité de rang de la fiducie réputée ne sont contestées. Toutefois, lorsqu'elle examine la validité de l'atteinte portée à une priorité d'origine provinciale par le tribunal chargé d'appliquer la *LACC* dans l'exercice de son pouvoir discrétionnaire d'évaluer une réclamation, la cour siégeant en révision ne doit pas perdre de vue la règle d'interprétation formulée dans *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307 (p. 356), et reproduite dans *Banque canadienne de l'Ouest* (par. 75) :

> Chaque fois qu'on peut légitimement interpréter une loi fédérale de manière qu'elle n'entre pas en conflit avec une loi provinciale, il faut appliquer cette interprétation de préférence à toute autre qui entraînerait un conflit.

[58] En l'espèce, le juge qui a autorisé la charge DE sous le régime de la *LACC* n'a pas pris en compte le fait que les participants au régime des salariés avaient une créance protégée par une fiducie réputée, et il n'a pas non plus mentionné expressément que les créanciers ordinaires, tels les participants au régime des cadres, n'avaient pas reçu avis de la motion en autorisation du prêt DE. Il a toutefois examiné des facteurs se rapportant à la fin réparatrice de la *LACC* et conclu qu'Indalex avait effectivement démontré que la réalisation des objets de la *LACC* serait compromise en l'absence de la charge DE. Je crois utile de citer les motifs qu'il a exprimés à l'appui de sa décision d'autoriser la charge DE le 17 avril 2009 ((2009), 52 C.B.R. (5th) 61) :

> [TRADUCTION]
>
> a) les requérantes ont besoin de fonds supplémentaires pour soutenir l'exploitation pendant leur période de restructuration sur la base de la continuité;

(b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;

(c) there is no other alternative available to the Applicants for a going concern solution;

(d) a stand-alone solution is impractical given the integrated nature of the business of Indalex Canada and Indalex U.S.;

(e) given the collateral base of Indalex U.S., the Monitor is satisfied that it is unlikely that the Post-Filing Guarantee with respect to the U.S. Additional Advances will ever be called and the Monitor is also satisfied that the benefits to stakeholders far outweighs the risk associated with this aspect of the Post-Filing Guarantee;

(f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;

(g) the Pre-Filing Security has been reviewed by counsel to the Monitor and it appears that the unsecured creditors of the Canadian debtors will be in no worse position as a result of the Post-Filing Guarantee than they were otherwise, prior to the CCAA filing, as a result of the limitation of the Canadian guarantee set forth in the draft Amended and Restated Initial Order . . . ; and

(h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing. [para. 9]

[59] 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

b) la marge de manœuvre que le financement DE procurerait aux requérantes aurait l'avantage de leur permettre de trouver une solution préservant la continuité de leur exploitation;

c) les requérantes ne disposent d'aucune autre solution permettant la continuité de l'exploitation;

d) vu le degré d'intégration de l'exploitation d'Indalex Canada et d'Indalex É.-U., une solution indépendante est irréaliste;

e) vu les biens fournis en garantie par Indalex É.-U., le contrôleur juge peu probable qu'il faille réaliser la garantie postérieure au début de l'instance consentie à l'égard des avances supplémentaires aux É.-U. et il est convaincu que les avantages pour les intéressés dépassent de beaucoup le risque associé à cet aspect de la garantie;

f) les avantages du financement DE pour les intéressés et les créanciers l'emportent sur tout préjudice que pourrait causer aux créanciers non garantis l'octroi d'un financement garanti par une superpriorité grevant l'actif des requérantes;

g) l'avocat du contrôleur a examiné la garantie antérieure au début de l'instance, et il appert que la garantie postérieure au début de l'instance ne placera pas les créanciers non garantis des débiteurs canadiens dans une situation pire que celle où ils se trouvaient avant l'introduction de l'instance fondée sur la *LACC*, en raison des restrictions applicables à la garantie canadienne établies dans le projet d'ordonnance initiale modifiée et reformulée . . .

h) la prépondérance des inconvénients favorise l'approbation du financement DE. [par. 9]

[59] Étant donné qu'il n'existait aucune autre solution pour préserver la continuité de l'exploitation, il est difficile d'accepter l'insinuation sans nuance de la Cour d'appel que les prêteurs DE auraient accepté que leur réclamation soit subordonnée à celles fondées sur la fiducie réputée. Rien dans la preuve présentée n'accrédite un tel scénario. Non seulement les conclusions de fait du juge chargé d'appliquer la *LACC* le contredisent, mais il a été démontré maintes et maintes fois que [TRADUCTION] « la priorité accordée au financement DE constitue un élément clé de la capacité du débiteur de tenter de conclure un arrangement » (J. P. Sarra, *Rescue! The Companies' Creditors*

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" (2009 CanLII 37906, at paras. 7-8).

Arrangement Act (2007), p. 97). La dure réalité est que l'octroi de prêts est régi par les impératifs commerciaux des prêteurs, et non par les intérêts des participants ou par les considérations de politique générale qui ont incité les législateurs provinciaux à protéger les bénéficiaires de caisses de retraite. Les motifs exposés par le juge Morawetz lorsque, le 12 juin 2009, les participants au régime des cadres ont demandé pour la première fois que leurs droits soient réservés sont révélateurs. Selon lui, toute incertitude quant à savoir si les prêteurs refuseraient de consentir des avances ou s'ils auraient priorité dans le cas où des avances seraient consenties [TRADUCTION] « n'améliorerait pas la situation ». Il a conclu qu'en l'absence de solution de rechange la réparation demandée était « nécessaire et appropriée » (2009 CanLII 37906, par. 7-8).

[60] In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the *PPSA* required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

[60] En l'occurrence, le respect du droit provincial implique nécessairement le non-respect de l'ordonnance rendue en vertu du droit fédéral. D'un côté, le par. 30(7) de la *LSM* exige qu'une partie du produit de la vente lié aux biens décrits dans la loi provinciale soit versée à l'administrateur du régime de retraite par priorité sur les paiements aux autres créanciers garantis. D'un autre côté, l'ordonnance initiale modifiée accorde à la charge DE priorité sur [TRADUCTION] « toutes les autres sûretés, y compris les fiducies, privilèges, charges et grèvements, d'origine législative ou autre » (par. 45). Accorder priorité aux prêteurs DE relègue à un rang inférieur les créances des autres intéressés, notamment les participants. Cette priorité d'origine judiciaire fondée sur la *LACC* a le même effet qu'une priorité d'origine législative. Les dispositions fédérales et provinciales sont inconciliables, car elles produisent des ordres de priorité différents et conflictuels. L'application de la doctrine de la prépondérance fédérale donne à la charge DE priorité sur la fiducie réputée.

C. *Did Indalex Have Fiduciary Obligations to the Plan Members?*

[61] The fact that the DIP financing charge supersedes the deemed trust or that the interests of the Executive Plan's members are not protected by the deemed trust does not mean that Plan Members have no right to receive money out of the reserve

C. *Indalex avait-elle des obligations fiduciaires envers les participants?*

[61] Le fait que la charge DE ait préséance sur la fiducie réputée ou que les intérêts des participants au régime des cadres ne soient pas protégés par la fiducie réputée ne signifient pas que les participants n'ont pas le droit de recevoir un montant prélevé

fund. What remains to be considered is whether an equitable remedy, which could override all priorities, can and should be granted for a breach by Indalex of a fiduciary duty.

[62] The first stage of a fiduciary duty analysis is to determine whether and when fiduciary obligations arise. The Court has recognized that there are circumstances in which a pension plan administrator has fiduciary obligations to plan members both at common law and under statute (*Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, at para. 41). It is clear that the indicia of a fiduciary relationship attach in this case between the Plan Members and Indalex as plan administrator. Sun Indalex and the Monitor do not dispute this proposition.

[63] However, Sun Indalex and the Monitor argue that the employer has a fiduciary duty only when it acts as plan administrator — when it is wearing its administrator's "hat". They contend that, outside the plan administration context, when directors make decisions in the best interests of the corporation, the employer is wearing solely its "corporate hat". On this view, decisions made by the employer in its corporate capacity are not burdened by the corporation's fiduciary obligations to its pension plan members and, consequently, cannot be found to conflict with plan members' interests. This is not the correct approach to take in determining the scope of the fiduciary obligations of an employer acting as plan administrator.

[64] Only persons or entities authorized by the *PBA* can act as plan administrators (ss. 1(1) and 8(1)(a)). The employer is one of them. A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the fact that the corporate employer can act as administrator

sur le fonds de réserve. Il faut encore examiner s'il est possible et s'il y a lieu d'imposer une réparation en equity — pouvant avoir préséance sur toutes les priorités — pour manquement par Indalex à une obligation fiduciaire.

[62] La première étape de l'analyse relative à une obligation fiduciaire consiste à déterminer si de telles obligations existent et dans quel contexte elles s'appliquent. La Cour a reconnu que, dans certaines circonstances, l'administrateur d'un régime de retraite a des obligations fiduciaires envers les participants en vertu tant de la common law que de la législation (*Burke c. Cie de la Baie d'Hudson*, 2010 CSC 34, [2010] 2 R.C.S. 273, par. 41). Il est clair que la relation entre les participants et Indalex, en sa qualité d'administrateur des régimes, présente les caractéristiques d'une relation fiduciaire. Ni Sun Indalex ni le contrôleur ne le contestent.

[63] Sun Indalex et le contrôleur font cependant valoir que l'employeur n'est tenu à une obligation fiduciaire que lorsqu'il agit en qualité d'administrateur des régimes — lorsqu'il porte son « chapeau » d'administrateur des régimes. Hors du contexte de l'administration des régimes, lorsque le conseil d'administration prend des décisions dans l'intérêt supérieur de la société, il porte uniquement son « chapeau » de gestionnaire de la société. Selon cette optique, les décisions de l'employeur concernant la gestion de l'entreprise ne sont pas assujetties aux obligations fiduciaires de la société envers les participants à son régime de retraite et, par conséquent, ne peuvent entrer en conflit avec les intérêts des participants. Je ne puis accepter cette interprétation lorsqu'il s'agit de déterminer la portée des obligations fiduciaires qui incombent à un employeur en sa qualité d'administrateur d'un régime de retraite.

[64] Seules peuvent administrer un régime de retraite les personnes ou entités qui y sont autorisées par la *LRR* (par. 1(1) et al. 8(1)a)). L'employeur fait partie de ces personnes ou entités. L'employeur constitué en société qui décide d'agir en qualité d'administrateur d'un régime accepte les obligations fiduciaires inhérentes à cette fonction. Puisque les administrateurs d'une société ont aussi une

of a pension plan means that s. 8(1)(a) of the *PBA* is based on the assumption that not all decisions taken by directors in managing a corporation will result in conflict with the corporation's duties to the plan's members. However, the corporate employer must be prepared to resolve conflicts where they arise. Reorganization proceedings place considerable burdens on any debtor, but these burdens do not release an employer that acts as plan administrator from its fiduciary obligations.

[65] Section 22(4) of the *PBA* explicitly provides that a plan administrator must not permit its own interest to conflict with its duties in respect of the pension fund. Thus, where an employer's own interests do not converge with those of the plan's members, it must ask itself whether there is a potential conflict and, if so, what can be done to resolve the conflict. Where interests do conflict, I do not find the two hats metaphor helpful. The solution is not to determine whether a given decision can be classified as being related to either the management of the corporation or the administration of the pension plan. The employer may well take a sound management decision, and yet do something that harms the interests of the plan's members. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

[66] When the interests the employer seeks to advance on behalf of the corporation conflict with interests the employer has a duty to preserve as plan administrator, a solution must be found to ensure that the plan members' interests are taken care of. This may mean that the corporation puts the members on notice, or that it finds a replacement administrator, appoints representative counsel or

obligation fiduciaire envers la société, le fait que l'employeur puisse agir en qualité d'administrateur d'un régime de retraite signifie que l'al. 8(1)a) de la *LRR* repose sur la prémisse que les décisions de gestion de l'entreprise prises par les administrateurs n'engendreront pas toujours un conflit avec les obligations de la société envers les participants au régime de retraite. L'employeur doit toutefois être prêt à résoudre les conflits lorsqu'ils surgissent. Une procédure de réorganisation impose inévitablement un poids à un débiteur, mais ce fardeau ne libère pas l'employeur qui agit en qualité d'administrateur d'un régime de retraite de ses obligations fiduciaires.

[65] Le paragraphe 22(4) de la *LRR* interdit expressément à l'administrateur d'un régime de permettre que son intérêt entre en conflit avec ses obligations à l'égard du régime de retraite. Par conséquent, l'employeur dont le propre intérêt ne coïncide pas avec celui des participants au régime doit se demander si cette divergence d'intérêts peut susciter un conflit et, le cas échéant, ce qu'il faut faire pour le résoudre. Lorsqu'il y a effectivement conflit, la métaphore des deux « chapeaux » n'est selon moi d'aucun secours. La solution ne consiste pas à déterminer si une décision peut être classifiée comme se rattachant à la gestion de la société ou à l'administration du régime de retraite. L'employeur peut très bien prendre une décision judicieuse concernant la gestion de la société et, néanmoins, porter préjudice aux intérêts des participants au régime. L'employeur qui administre un régime de retraite n'est pas autorisé à négliger ses obligations fiduciaires envers les participants au régime et à favoriser les intérêts concurrents de la société sous prétexte qu'il porte le « chapeau » de dirigeant de la société. Ce sont les conséquences d'une décision, et non sa nature qui doivent être prises en compte.

[66] Lorsque les intérêts de la société que l'employeur tente de servir se heurtent à ceux que l'employeur a le devoir de protéger en qualité d'administrateur du régime, il faut trouver une façon de veiller sur les intérêts des participants. Cela peut vouloir dire que la société les tiendra informés, qu'elle trouvera un administrateur substitut pour le régime, qu'elle nommera un avocat

finds some other means to resolve the conflict. The solution has to fit the problem, and the same solution may not be appropriate in every case.

[67] In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Indalex had a number of responsibilities as plan administrator. For example, s. 56(1) of the *PBA* required it to ensure that contributions were paid when due. Section 56(2) required that it notify the Superintendent if contributions were not paid when due. It was also up to Indalex under s. 59 to commence proceedings to obtain payment of contributions that were due but not paid. Indalex, as an employer, paid all the contributions that were due. However, its insolvency put contributions that had accrued to the date of the wind up at risk. In an insolvency context, the administrator's claim for contributions that have accrued is a provable claim.

[68] In the context of this case, the fact that Indalex, as plan administrator, might have to claim accrued contributions from itself means that it would have to simultaneously adopt conflicting positions on whether contributions had accrued as of the date of liquidation and whether a deemed trust had arisen in respect of wind-up deficiencies. This is indicative of a clear conflict between Indalex's interests and those of the Plan Members. As soon as it saw, or ought to have seen, a potential for conflict, Indalex should have taken steps to ensure that the interests of the Plan Members were protected. It did not do so. On the contrary, it contested the position the Plan Members advanced. At the very least, Indalex breached its duty to avoid conflicts of interest (s. 22(4) *PBA*).

[69] Since the Plan Members seek an equitable remedy, it is important to identify the point at

pour représenter les participants ou qu'elle résoudra le conflit par un autre moyen. La solution doit être adaptée au problème, et une solution donnée ne vaudra pas nécessairement pour tous les cas.

[67] En l'espèce, il y avait bien conflit entre les obligations fiduciaires qui incombaient à Indalex en sa qualité d'administrateur des régimes et les décisions de gestion qu'elle devait prendre dans le meilleur intérêt de la société. Indalex avait certaines responsabilités en sa qualité d'administrateur des régimes. Par exemple, le par. 56(1) de la *LRR* l'obligeait à veiller à ce que les cotisations soient payées à leur date d'exigibilité et, si elles ne l'étaient pas, le par. 56(2) exigeait qu'elle en avise le surintendant. Il incombait également à Indalex, aux termes de l'art. 59, d'introduire une instance devant un tribunal compétent pour obtenir le paiement des cotisations dues, mais impayées. Indalex, en tant qu'employeur, a acquitté toutes les cotisations dues. Son insolvabilité compromettait toutefois le paiement des cotisations accumulées à la date de la liquidation. En cas d'insolvabilité, la créance de l'administrateur d'un régime à l'égard des cotisations accumulées constitue une réclamation prouvable.

[68] Dans le contexte de la présente affaire, le fait qu'Indalex pouvait, en sa qualité d'administrateur des régimes de retraite, avoir à se réclamer à elle-même les cotisations accumulées l'amènerait à devoir adopter simultanément des positions opposées quant à savoir si des cotisations s'étaient accumulées à la date de la liquidation et si les déficits de capitalisation étaient protégés par une fiducie réputée. Cet exemple démontre qu'il existait manifestement un conflit entre les intérêts d'Indalex et ceux des participants. Indalex aurait dû prendre des mesures pour assurer la protection des intérêts des participants dès qu'elle a constaté, ou qu'elle aurait dû constater, l'existence d'un conflit potentiel. Elle ne l'a pas fait. Elle a, au contraire, contesté la position défendue par les participants. Elle a donc, à tout le moins, manqué à son obligation d'éviter les conflits d'intérêts (par. 22(4) *LRR*).

[69] Comme les participants demandent une réparation en equity, il importe d'établir à quel moment

which Indalex should have moved to ensure that their interests were safeguarded. Before doing so, I would stress that factual contexts are needed to analyse conflicts between interests, and that it is neither necessary nor useful to attempt to map out all the situations in which conflicts may arise.

[70] As I mentioned above, insolvency puts the employer's contributions at risk. This does not mean that the decision to commence insolvency proceedings entails on its own a breach of a fiduciary obligation. The commencement of insolvency proceedings in this case on April 3, 2009 in an emergency situation was explained by Timothy R. J. Stubbs, the then-president of Indalex. The company was in default to its lender, it faced legal proceedings for unpaid bills, it had received a termination notice effective April 6 from its insurers, and suppliers had stopped supplying on credit. These circumstances called for urgent action by Indalex lest a creditor start bankruptcy proceedings and in so doing jeopardize ongoing operations and jobs. Several facts lead me to conclude that the stay sought in this case did not, in and of itself, put Indalex in a conflict of interest.

[71] First, a stay operates only to freeze the parties' rights. In most cases, stays are obtained *ex parte*. One of the reasons for refraining from giving notice of the initial stay motion is to avert a situation in which creditors race to court to secure benefits that they would not enjoy in insolvency. Subjecting as many creditors as possible to a single process is seen as a way to treat all of them more equitably. In this context, plan members are placed on the same footing as the other creditors and have no special entitlement to notice. Second, one of the conclusions of the order Indalex sought was that it was to be served on all creditors, with a few exceptions, within 10 days. The notice allowed any interested party to apply to vary the order. Third, Indalex was permitted to pay all pension benefits. Although the order excluded special solvency payments, no ruling was made at that point on the

Indalex aurait dû prendre des mesures pour veiller à ce que leurs intérêts soient protégés. Soulignons au préalable que l'analyse d'un conflit d'intérêts doit s'appuyer sur un contexte factuel et qu'il n'est ni nécessaire ni utile de tenter de décrire toutes les situations dans lesquelles un conflit est susceptible de surgir.

[70] L'insolvabilité, comme je l'ai déjà mentionné, met en péril les cotisations de l'employeur. Cela ne signifie pas pour autant que la seule décision d'engager une procédure en matière d'insolvabilité constitue un manquement à une obligation fiduciaire. Le président d'Indalex à l'époque, M. Timothy R. J. Stubbs, a expliqué pourquoi une procédure en matière d'insolvabilité avait été engagée, le 3 avril 2009, dans une situation d'urgence. La dette d'Indalex envers son prêteur était en souffrance, la société s'exposait à des poursuites pour factures impayées, elle avait reçu un avis de résiliation de son assureur qui prenait effet le 6 avril et ses fournisseurs ne lui faisaient plus crédit. Indalex devait donc agir de toute urgence, avant qu'un créancier n'entame une procédure de mise en faillite, ce qui aurait compromis la poursuite de l'exploitation de l'entreprise et le maintien des emplois. Plusieurs raisons m'amènent à conclure que la suspension demandée en l'espèce n'a pas en elle-même placé Indalex en conflit d'intérêts.

[71] Premièrement, la suspension ne fait que figer les droits des parties. La plupart du temps, elle s'obtient *ex parte*. C'est notamment pour éviter que les créanciers se ruent devant les tribunaux pour tenter d'obtenir des avantages que les procédures en matière d'insolvabilité ne leur procureraient pas qu'on s'abstient de donner avis de la motion initiale en suspension. Il semble plus équitable d'appliquer un processus unique au plus grand nombre possible de créanciers. Dans ce contexte, les participants sont sur le même pied que les autres créanciers, et ils ne bénéficient d'aucun droit spécial de recevoir un avis. Deuxièmement, l'une des conclusions de l'ordonnance demandée par Indalex exigeait que, sous réserve de quelques exceptions, tous les créanciers reçoivent signification de l'ordonnance dans un délai de 10 jours. L'avis permettait à tout intéressé de demander une modification de l'ordonnance.

merits of the creditors' competing claims, and a stay gave the Plan Members the possibility of presenting their arguments on the deemed trust rather than losing it altogether as a result of a bankruptcy proceeding, which was the alternative.

[72] Whereas the stay itself did not put Indalex in a conflict of interest, the proceedings that followed had adverse consequences. On April 8, 2009, Indalex brought a motion to amend and restate the initial order in order to apply for DIP financing. This motion had been foreseen. Mr. Stubbs had mentioned in the affidavit he signed in support of the initial order that the lenders had agreed to extend their financing, but that Indalex would be in need of authorization in order to secure financing to continue its operations. However, the initial order had not yet been served on the Plan Members as of April 8. Short notice of the motion was given to the USW rather than to all the individual Plan Members, but the USW did not appear. The Plan Members were quite simply not represented on the motion to amend the initial stay order requesting authorization to grant the DIP charge.

[73] In seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the Plan Members' priority. This was a case in which Indalex's directors permitted the corporation's best interests to be put ahead of those of the Plan Members. The directors may have fulfilled their fiduciary duty to Indalex, but they placed Indalex in the position of failing to fulfil its obligations as plan administrator. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the Plan Members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the Plan Members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty

Troisièmement, Indalex était autorisée à verser toutes les prestations de retraite. Même si l'ordonnance excluait les paiements spéciaux de solvabilité, elle ne réglait pas les droits concurrents des créanciers, et la suspension permettait aux participants de présenter leurs arguments au sujet de la fiducie réputée, alors qu'ils en auraient tout simplement perdu le bénéfice dans le contexte d'une faillite, qui était la solution de rechange.

[72] Bien que la suspension en elle-même n'ait pas placé Indalex en situation de conflit d'intérêts, les procédures qui ont suivi ont eu des conséquences négatives. Le 8 avril 2009, Indalex a déposé une motion en modification et reformulation de l'ordonnance initiale pour demander un financement DE. Cette motion avait été prévue. M. Stubbs avait mentionné dans son affidavit à l'appui de la demande d'ordonnance initiale que les prêteurs avaient consenti au financement, mais qu'Indalex devrait être autorisée à obtenir le financement pour poursuivre ses activités. Toutefois, le 8 avril, l'ordonnance initiale n'avait pas encore été signifiée aux participants. Un court préavis avait été donné au Syndicat, plutôt qu'à chacun des participants, mais le Syndicat n'a pas comparu. Les participants n'étaient tout simplement pas représentés lors de l'examen de la motion en modification de l'ordonnance initiale de suspension et en autorisation d'accorder la charge DE.

[73] En demandant au tribunal d'autoriser une forme de financement selon laquelle un créancier se verrait accorder priorité sur tous les autres, Indalex demandait au tribunal chargé d'appliquer la *LACC* de faire échec à la priorité dont bénéficiaient les participants. Il s'agit d'un cas où les administrateurs d'Indalex ont permis que les intérêts de la société l'emportent sur ceux des participants. Ce faisant, ils ont peut-être rempli leurs obligations fiduciaires envers Indalex, mais ils ont fait en sorte qu'Indalex a manqué à ses obligations en tant qu'administrateur des régimes. L'intérêt de la société consistait à rechercher la meilleure façon de survivre dans un contexte d'insolvabilité. La poursuite de cet intérêt était incompatible avec le devoir de l'administrateur des régimes envers les participants de veiller à ce que toutes les cotisations soient versées aux caisses de retraite. En l'occurrence, ce devoir de l'administrateur des régimes impliquait, plus

meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the Plan Members. Because Indalex supported the motion asking that a priority be granted to its lender, it could not at the same time argue for a priority based on the deemed trust.

[74] The Court of Appeal found a number of other breaches. I agree with Cromwell J. that none of the subsequent proceedings had a negative impact on the Plan Members' rights. The events that occurred, in particular the second DIP financing motion and the sale process, were predictable and, in a way, typical of reorganizations. Notice was given in all cases. The Plan Members were represented by able counsel. More importantly, the court ordered that funds be reserved and that a full hearing be held to argue the issues.

[75] The Monitor and George L. Miller, Indalex U.S.'s trustee in bankruptcy, argue that the Plan Members should have appealed the Amended Initial Order authorizing the DIP charge, and were precluded from subsequently arguing that their claim ranked in priority to that of the DIP lenders. They take the position that the collateral attack doctrine bars the Plan Members from challenging the DIP financing order. This argument is not convincing. The Plan Members did not receive notice of the motion to approve the DIP financing. Counsel for the Executive Plan's members presented the argument of that plan's members at the first opportunity and repeated it each time he had an occasion to do so. The only time he withdrew their opposition was at the hearing of the motion for authorization to increase the DIP loan amount after being told that the only purpose of the motion was to increase the amount of the authorized loan. The *CCAA* judge set a hearing date for the very purpose of presenting the arguments that Indalex, as plan administrator, could have presented when it requested the amendment to the initial order.

particulièrement, qu'il donne à tout le moins aux participants la possibilité d'exposer leurs arguments. Cela signifiait, au minimum, que les participants avaient droit à un avis raisonnable de la motion en autorisation du financement DE. La teneur de cette motion, présentée sans avis convenable, allait à l'encontre des intérêts des participants. Étant donné qu'Indalex soutenait la motion visant l'octroi d'une priorité à son prêteur, elle ne pouvait pas simultanément défendre l'existence d'une priorité fondée sur la fiducie réputée.

[74] La Cour d'appel a constaté d'autres manquements. Je partage l'opinion du juge Cromwell qu'aucune des procédures subséquentes n'a porté atteinte aux droits des participants. La suite des événements, notamment la deuxième motion en approbation du financement DE et le processus de vente, était prévisible et, à cet égard, typique des réorganisations. Dans tous les cas, des avis ont été donnés. Les participants ont été représentés par des avocats compétents. Fait plus important, le tribunal a ordonné que des fonds soient réservés et qu'une audience soit tenue pour que les questions en litige soient pleinement débattues.

[75] Le contrôleur et George L. Miller, le syndic de faillite d'Indalex É.-U., soutiennent que les participants auraient dû interjeter appel de l'ordonnance initiale modifiée autorisant la charge DE et qu'ils ne devaient pas être admis à prétendre plus tard que leur créance avait priorité sur celle des prêteurs DE. Ils plaident que la règle interdisant les contestations indirectes empêche les participants de contester l'ordonnance autorisant le financement DE. Cet argument n'est pas convaincant. Les participants n'ont pas reçu avis de la motion demandant au tribunal d'autoriser le financement DE. L'avocat des participants au régime des cadres a défendu leur position dès qu'il a pu le faire et l'a réitérée chaque fois qu'il en a eu l'occasion. À l'audition de la motion visant l'augmentation du prêt DE, il n'a retiré leur opposition que lorsqu'on lui a dit que son seul objet était d'augmenter le montant du prêt autorisé. Le juge chargé d'appliquer la *LACC* a fixé une date d'audience expressément pour la présentation des arguments qu'Indalex aurait pu faire valoir, en qualité d'administrateur des régimes, lorsqu'elle a demandé la modification de l'ordonnance initiale.

It cannot now be argued, therefore, that the Plan Members are barred from defending their interests by the collateral attack doctrine.

D. *Would an Equitable Remedy Be Appropriate in the Circumstances?*

[76] The definition of "secured creditor" in s. 2 of the *CCAA* includes a trust in respect of the debtor's property. The Amended Initial Order (at para. 45) provided that the DIP lenders' claims ranked in priority to all trusts, "statutory or otherwise". Indalex U.S. was subrogated to the DIP lenders' claim by operation of the guarantee in the DIP lending agreement.

[77] Counsel for the Executive Plan's members argues that the doctrine of equitable subordination should apply to subordinate Indalex U.S.'s subrogated claim to those of the Plan Members. This Court discussed the doctrine of equitable subordination in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558, but did not endorse it, leaving it for future determination (p. 609). I do not need to endorse it here either. Suffice to say that there is no evidence that the lenders committed a wrong or that they engaged in inequitable conduct, and no party has contested the validity of Indalex U.S.'s payment of the US$10 million shortfall.

[78] This leaves the constructive trust remedy ordered by the Court of Appeal. It is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. I agree with my colleague Cromwell J. that this condition is not met in the case at bar. I adopt his reasoning on this issue.

[79] Moreover, I am of the view that it was unreasonable for the Court of Appeal to reorder the priorities in this case. The breach of fiduciary duty identified in this case is, in substance, the lack of notice. Since the Plan Members were allowed to fully argue their case at a hearing specifically held

La règle interdisant les contestations indirectes ne peut donc être invoquée maintenant pour empêcher les participants de défendre leurs intérêts.

D. *Y a-t-il lieu d'accorder une réparation en equity en l'espèce?*

[76] La définition d'un « créancier garanti » à l'art. 2 de la *LACC* inclut la fiducie relative aux biens du débiteur. L'ordonnance initiale modifiée donne à la créance des prêteurs DE priorité sur toute fiducie [TRADUCTION] « d'origine législative ou autre » (par. 45). Indalex É.-U. a été subrogée aux prêteurs DE en conséquence de la garantie consentie dans la convention de prêt DE.

[77] L'avocat des participants au régime des cadres soutient que, selon le principe de la subordination reconnue en equity, la créance d'Indalex É.-U. fondée sur la subrogation est subordonnée à celle des participants. Dans *Société d'assurance-dépôt du Canada c. Banque Commerciale du Canada*, [1992] 3 R.C.S. 558, notre Cour a examiné le principe de la subordination reconnue en equity. Elle ne l'a toutefois pas entériné, reportant l'examen de cette question à un autre moment (p. 609). Je n'ai pas non plus besoin de l'entériner ici. Il suffit de mentionner que la preuve ne révèle aucune inconduite ni injustice de la part des prêteurs, et qu'aucune partie ne conteste la validité du paiement, par Indalex É.-U., des 10 millions de dollars américains manquants.

[78] Reste donc la fiducie par interprétation imposée par la Cour d'appel. Il est bien établi en droit qu'une réparation de la nature d'un droit de propriété n'est généralement accordée qu'à l'égard d'un bien ayant un lien direct avec un acte fautif ou d'un bien qui peut être rattaché à un tel bien. Je partage l'avis de mon collègue le juge Cromwell que cette condition n'est pas remplie en l'espèce et je souscris à ses motifs sur ce point.

[79] En outre, je considère qu'il était déraisonnable pour la Cour d'appel de modifier l'ordre de priorité. Le manquement à l'obligation fiduciaire constaté en l'espèce consiste essentiellement en l'absence d'avis. Puisque les participants ont été autorisés à présenter leurs arguments lors d'une

to adjudicate their rights, the *CCAA* court was in a position to fully appreciate the parties' positions.

[80] It is difficult to see what gains the Plan Members would have secured had they received notice of the motion that resulted in the Amended Initial Order. The *CCAA* judge made it clear, and his finding is supported by logic, that there was no alternative to the DIP loan that would allow for the sale of the assets on a going-concern basis. The Plan Members presented no evidence to the contrary. They rely on conjecture alone. The Plan Members invoke other cases in which notice was given to plan members and in which the members were able to fully argue their positions. However, in none of those cases were plan members able to secure any additional benefits. Furthermore, the Plan Members were allowed to fully argue their case. As a result, even though Indalex breached its fiduciary duty to notify the Plan Members of the motion that resulted in the Amended Initial Order, their claim remains subordinate to that of Indalex U.S.

IV. Conclusion

[81] There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the *CCAA*, but chose not to (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, in force September 18, 2009, SI/2009-68; see also Bill C-501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:

audience spécialement tenue pour statuer sur leurs droits, le tribunal chargé d'appliquer la *LACC* était pleinement en mesure d'évaluer la position des parties.

[80] De plus, je vois difficilement comment les participants auraient pu améliorer leur position même s'ils avaient reçu avis de la motion en modification de l'ordonnance initiale. Le juge chargé d'appliquer la *LACC* a clairement indiqué que la seule solution permettant la vente de l'actif en tant qu'entreprise en exploitation était le financement DE — et la logique appuie cette conclusion. Les participants n'ont présenté aucune preuve contraire. Leur argumentation est uniquement fondée sur des conjectures. Ils invoquent d'autres affaires où des participants à des régimes ont reçu un avis et ont pu défendre pleinement leur position. Or, dans aucun des exemples qu'ils citent, les intéressés n'ont pu obtenir d'avantages additionnels. Qui plus est, les participants en l'espèce ont pu faire valoir pleinement leur position. Par conséquent, bien qu'Indalex ait manqué à son obligation fiduciaire d'informer les participants de la motion en modification de l'ordonnance initiale, leur créance demeure subordonnée à celle d'Indalex É.-U.

IV. Conclusion

[81] Il existe des raisons valables d'accorder une protection spéciale aux participants à un régime de retraite lors de procédures en matière d'insolvabilité. Le législateur a envisagé la possibilité de leur accorder cette protection lorsqu'il a édicté les modifications les plus récentes à la *LACC*, mais il a décidé de s'en abstenir (*Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies, la Loi sur le Programme de protection des salariés et le chapitre 47 des Lois du Canada (2005)*, L.C. 2007, ch. 36, entrée en vigueur le 18 septembre 2009, TR/2009-68; voir aussi le projet de loi C-501, *Loi modifiant la Loi sur la faillite et l'insolvabilité et d'autres lois (protection des prestations)*, 3e sess., 40e lég., 24 mars 2010 (modifié par la suite par le Comité permanent de l'industrie, des sciences et de la technologie, 1er mars 2011)). Un rapport du Comité sénatorial permanent des banques et du commerce a expliqué ainsi le choix fait par le législateur :

Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency – at its essence – is characterized by insufficient assets to satisfy everyone, and choices must be made.

The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged.

(*Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at p. 98; see also p. 88.)

[82] In an insolvency process, a *CCAA* court must consider the employer's fiduciary obligations to plan members as their plan administrator. It must grant a remedy where appropriate. However, courts should not use equity to do what they wish Parliament had done through legislation.

[83] In view of the fact that the Plan Members were successful on the deemed trust and fiduciary duty issues, I would not order costs against them either in the Court of Appeal or in this Court.

[84] I would therefore allow the main appeals without costs in this Court, set aside the orders

Conscients de la vulnérabilité des actuels retraités, nous n'estimons toutefois pas qu'il faudrait modifier pour le moment les dispositions de la LFI concernant les créances liées à des retraites. Actuellement les retraités peuvent recevoir des prestations des Régimes de pensions du Canada et de rentes du Québec, de la Sécurité de la vieillesse et du Supplément de revenu garanti et disposent souvent d'économies personnelles et de REER pouvant leur assurer un revenu à la retraite. Il faut trouver un juste équilibre entre, d'une part, le souhait exprimé par certains de nos témoins de mieux protéger les retraités et les actuels cotisants à un régime de retraite professionnel et, d'autre part, les intérêts des autres. Nous le répétons, l'insolvabilité se caractérise de par sa nature même par des actifs insuffisants pour répondre aux besoins de chacun, et il faut faire des choix.

Le Comité estime que, si l'on accordait la protection qu'ont demandée certains témoins, cela serait tellement injuste pour les autres intervenants qu'il ne peut le recommander. Par exemple, nous estimons qu'une superpriorité ou un fonds pourraient indûment réduire les fonds à répartir entre les créanciers. La disponibilité et le coût du crédit pourraient être touchés, de même que, par ricochet, tous les demandeurs de crédit au Canada.

(*Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2003), p. 109-110; voir aussi p. 98.)

[82] Dans une procédure en matière d'insolvabilité, le tribunal chargé d'appliquer la *LACC* doit prendre en compte les obligations fiduciaires de l'employeur envers les participants en sa qualité d'administrateur de leurs régimes de retraite. Il doit accorder une réparation lorsque cette mesure est indiquée. Cependant, le tribunal ne doit pas utiliser l'equity pour accomplir ce qu'il aurait souhaité que le législateur fît.

[83] Les participants ayant obtenu gain de cause sur les questions de la fiducie réputée et des obligations fiduciaires, je suis d'avis de ne les condamner aux dépens ni devant la Cour d'appel, ni devant notre Cour.

[84] Je suis donc d'avis d'accueillir les pourvois principaux sans dépens devant notre Cour, d'annuler

made by the Court of Appeal, except with respect to orders contained in paras. 9 and 10 of the judgment of the Court of Appeal in the former executive members' appeal and restore the orders of Campbell J. dated February 18, 2010. I would dismiss USW's costs appeal without costs.

The reasons of McLachlin C.J. and Rothstein and Cromwell JJ. were delivered by

CROMWELL J. —

I. Introduction

[85] When a business becomes insolvent, many interests are at risk. Creditors may not be able to recover their debts, investors may lose their investments and employees may lose their jobs. If the business is the sponsor of an employee pension plan, the benefits promised by the plan are not immune from that risk. The circumstances leading to these appeals show how that risk can materialize. Pension plans and creditors find themselves in a zero-sum game with not enough money to go around. At a very general level, this case raises the issue of how the law balances the interests of pension plan beneficiaries with those of other creditors.

[86] Indalex Limited, the sponsor and administrator of employee pension plans, became insolvent and sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Although all current contributions were up to date, the company's pension plans did not have sufficient assets to fulfill the pension promises made to their members. In a series of court-sanctioned steps, which were judged to be in the best interests of all stakeholders, the company borrowed a great deal of money to allow it to continue to operate. The parties injecting the operating money were given a super priority over the claims by other creditors. When the business was sold, thereby preserving hundreds of

les ordonnances rendues par la Cour d'appel, à l'exception de celles figurant aux par. 9 et 10 du jugement de la Cour d'appel concernant l'appel des anciens cadres, et de rétablir les ordonnances du juge Campbell datées du 18 février 2010. Je suis d'avis de rejeter sans dépens le pourvoi du Syndicat des Métallos sur la question des dépens.

Version française des motifs de la juge en chef McLachlin et des juges Rothstein et Cromwell rendus par

LE JUGE CROMWELL —

I. Introduction

[85] L'insolvabilité d'une entreprise met en péril de nombreux intérêts. Le créancier pourrait ne pas recouvrer sont dû, l'investisseur, perdre la somme investie et l'employé, se retrouver sans emploi. Lorsque l'entreprise est le promoteur du régime de retraite de ses employés, les prestations promises par le régime ne sont pas à l'abri du risque couru. Les faits à l'origine des présents pourvois illustrent la concrétisation de ce risque. Régimes de retraite et créanciers se retrouvent dans une situation où, à cause de l'insuffisance de l'actif, les uns sauvent leur mise, les autres non. De manière très générale, le présent pourvoi soulève la question de savoir de quelle manière le droit pondère les intérêts des bénéficiaires d'un régime de retraite et ceux d'autres créanciers.

[86] Devenue insolvable, Indalex Limited, le promoteur et l'administrateur des régimes de retraite des salariés, a demandé la protection contre ses créanciers en application de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). Toutes les cotisations pour service courant avaient alors été perçues, mais l'actif des régimes de retraite de la société ne permettait pas de verser aux participants les prestations de retraite promises. La société a pris une série de mesures, avalisées par le tribunal et jugées servir au mieux les intérêts de tous les intéressés, dont l'emprunt d'importantes sommes pour la poursuite de ses activités. Les personnes qui ont alors injecté les sommes nécessaires ont

TAB 16

CITATION: Comstock Canada Ltd. (Re), 2013 ONSC 4700
COURT FILE NO.: 32-1763935
DATE: 20130712

SUPERIOR COURT OF JUSTICE – ONTARIO

IN THE MATTER OF SECTION 47.01 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED

RE: **IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF COMSTOCK CANADA LTD., Applicant**

BEFORE: **MORAWETZ J.**

COUNSEL: **A. MacFarlane and F. Lamie, for Comstock Canada Ltd., Applicant**

H. Chaiton, for the Bank of Montreal

R. B. Schwill, for PricewaterhouseCoopers Inc.

HEARD & ENDORSED: **JULY 3, 2013**

REASONS: **JULY 12, 2013**

ENDORSEMENT

[1] Comstock Canada Ltd. ("Comstock") brought an urgent motion for an order appointing PricewaterhouseCoopers Inc. ("PwC") as interim receiver (in such capacity, the "Interim Receiver"), in respect of Comstock for the limited and specific purpose of authorizing and directing the Interim Receiver to borrow funds for the purpose of enabling payment of Comstock's current payroll and independent contractor amounts due and owing on July 4, 2013.

[2] Comstock is a borrower or principal obligor in respect of secured debt obligations pursuant to a credit agreement dated July 29, 2011, as amended (the "Credit Agreement") among Comstock, as borrower and Bank of Montreal ("BMO") as lender.

[3] Comstock has been unable to comply with certain financial and other covenants under the Credit Agreement.

[4] On June 27, 2013, Chrysler Canada locked out Comstock from the performance of its contract at facilities in Ontario.

[5] In response, Comstock's Board of Directors determined that Comstock had no other readily available options but to file a Notice of Intention to Make a Proposal (the "NOI") pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act* ("BIA") on June 28, 2013.

[6] The record established that, by Thursday, July 4, 2013, Comstock required an immediate advance on a priority basis of $1.5 million in order to meet its payroll and independent contractor obligations.

[7] Counsel to Comstock submitted that, in the absence of Comstock being able to meet payroll, a predictable chain of events would follow, namely, employees and contractors would, in a likelihood, not show up to work, which in turn would cause a serious disruption to Comstock's ability to provide its core services which would impair the viability of various projects and have negative effects that would cascade through the trades, subtrades, and local economies of the various Comstock projects across Canada.

[8] BMO was prepared to fund the Interim Receiver in respect of the amount required for the payroll in accordance with the terms of the term sheet substantially in the form attached to the affidavit of Mr. Birkbeck, sworn July 3, 2013.

[9] A fundamental precondition to BMO's contemplated advance included the appointment of the Interim Receiver and the granting a of super-priority charge in favour of the Interim Receiver for the payroll advance, with specific priority being given over construction lien and trust claimants.

[10] Counsel advised that it was contemplated that Comstock would shortly be filing a motion to continue these proceedings under the *Companies' Creditors Arrangement Act* ("CCAA").

[11] The request for the appointment of the Interim Receiver was made pursuant to section 47.1(1) of the BIA. As noted, the NOI had been filed under section 50.4 of the BIA.

[12] The appointment can be made if it is shown to be necessary for the protection of (a) the debtor's estate; or (b) the interests of one or more creditors, or other creditors generally.

[13] Having reviewed the record, I concluded that it was appropriate to make the order for both the protection of the debtor's estate and the interests of creditors.

[14] Section 47.2(1) provides the authority to make an order respecting the fees and expenses of the Interim Receiver. In this case, given the urgency of the situation and the magnitude of the operations of Comstock, I concluded that it was appropriate to grant the Interim Receiver a super-priority for its fess and disbursements in the form of the Interim Receiver's Charge. Section 47.2(1) provides that the court shall not make such an order unless it is satisfied that all secured creditors who would be materially affected by the order were given reasonable advance notification and an opportunity to make representations to the court. BMO, the major secured

lender, does not object to the granting of a charge. With respect to the position of other secured creditors, I concluded that the granting of the super-priority charge would not have a material effect on their positions. The appointment of the Interim Receiver is for a limited purpose and, in view of the stated intention of Comstock to seek to continue these proceedings under the CCAA, it will also be time limited. The urgency of the situation and the accompanying uncertainty was such that, in my view, Comstock and its creditors would benefit from the presence of the Interim Receiver. The alternative could result in a chaotic situation which would be detrimental to the interests of all stakeholders.

[15] I turn now to the issue of authorization for the Interim Receiver to borrow funds, on a super-priority basis, to cover payroll. In my view, an advance of this type does not have the effect of preferring a creditor or group of creditors. Rather, it provides compensation for services rendered and is designed to keep the business operating. It also does not have the effect of altering priorities of any specific creditor group nor, in my view, does it have any obvious negative impact on construction lien and trust claimants.

[16] Section 47.2(2) specifies that "disbursements" in subsection (1) do not include payments made in operating a business of the debtor. If the advance were to be made on a super-priority basis, it became necessary to also consider the appropriateness of granting a fixed and specific charge (the "Interim Receiver's Borrowing Charge") as security for the payment of money borrowed to cover payroll and independent contractor obligations.

[17] I am satisfied that the creation of a charge (the "Interim Receiver's Borrowing Charge") to the extent of $1.5 million, was appropriate in these circumstances. Simply put, in the absence of granting this charge, there was a significant likelihood that the job sites would be shut down causing significant damage to many parties and would impair the ability of Comstock to restructure either under the BIA or the CCAA.

[18] BMO did not oppose the granting of this provision. With respect to the impact on other secured creditors, including any construction lien and trust beneficiaries, it appears to me that the granting of the Interim Receiver's Borrowing Charge would not have a material effect on these secured creditors. The de facto beneficiaries of the Interim Receiver's Borrowing Charge are the employees and contractors. If this group does not show up to work, the enterprise value of Comstock will suffer.

[19] In this case, I was satisfied that the purpose of the "Interim Receiver's Borrowing Charge" was to maintain business operations and to promote a greater stability for Comstock.

[20] Section 50.6 of the BIA provides the authority to grant super-priority for interim financing for an insolvent debtor. There is no similar provision to provide such financing for an Interim Receiver under section 47.1 However, there is no provision that prohibits the granting of such super-priority. In view of the urgency of this situation, it seems to me that the objectives of PART III of the BIA and the expected proceedings under the CCAA would be frustrated if the Interim Receiver's Borrowing Charge was not granted. I was satisfied that, in these circumstances, the charge could be granted under the inherent jurisdiction of the court.

[21] In the result, the motion was granted, which appointed PwC as Interim Receiver. The order specifically provides for an Interim Receiver's Charge for PwC's reasonable fees and disbursements and for the Interim Receiver's Borrowing Charge, provided that the outstanding principal amount does not exceed $1.5 million. These charges are to have specific priority over present construction liens and trust claims whether or not perfected or preserved.

[22] A formal order was signed to give effect to the foregoing.

Morawetz J.

Date: July 12, 2013

TAB 17

CITATION: Mustang GP Ltd. (Re), 2015 ONSC 6562
COURT FILE NOs.: 35-2041153, 35-2041155, 35-2041157
DATE: 2015/10/28

SUPERIOR COURT OF JUSTICE – ONTARIO – IN BANKRUPTCY

RE: 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.

BEFORE: Justice H. A. Rady

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.

No one else appearing.

HEARD: October 19, 2015

ENDORSEMENT

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 *Re Electro Sonic Inc.*, 2014 ONSC 942 (S.C.J.).

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 *Re P.J. Wallbank Manufacturing*, 2011 ONSC 7641 (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 *Re Comstock Canada Ltd.*, 2013 ONSC 4756 (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 *Sun Indalex Finance, LLC* v. *United Steelworkers*, 2013 SCC 6 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 *Re Colossus Minerals Inc.*, 2014 ONSC 514 (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 *Re Brainhunter* (2009), 62 C.B.R. (5^{th}) 41, 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 *CCM Master Qualified Fund Ltd.* v. *blutip Power Technologies* 2012 ONSC 175 (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.

"Justice H.A. Rady"
Justice H.A. Rady

Date: October 28, 2015

TAB 18

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Preferred Steel Construction Inc. v. College of New Caledonia,* 2014 BCSC 1137

Date: 20140623
Docket: 99693
Registry: Kelowna

Between:

Preferred Steel Construction Inc.

Plaintiff

And

College of New Caledonia and M3 Steel (Kamloops) Ltd.

Defendants

Before: The Honourable Mr. Justice Cole

Reasons for Judgment

Counsel for the Plaintiff:	J.W. Craddock
Counsel for the Defendant M3 Steel (Kamloops) Ltd.:	D.A. McMillan
Place and Date of Hearing:	Kelowna, B.C. April 17, 2014
Place and Date of Judgment:	Kelowna, B.C. June 23, 2014

[1] The defendant applies for an order that paragraphs 9 and 10 of the notice of civil claim be struck on the grounds that they disclose no reasonable claim and constitute an abuse of process pursuant to Rule 9-5(1)(a) and (d) of the *Supreme Court Civil Rules*. In the alternative, the defendant M3 Steel (Kamloops) Ltd., ("M3") the applicant in this matter, asks for judgment dismissing the whole of the plaintiff's claim pursuant to Rule 9-6(4).

BACKGROUND

[2] The plaintiff, Preferred Steel Construction Inc. ("Preferred Steel"), is a contractor engaged in the erection of structural steel buildings and is a subcontractor to the defendant M3. M3 was a subcontractor to IDL Projects Inc. ("IDL") who was the general contractor or the prime contractor. IDL, in April of 2010, entered into a contract or what is referred to as the "prime contract" with the College of New Caledonia ("College") who is the owner of the land upon which the construction project took place.

[3] When the project was substantially completed on June 15, 2011, IDL owed a significant amount of money to M3 in respect of its subcontract with M3.

[4] On June 24, 2011, M3 filed a claim of lien against the lands owned by the College. On August 19, 2011, IDL filed a petition in the Supreme Court of British Columbia pursuant to s. 24 of the *Builders Lien Act*, S.B.C. 1997, c. 45, seeking removal of M3's claim of lien. On September 1, 2011, an order was made cancelling M3's lien upon the posting of a lien bond.

[5] On September 7, 2011, M3 commenced an action in Supreme Court alleging a claim of debt against IDL.

[6] At the time the project was substantially completed the plaintiff claimed to be owed a sum of money by M3 in respect to their subcontract with M3. The plaintiff did not file a claim of lien against the land owned by the College. On September 29, 2011, M3 filed an assignment in bankruptcy.

[7] On September 30, 2011, the College paid out the entire balance of the holdback funds that were due and owing to IDL with respect to the prime contract between the College and IDL. At no time were funds owed by the College to M3 in respect to the project and no funds were ever held back by the College from M3.

[8] The plaintiff commenced this action on October 5, 2011, against the College for a lien against any holdback funds that had been retained by the College. In addition to the lien holdback claim the plaintiff alleged that any funds that the College had not yet disbursed in connection with the project were impressed with a trust pursuant to s. 10 of the *Builders Lien Act*. The plaintiff also advanced a claim of debt against M3.

[9] On October 13, 2011, the College filed a response to civil claim, defending the action on the basis that it had already paid out all funds owed on its contract with IDL prior to the commencement of this action and there were no holdback funds that could be the subject of a holdback lien. The College also defended the action on the basis that no funds in its hands could constitute a trust fund within the meaning of s. 10 of the *Builders Lien Act*.

[10] The plaintiff also filed a claim as an unsecured creditor in M3's bankruptcy through its trustee in bankruptcy the Bowra Group Inc. M3 continued to pursue its debt action against IDL. On April 17, 2013, Master McDiarmid in M3's bankruptcy proceeding granted leave to the plaintiff to continue their action, for the sole purpose of allowing the plaintiff to assert a claim as beneficiary against the trust created under s. 10 of the *Builders Lien Act*.

DISCUSSION

[11] The relevant sections of the *Builders Lien Act* are as follow:

Holdback

4 (1) The person primarily liable on each contract, and the person primarily liable on each subcontract, under which a lien may arise under this Act must retain a holdback equal to 10% of the greater of

(a) the value of the work or material as they are actually provided under the contract or subcontract, and

(b) the amount of any payment made on account of the contract or subcontract price.

(2) The obligation to retain the holdback under subsection (1) applies whether or not the contract or subcontract provides for periodic payments or payment on completion.

…

Holdback account

5 (1) Subject to subsection (8), an owner must

(a) establish at a savings institution a holdback account for each contract under which a lien may arise,

(b) pay into the holdback account the amount the owner is required to retain under section 4, and

(c) administer the holdback account together with the contractor from whom the holdback was retained.

(2) Subject to sections 9 and 34, all amounts deposited into a holdback account

(a) are charged with payment of all liens arising under the contractor from whom the holdback was retained,

(b) subject to paragraph (a), are held in trust for the contractor referred to in paragraph (a), and

(c) must not be paid out of the account without the agreement of all the persons who administer the account.

…

Contract money received constitutes trust fund

10 (1) Money received by a contractor or subcontractor on account of the price of the contract or subcontract constitutes a trust fund for the benefit of persons engaged in connection with the improvement by that contractor or subcontractor and the contractor or subcontractor is the trustee of the fund.

(2) Until all of the beneficiaries of the fund referred to in subsection (1) are paid, a contractor or subcontractor must not appropriate any part of the fund to that person's own use or to a use not authorized by the trust.

(3) If the liens of a class of lien claimants are discharged under this Act by the payment of an amount that is less than the amount owing to the person who engaged the class, the members of the class are subrogated to the rights under subsections (1) and (2) of the person who engaged the class.

(4) Subsections (1) and (2) do not apply to money received by an architect, engineer or material supplier.

[12] Paragraphs 9 and 10 of the notice of claim read as follows:

> 9. By virtue of the said materials and services supplied by the Plaintiff to the Defendant M3 Steel for work on the Lands, the Plaintiff says that any further monies owing by the Defendant CNC to the Defendant M3 Steel either directly or through the Project contractor, with respect to the Project on the Lands, are trust funds (herein called the "Trust Funds"), pursuant to section 10 of the *Builders Lien Act*, R.S.B.C. 1997, c.-45, and are held by the Defendant CNC in trust for the Plaintiff and other subcontractors of the Defendant M3 Steel. The Plaintiff claims its appropriate share of the said Trust Funds pursuant *to the Builders Lien Act*.
>
> 10. The Plaintiff says that any monies held back by the Defendant CNC from the Defendant M3 Steel with respect to the Project on the Lands (hereafter called the "Holdback Funds") pursuant to section 4 of the *Builders Lien Act*, are held by the defendant CNC in trust for the Plaintiff and other subcontractors of the Defendant M3 Steel. The Plaintiff claims its appropriate share of the Holdback Funds pursuant to the *Builders Lien Act.*

[13] In paragraph 9 of the notice of claim the plaintiff alleges that any funds that the College has not yet disbursed in connection with the project were impressed with the trust pursuant to s. 10 of the *Builders Lien Act*. However, s. 10 of the *Builders Lien Act* applies only to "[m]oney received by a contractor or subcontractor on account of the price of the contract or subcontract" (s. 10(1)). Thus, the trust provisions in s. 10 of the *Builders Lien Act* do not apply to any funds retained or held back from the general contractor or any subcontractor by the owner.

[14] This fundamental principle of the *Builders Lien Act* has been recognized in numerous cases and in the leading text *British Columbia Builders Lien Practice Manual,* loose leaf (Consulted on 12 June, 2014), (Vancouver: Continuing Legal Education Society of British Columbia), ch. 9 at 39, which states as follows with regards to s. 10:

> The trust arises when the contractor or subcontractor receives money on account of the contract price. The key word is "receives". As stated by Huddart J. in *Commercial Union Insurance Company of Canada v. Surrey (City)* (1996), 22 B.C.L.R. (3d) 70 at para. 16 (S.C.), affirmed (1996), 38 B.C.L.R. (3d) 389 (C.A.), leave to appeal refused [1997] S.C.C.A. No. 279 (QL):
>
> > Monies are "received by the contractor" when they are paid by the owner on account of the contract, not only to the contractor directly,

> but also when paid to a third party at the contractor's direction or to its benefit. Payment is seen as the correlative of receipt.
>
> As a result, money that may be due to a contractor from the owner but is not yet received, is not subject to a trust.
>
> Money held back as a holdback does not constitute a trust fund because it has not been "received" by the contractor (*A & M Painting Contractors Ltd. v. Byers Construction Western Ltd.* (1981), 28 B.C.L.R. 43 (C.A.); *Wall Brothers Construction Co. v. Canson Enterprises Ltd.* (1986), 70 B.C.L.R. 243 (C.A.); *Commercial Union Assurance Co. of Canada*)….

[15] Paragraph 10 of the notice of claim makes a trust claim under s. 4 of the *Builders Lien Act* with regards to monies held back by the College. However, both parties acknowledge that the action against the College was dismissed by consent on June 4, 2013, and yet the only claim in paragraph 10 is against the College, not M3.

[16] The plaintiff submits that there is an implicit claim against M3 in paragraph 10 by way of the claim in paragraph 9. That is, the money held back by the College is held in trust for M3, and any money received by M3 is held in trust for the plaintiff by operation of s. 10 of the *Builders Lien Act*. However, as M3 is the only defendant in this case there can be no claim against M3 for money held back by a non-party to the action.

[17] I am satisfied that paragraphs 9 and 10 of the notice of civil claim disclose no cause of action known or recognized in law and those paragraphs will be struck.

[18] The applicant is entitled to costs.

The Honourable Mr. Justice F.W. Cole

TAB 19

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Preferred Steel Construction Inc. v. M3 Steel (Kamloops) Ltd.,* 2015 BCCA 16

Date: 20150114
Dockets: CA041816; CA041989

Between:

Preferred Steel Construction Inc.

Appellant
(Plaintiff)

And

M3 Steel (Kamloops) Ltd.

Respondent
(Defendant)

Corrected Judgment: The text of the judgment was corrected at paragraph 34 on June 9, 2015.

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Neilson
The Honourable Mr. Justice Groberman

On appeal from: An order of the Supreme Court of British Columbia, dated April 17, 2014 (*Preferred Steel Construction Inc. v. College of New Caledonia*, 2014 BCSC 1427 and 2014 BCSC 1137, Kelowna Registry No. S99693).

Counsel for the Appellant:	J.C. MacInnis
Counsel for the Respondent:	D.A. McMillan
Place and Date of Hearing:	Vancouver, British Columbia October 24, 2014
Place and Date of Judgment:	Vancouver, British Columbia January 14, 2015

Written Reasons by:
The Honourable Madam Justice Neilson

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Groberman

Summary:

These two appeals arise from a construction project after which the respondent failed to pay the appellant, who was its subcontractor, the full amount owing on its subcontract. The appellant brought an action against the respondent. The respondent brought an application to strike parts of the appellant's notice of civil claim because it did not plead a valid claim under the Builders Lien Act. The appellant responded by applying to amend its pleadings. The motions were heard together. The chambers judge dismissed the appellant's motion to amend because it had failed to bring it within the time set by an order made at a case planning conference. The judge then granted the respondent's motion to strike.

Held: Appeals allowed. The chambers judge erred by resting his decision solely on the case planning order without considering other factors enunciated in the authorities, including the overriding concerns of justice and convenience. The Court considered these factors, and allowed the amendments. It followed that the appeal from the order striking the claim must be allowed as well.

Reasons for Judgment of the Honourable Madam Justice Neilson:

[1] These two appeals arise from a construction project on lands owned by the College of New Caledonia, in which the College engaged IDL Projects Inc. as its general contractor; IDL retained the respondent, M3 Steel (Kamloops) Ltd., as the structural steel contractor; and M3 Steel subcontracted a portion of the steel supply and fabrication to the appellant, Preferred Steel Construction Inc. When M3 Steel failed to pay Preferred Steel the full amount owing on its subcontract, Preferred Steel commenced an action against M3 Steel and the College. The action followed a somewhat tortuous path and M3 Steel ultimately brought an application to strike the integral paragraphs of Preferred Steel's notice of civil claim pursuant to R. 9-5(1) of the *Supreme Court Civil Rules*. Preferred Steel responded by bringing an application to amend its pleadings pursuant to R. 6-1(1).

[2] Both motions were heard by a Supreme Court judge sitting in chambers on April 17, 2014. In oral reasons given that day, he dismissed Preferred Steel's application to amend. This order is the subject of appeal CA041816. The judge reserved judgment on M3 Steel's application to strike and, in reasons released on June 23, 2014, granted this motion. This order is the subject of appeal CA041989.

[3] For the following reasons, I would allow appeal CA041816, set aside the April 17, 2014 order of the chambers judge, and grant Preferred Steel leave to amend its notice of civil claim in the form attached to its notice of application. It necessarily follows that appeal CA041989 must be allowed as well, and the order of June 23, 2014 set aside, as the basis for striking the pleadings has been remedied by the amendments.

Background

[4] Both appeals arise from the same facts. At the hearing before us, counsel for Preferred Steel took issue with which affidavits filed below could be properly considered on each appeal. I do not find it necessary to deal with this concern as

most of the facts are not in dispute, and it has no bearing on the result I have reached.

[5] Work on the project began in the fall of 2010. When payments from M3 Steel to Preferred Steel fell behind, Preferred Steel filed a lien claim in the amount of $583,794.74 against the lands owned by the College on December 10, 2010, pursuant to s. 2 of the *Builders Lien Act*, R.S.B.C. 1997, c. 45 (the "Act"). On February 11, 2011, it agreed to release the lien in exchange for M3 Steel's promise to pay it $134,936.17 by July 11, 2011. M3 Steel encountered financial difficulties, however, and paid only $36,764.07 pursuant to this agreement.

[6] Preferred Steel did not file another s. 2 lien claim after the certificate of substantial completion was issued on June 15, 2011.

[7] On June 24, 2011, M3 Steel filed a s. 2 lien claim. IDL filed a petition seeking removal of the lien pursuant to s. 24 of the Act. An order was made on September 1, 2011 cancelling the lien upon the posting of a bond by IDL. M3 Steel then sued IDL in debt.

[8] On September 30, 2011, the College released the holdback funds to IDL, pursuant to s. 8(4) of the Act.

[9] M3 Steel went into receivership in September 2011, and filed an assignment in bankruptcy on September 29, 2011.

[10] On October 5, 2011, apparently without notice of M3 Steel's bankruptcy or the release of the holdback funds by the College, Preferred Steel filed a notice of civil claim against the College and M3 Steel. Paragraphs 9 and 10 of this pleading set out its claims under the Act, which became the focus of the applications before the chambers judge.

[11] Paragraph 9 pleaded that Preferred Steel was a beneficiary of a statutory trust created by s. 10 of the Act, the relevant part of which provides:

> 10 (1) Money received by a contractor or subcontractor on account of the price of the contract or subcontract constitutes a trust fund for the benefit of persons engaged in connection with the improvement by that contractor or subcontractor and the contractor or subcontractor is the trustee of the fund.
>
> (2) Until all of the beneficiaries of the fund referred to in subsection (1) are paid, a contractor or subcontractor must not appropriate any part of the fund to that person's own use or to a use not authorized by the trust.

[12] Preferred Steel framed its claim under s. 10 as follows:

> 9. By virtue of the said materials and services supplied by the Plaintiff to the Defendant M3 Steel for work on the Lands, the Plaintiff says that any further monies owing by the Defendant [College] to the Defendant M3 Steel either directly or through the Project contractor, with respect to the Project on the Lands, are trust funds (herein called the "Trust Funds"), pursuant to section 10 of the *Builders Lien Act,* R.S.B.C. 1997, c.-45, and are held by the Defendant [College] in trust for the Plaintiff and other subcontractors of the Defendant M3 Steel. The Plaintiff claims its appropriate share of the said Trust Funds pursuant to the *Builders Lien Act.*

[13] Paragraph 10 of the notice of civil claim pleaded a holdback lien arising under s. 4(9) of the Act, as interpreted in *Shimco Metal Erectors Ltd. v. North Vancouver (District)*, 2003 BCCA 193. Section 4(9) reads:

> Subject to section 34, a holdback required to be retained under this section is subject to a lien under this Act, and each holdback is charged with payment of all persons engaged, in connection with the improvement, by or under the person from whom the holdback is retained.

[14] The notice of civil claim pleaded the holdback lien in these terms:

> 10. The Plaintiff says that any monies held back by the Defendant [College] from the Defendant M3 Steel with respect to the Project on the Lands (herein called the "Holdback Funds"), pursuant to section 4 of the *Builders Lien Act*, are held by the Defendant [College] in trust for the Plaintiff and other subcontractors of the Defendant M3 Steel. The Plaintiff claims its appropriate share of the Holdback Funds pursuant to the *Builders Lien Act*.

[15] Paragraphs 9 and 10 of Preferred Steel's pleadings were defective as they mistakenly named the College, rather than M3 Steel, as the trustee of the s. 10 and

holdback lien funds. The only cause of action Preferred Steel pleaded against M3 Steel was a claim in debt in the amount of $308,545.94.

[16] Preferred Steel did not serve its notice of civil claim on M3 Steel and the College until October 5, 2012.

[17] Between December 2011 and April 2012, the parties' counsel corresponded in an attempt to settle the various claims arising out of the project. By March 1, 2012, Preferred Steel's counsel knew that M3 Steel had settled its debt claim with IDL, and that IDL had released $185,000 to M3 Steel's receiver and trustee in bankruptcy.

[18] Counsel for the receiver and trustee confirmed the release of the funds, and indicated to Preferred Steel's counsel that he would accept service if Preferred Steel intended to proceed with litigation with respect to these funds. When counsel for Preferred Steel advised that his client would proceed with an action against M3 Steel, counsel for the receiver and trustee responded on July 10, 2012, stating:

> You are surely cognisant of the fact that your client's right of action in debt against M3 Steel is stayed as a result of M3 Steel's Assignment in Bankruptcy. Further, you should be fully aware from our extensive past correspondence that the Receiver has not breached, and has no intention of breaching, the Section 10 trust, by applying funds collected on behalf of M3 Steel to a purpose that is not authorized under the *Act*. The Receiver has consistently maintained the position that the claims of all potential trust beneficiaries must be taken into account, and that excessive or inflated trust claims cannot be entertained.
>
> In the event that you commence and serve an action on the basis outlined in your letter, we will bring on an application to strike the debt action and seek costs. The trust claim will be defended on the basis that the Receiver has not committed any breach of trust, and a further application will be brought to interplead any funds that may be subject to outstanding trust claims into Court. The Receiver will, of course, claim its costs in such proceedings. Pursuant to the *Canadian Forest Products* decision, the funds will then remain in Court until all potential trust claimants have been afforded the opportunity to prove their claims on a *pari passu* basis.

[19] On October 13, 2012, shortly after Preferred Steel served its notice of civil claim, the College filed a response. This stated that the College had released the holdback funds before Preferred Steel commenced its action, and that Preferred

Steel's claims against it were misguided because, as an owner, the College was not subject to a s. 10 trust, and Preferred Steel's holdback lien lay against M3 Steel.

[20] On April 3, 2013, Preferred Steel brought on an application in the bankruptcy proceeding for leave to continue its action against M3 Steel, pursuant to s. 69.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. This was heard by Master McDiarmid who, on April 17, 2012 granted leave and ordered that Preferred Steel may continue its "claim as beneficiary against a trust created under s. 10 of the [Act]" as pleaded in its notice of civil claim: 2013 BCSC 664 at para. 38. As well, Master McDiarmid directed Preferred Steel to set a case planning conference within 30 days to consider amendments and the closing of pleadings, among other things.

[21] On April 30, 2013, M3 Steel filed a response to civil claim. This reiterated the view that Preferred Steel had no claim under the Act against the College. As well, while it acknowledged Preferred Steel may have had a claim to a holdback lien or as a beneficiary of a s. 10 trust against M3 Steel, it pleaded that the limitation period for the s. 10 trust claim had expired.

[22] On June 4, 2013, Preferred Steel filed a consent order dismissing its claim against the College.

[23] The case planning conference directed by Master McDiarmid did not take place until September 30, 2013, and was conducted by Mr. Justice Barrow. The only information before us as to what transpired at that proceeding is the order made by Barrow. J. at its conclusion, to which I will refer as the "Barrow Order". This stated:

> The Plaintiff herein shall be at liberty to amend its Notice of Civil Claim provided that any Amended Notice of Civil Claim be filed before the 25th day of October, 2013.

[24] Preferred Steel's counsel did not make any amendments to the notice of civil claim prior to October 25, 2013. Mr. Gerald Webb, the principal of Preferred Steel, says its counsel told him that there was no problem with the claim and no need for an amendment.

[25] On January 3, 2014, M3 Steel filed its application to strike paragraphs 9 and 10 of Preferred Steel's notice of civil claim. It alleged that these pleadings disclosed no valid claim against M3 Steel; that the trust claim had not been commenced within the one-year limitation period under s. 14 of the Act; and that Preferred Steel was not entitled to make any further amendments after the deadline set by the Barrow Order. The motion was set for March 6, 2014.

[26] On February 27, 2014, Preferred Steel's counsel wrote to counsel for M3 Steel requesting an adjournment of the motion because he had not prepared responding material. He said this was due to "administrative errors", which he described as "solely the fault of our office and not our client". His request was refused.

[27] Mr. Webb first heard about M3 Steel's motion to strike on February 25, 2014 through a call from the office of Preferred Steel's counsel. On March 3, 2014, he met with counsel, who told him for the first time that there were problems with the pleadings, and that he had failed to respond to the motion to strike because he had misplaced the documents related to it. As a result, Mr. Webb discharged this counsel and appeared on his own behalf in chambers on March 6, 2014 to ask for an adjournment so Preferred Steel could retain new counsel. His request was granted on terms that Preferred Steel pay $750 in costs forthwith, and that the application be heard by April 25, 2014.

[28] Preferred Steel retained new counsel by March 18, 2014. Conflicts in counsels' calendars led to some difficulty in finding a mutually convenient date for the motion, and M3 Steel's counsel eventually set it down unilaterally for April 14, 2014. Preferred Steel's counsel brought the cross-application to amend on short notice. The key proposed amendments reframed paragraphs 9 and 10 of the notice of civil claim as claims against M3 Steel in these terms:

> 12. The Plaintiff says IDL Projects Inc. and the Defendant M3 Steel received or alternatively will receive certain sums of money on account of the contract price entered into with respect to the Project on the Lands. These sums constitute trust funds for the benefit of the Plaintiff (herein called the "Trust Funds") pursuant to section 10 of the *Builders Lien Act*, R.S.B.C. 1997,

> c. 45, and are held in trust for the Plaintiff. The Defendant M3 Steel has appropriated or converted all or part of the sums received to uses not authorized by the trust. The Plaintiff claims its appropriate share of the said Trust Funds pursuant to the *Builders Lien Act*.
>
> 13. IDL Projects Inc. and the Defendant M3 Steel were and are obligated by section 4 of the *Builders Lien Act* to retain a holdback pursuant to that section.
>
> 14. The Plaintiff is a person engaged in connection with the Project by or under the person whom the holdback was retained or was required to be retained by IDL Projects Inc. and the Defendant M3 Steel, and so the holdback retained by the Defendant M3 Steel is charged with payment of the amount of $308,545.94.

[29] As described at the outset of this decision, the chambers judge dismissed Preferred Steel's application to amend and, after reserving judgment, granted M3 Steel's application to strike paragraphs 9 and 10 of the notice of civil claim.

Analysis

Preferred Steel's Application to Amend the Notice of Civil Claim – CA041816

[30] The chambers judge dealt with Preferred Steel's motion to amend paragraphs 9 and 10 of its notice of civil claim in brief oral reasons. He described the litigation as "long and tortured". He observed that Preferred Steel had done little to pursue its action and, in particular, had failed to amend its pleadings before October 25, 2013 in compliance with the Barrow Order. He noted Mr. Webb's evidence that Preferred Steel's former lawyer had advised him that amendments were unnecessary, but he was critical of the fact that there was no evidence from that lawyer to support this allegation. The chambers judge concluded:

> [5] Case planning conferences are relatively new, but the orders are made in order to make sure that the objectives of the Supreme Court Rules, that is, to secure the just, speedy and inexpensive determination of every proceeding on its merits are met: Rule 1-3. If parties do not comply with orders made at case planning conferences, then the case planning conference becomes meaningless. Even if the plaintiff had not admitted that they had a valid cause of action I would still have dismissed the plaintiff's application. The plaintiff's application to amend is denied.

[31] I pause to note that the admission referred to by the chambers judge is controversial and it is unnecessary to address it as it has no bearing on my view of this appeal.

[32] Preferred Steel contends the chambers judge erred:

a) in concluding that the Barrow Order extinguished its right to amend its pleadings with leave of the court or consent of the parties; and

b) in failing to consider whether it was just and convenient to permit the amendments.

[33] Whether or not to permit amendments to pleadings is a matter of judicial discretion. Such an order is entitled to significant appellate deference. This Court will not interfere with it unless there has been an error in principle, a palpable and over-riding error as to the facts, or a demonstrated injustice: *Wong v. Transamerica Life Canada*, 2014 BCCA 286 at para. 29.

The Positions of the Parties

[34] Preferred Steel argues, first, that in finding the Barrow Order barred any amendments to its pleadings after October 25, 2013, the chambers judge misapprehended the import of that Order and failed to consider the role of R. 6-1(1), which read as follows at the time of these events:

> (1) Subject to Rules 6-2 (7) and (10) and 7-7 (5), a party may amend the whole or any part of a pleading filed by the party
>
> (a) once without leave of the court, at any time before the earlier of the following:
>
> (i) the date of service of the notice of trial, and
>
> (ii) the date a case planning conference is held, or
>
> (b) after the earlier of the dates referred to in paragraph (a) of this subrule, only with
>
> (i) leave of the court, or
>
> (ii) written consent of the parties of record.

[35] Preferred Steel maintains that since it had not made any amendments to its pleadings before the case planning conference, the intent of the Barrow Order was simply to extend the time for the "free amendment" permitted by R. 6-1(1)(a) to

October 25, 2013. Thereafter, the Barrow Order was not intended to preclude a party from applying for further amendments under R. 6-1(b).

[36] With respect to its second ground of appeal, Preferred Steel acknowledges the discretionary nature of the chambers judge's order, but says he was nevertheless bound to exercise his discretion judicially and in accord with the legal principles that govern applications to amend. The leading authorities establish that the factors to be considered in deciding whether to permit amendments include the length of any delay in bringing the application to amend; the reasons for the delay; the connection, if any, between the existing claims and the proposed new cause of action; and whether the delay has caused prejudice to the opposing party. The expiry of a limitation period prior to the amendment is a relevant circumstance, but no one factor is determinative. The overriding concern is whether it would be just and convenient to allow the amendments: *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 (C.A.) at paras. 45, 67, 74; *Letvad v. Fenwick*, 2000 BCCA 630 at paras. 24, 29; *Chouinard v. O'Connor*, 2011 BCCA 161 at paras. 18-21.

[37] Preferred Steel contends that, instead of considering these factors, the chambers judge erred in principle by foreclosing argument on them, and arbitrarily relied on the Barrow Order alone to deny the amendments. Had he applied the governing authorities, the chambers judge would inevitably have found that it was just and convenient to grant the amendments. Preferred Steel says its delay in bringing the application to amend was not inordinate and was not caused by dilatory conduct on its part, but by the actions of its former counsel of which it was unaware. It argues that M3 Steel has led no evidence of prejudice, and cannot be surprised by the application to amend as it has anticipated the claims from Preferred Steel since the project ended. Preferred Steel submits that, by contrast, it will suffer significant prejudice if the amendments are denied as it will be unable to recover any part of the substantial sum that M3 Steel indisputably owes it. To avoid further delay, Preferred Steel invites this Court to apply the relevant legal test to the record before us and permit the amendments.

[38] In response, M3 Steel submits that the chambers judge made no reviewable error. The Barrow Order was clear and unambiguous, and he was entitled to find that it barred any further amendments after October 25, 2013. Preferred Steel must have known at the case planning conference that amendments were required to salvage its claim against M3 Steel. The chambers judge properly held that to permit amendments after the deadline set by the Barrow Order would render the case planning process meaningless.

[39] M3 Steel argues that the delay in seeking the amendments was inordinate and has caused clear prejudice as it has been unable to conclude its bankruptcy proceedings. It has other creditors in addition to Preferred Steel, and all have had to await the outcome of this action to properly dispose of the s. 10 trust funds held by the receiver and trustee under the Act. As well, M3 Steel says there is a presumption of prejudice because permitting the amendments will deprive it of its limitation defence. Section 14 of the Act requires that an action by a beneficiary of a trust created under section 10 must be commenced no later than one year after the head contract is completed. The limitation period for Preferred Steel's s. 10 claim thus expired on June 15, 2012. M3 Steel maintains it would clearly be unjust to allow Preferred Steel to advance a cause of action under s. 10 more than two years after that date.

[40] In response to M3 Steel's position on the limitation defence, Preferred Steel contends that Master McDiarmid, in the application under s. 69.4 of the *Bankruptcy and Insolvency Act*, definitively addressed whether the claim was time-barred and decided it was not. As a result, M3 Steel is estopped from arguing a limitation defence now. As well, Preferred Steel points out that its s. 10 trust claim is a pre-existing claim as defined by s. 30 of the *Limitation Act*, S.B.C. 2012, c. 13, and so is governed by the predecessor to that legislation, the *Limitation Act*, R.S.B.C. 1996, c. 266. Section 4(4) of this earlier legislation expressly provides that an amendment may be allowed even if it raises a new claim that would have been barred by the lapse of time since the action was commenced. Thus, loss of a limitation defence is not a determinative factor in deciding whether the amendments should be allowed.

Analysis

[41] It is clear that Preferred Steel's notice of civil claim is defective in that it has wrongly pleaded its s. 10 trust claim and its holdback lien claim against the College, instead of against M3 Steel. The College, as the owner of the project, is not subject to the statutory trust enacted by s. 10, and divested itself of the holdback funds before Preferred Steel filed its action.

[42] It is also clear that by September 30, 2013, the date of the case planning conference, Preferred Steel's counsel knew the funds subject to the s. 10 trust and the holdback lien were in the hands of M3 Steel's receiver and trustee, and thus should have been aware that amendments were required to the notice of civil claim to substitute M3 Steel for the College as the proper defendant to these claims.

[43] I agree with the chambers judge that the Barrow Order was clear in stipulating that the plaintiff had liberty to amend its pleadings before October 25, 2012, and that it is important to abide by orders made at a case planning conference. I consider that he erred, however, by resting his decision solely on that Order, to the exclusion of other relevant considerations.

[44] Early in the hearing the chambers judge expressed his view that Preferred Steel was in a "very, very difficult position" because it had not amended its notice of civil claim within the time set by the Barrow Order, and had not applied to vary or set aside that order. When Preferred Steel's new counsel explained that its former counsel had advised that there was no need to amend, the chambers judge criticized Preferred Steel for failing to obtain evidence of this from the lawyer. This exchange then took place:

> Okay. No application to set aside the order, the order stands. You can't make an amendment because you were ordered to make it by October 25th. Isn't that the end of the --
>
> MR. CRADDOCK: I don't --
>
> THE COURT: -- the saga? Because if in fact the advice given to your client was wrong, then your client has an action against the lawyer. He has a remedy, if that was his advice.

[45] Counsel for Preferred Steel then attempted to argue that it should nevertheless be permitted to bring an application under R. 6-1 because it did not know its pleadings were defective, and changed counsel to remedy this as soon as it found out. He then attempted to direct the chambers judge to the governing authorities, leading to this exchange:

> MR. CRADDOCK: No, it's not, no. And I'm saying, you know, the principles of the case authorities are that really in granting amendments the amendments should go in the ordinary course, subject to there being prejudice against the other party. There's no material that shows any prejudice that's been found here to the bankrupt company. The only prejudice, My Lord, is going to be in respect to a secured creditor, which appears to be the Bank of Montreal that's owed $1.1 million under its security and it's only been paid 300,000.
>
> THE COURT: Okay. All right. No, I don't have any disagreement with you, sir, as to what the law is in terms of amendments. You give me a case that says that after an order was made as to when amendments can be made that you still have a right to come back to court -- without setting aside or varying the order to amend, you have a right to amend. You show me the law on that.
>
> MR. CRADDOCK: I don't have a case with me --
>
> THE COURT: Well --
>
> MR. CRADDOCK: -- that states that.
>
> THE COURT: -- is that what you're talking about?
>
> MR. CRADDOCK: Yes, I am.
>
> THE COURT: Yes.
>
> MR. CRADDOCK: So in that -- in that situation, My Lord, if the court's position is that -- is that my application is ill-founded and -- and stands no chance to succeed --
>
> THE COURT: I'm sorry?
>
> MR. CRADDOCK: If -- if the court's position is my application stands no chance to succeed for the amendment of the pleadings, then at this time, given the way in which this application has been brought on before the court by my friend without my agreement and in a time frame that I didn't recognize was going to happen in the first place, I would have to apply to amend my application and seek leave to bring on an application to extend or amend the order of Mr. Justice Barrow.

[46] Counsel for Preferred Steel then sought leave to adjourn so it could bring an application to vary the Barrow Order, and the chambers judge denied this request.

There was no further discussion of the law or of the factors enunciated in the authorities, including the overriding concerns of justice and convenience.

[47] While I appreciate the discretionary nature of the order under appeal, I am satisfied the chambers judge erred in principle by effectively treating the Barrow Order as a final order that was conclusive of the application to amend, instead of applying the governing legal principles to the circumstances before him. While the Barrow Order was an important consideration, the authorities are clear that no one factor should be given overriding importance in assessing whether it is just and convenient to permit the proposed amendments. As evidenced by R. 6-1(1)(b), litigation has an evolutionary quality, and there must be some flexibility in ensuring that pleadings adapt to changing circumstances. The overarching values of justice and convenience reflect this. By resting his decision solely on the Barrow Order, and failing to consider other relevant factors, the chambers judge effectively declined to exercise his discretion.

[48] I would accordingly allow the appeal and set aside the order denying the amendments. I agree with Preferred Steel that in the interest of avoiding further delay this Court may proceed to apply the governing principles to the record before it, and decide whether the proposed amendments should be permitted (s. 9(1)(a) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77).

[49] The delay under consideration is five-and-a-half months, from the deadline set by the Barrow Order to the application to amend. While this was clearly undesirable, I am satisfied it was not attributable to dilatory conduct on the part of Preferred Steel or its principal, Mr. Webb. The delay is instead explained by the conduct of Preferred Steel's former counsel.

[50] There is nothing to suggest that Preferred Steel deliberately ignored the Barrow Order, or otherwise sought to delay prosecution of its action. On Mr. Webb's undisputed evidence, he retained and relied entirely on counsel to litigate Preferred Steel's claims under the Act as quickly as possible. Mr. Webb knew nothing about the deficiencies in the notice of civil claim or the need for amendments until March

2014. When he learned of these problems, and found out counsel was unprepared for M3 Steel's application to strike, Mr. Webb acted promptly in discharging him and retaining a new lawyer to represent Preferred Steel. I do not agree with the chambers judge that it was necessary for Preferred Steel to obtain an affidavit from its former counsel to establish these facts. Mr. Webb was entitled to swear to these events on information and belief under R. 22-2(13), as the application to amend did not seek a final order. M3 Steel did not contest his evidence on these points, or seek to cross-examine him on his affidavit.

[51] On several occasions, this Court has expressed the view that if a delay in seeking changes to pleadings or parties is attributable to errors by counsel, a party should not be penalized by its lawyer's conduct unless the delay has caused irremediable prejudice to the other side: *Chouinard* at para. 12; *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 at paras. 92-94; *McIntosh v. Nilsson Bros. Inc.*, 2005 BCCA 297 at para. 10.

[52] I am not persuaded that the delay has led to irremediable prejudice to M3 Steel. It does not allege it has lost documentary or other evidence due to the delay. Nor will the amendments derail or postpone some step in the litigation, as discovery procedures have not yet taken place and no trial date has been set.

[53] M3 Steel could not have been taken by surprise by Preferred Steel's application to amend. It has been a defendant to the action from the outset. It is common ground that Preferred Steel was its subcontractor on the project and that it has not paid what is due under the subcontract. While the notice of civil claim wrongly named the College as the defendant to the causes of action arising under the Act, it was self-evident that the funds owed by the College on the project would move down the contractual chain, and those destined for Preferred Steel would eventually come to M3 Steel. Indeed, its receiver and trustee has long acknowledged that it is holding these funds under a s. 10 trust for the benefit of Preferred Steel and other subcontractors. Thus, there is a clear connection between Preferred Steel's existing claims and the proposed amendments.

[54] As to M3 Steel's argument that prejudice must be presumed because the amendments would result in loss of its limitation defence, I do not agree with Preferred Steel that Master McDiarmid decided the s. 10 trust claim was not statute-barred. A review of his reasons shows he simply granted Preferred Steel the right to continue its action. The import of having named the wrong party as the defendant to the s. 10 trust claim was not raised before him, and he did not pronounce on the validity of the limitation defence in that context.

[55] The prejudice arising from the loss of a limitation defence should not, however, be overstated. It remains but one factor in considering the overarching principles of justice and convenience, and the broad discretion provided by s. 4(4) of the former *Limitation Act*. M3 Steel contends that s. 4(4) does not apply to the limitation period created by s. 14 of the Act, but provides no authority in support of this proposition. In my view, the broad words of s. 4(4) militate against such an interpretation. This provision states the court may allow an amendment "in any action", even if the fresh cause of action would have been statute-barred. "Action" is expansively defined in s. 1 of the legislation to include "any proceeding in a court". Had it been the intent of the legislature to exempt the limitation period enacted by s. 14 of the Act from s. 4(4), one would expect to see this expressly stated in one or both of these enactments.

[56] I conclude that while the delay was regrettable it was not inordinate, and Preferred Steel has offered a reasonable explanation for the delay and for its failure to amend its pleading in compliance with the time set by the Barrow Order. M3 Steel has not established irremediable prejudice attributable to the delay. Preferred Steel's claims against M3 Steel under the Act are implicit in its original pleading, and have been anticipated and acknowledged by M3 Steel though its receiver and trustee. There is a clear connection between the existing claims and the proposed amendments. While I acknowledge there is prejudice related to loss of a limitation defence, I am satisfied that, in all of the circumstances, it would be just and convenient to permit the amendments.

[57] I would accordingly allow the appeal, and grant Preferred Steel leave to amend its notice of civil claim in the form attached to its notice of application. It necessarily follows that appeal CA041989 must be allowed as well, and the order striking Preferred Steel's claim be set aside.

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Groberman"