COURT / ESTATE FILE NUMBER	2501-09028
COURT	COURT OF KING'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 RECEIVERSHIP OF 2755857 ALBERTA LTD.
APPLICANT	UCAPITAL – ULOAN SOLUTIONS INC.
RESPONDENT	CLEO ENERGY CORP.
DOCUMENT	**BOOK OF AUTHORITIES**
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TAB ONE

Peace River Hydro Partners, Acciona Infrastructure Canada Inc., Samsung C&T Canada Ltd., Acciona Infraestructuras S.A. and Samsung C&T Corporation *Appellants*

v.

Petrowest Corporation, Petrowest Civil Services LP by its general partner, Petrowest GP Ltd., carrying on business as RBEE Crushing, Petrowest Construction LP by its general partner Petrowest GP Ltd., carrying on business as Quigley Contracting, Petrowest Services Rentals LP by its general partner Petrowest GP Ltd., carrying on business as Nu-Northern Tractor Rentals, Petrowest GP Ltd., as general partner of Petrowest Civil Services LP, Petrowest Construction LP and Petrowest Services Rentals LP, Trans Carrier Ltd. And Ernst & Young Inc. in its capacity as court-appointed receiver and manager of Petrowest Corporation, Petrowest Civil Services LP, Petrowest Construction LP, Petrowest Services Rentals LP, Petrowest GP Ltd. and Trans Carrier Ltd. *Respondents*

and

Canadian Commercial Arbitration Center, Arbitration Place, Chartered Institute of Arbitrators (Canada) Inc., Insolvency Institute of Canada and Canadian Federation of Independent Business *Interveners*

Peace River Hydro Partners, Acciona Infrastructure Canada Inc., Samsung C&T Canada Ltd., Acciona Infraestructuras S.A. et Samsung C&T Corporation *Appelantes*

c.

Petrowest Corporation, Petrowest Civil Services LP représentée par sa commanditée, Petrowest GP Ltd., faisant affaire sous le nom de RBEE Crushing, Petrowest Construction LP représentée par sa commanditée Petrowest GP Ltd., faisant affaire sous le nom de Quigley Contracting, Petrowest Services Rentals LP représentée par sa commanditée Petrowest GP Ltd., faisant affaire sous le nom de Nu-Northern Tractor Rentals, Petrowest GP Ltd., en sa qualité de commanditée de Petrowest Civil Services LP, Petrowest Construction LP et Petrowest Services Rentals LP, Trans Carrier Ltd. et Ernst & Young Inc. en sa qualité de séquestre et d'administratrice nommée par le tribunal de Petrowest Corporation, Petrowest Civil Services LP, Petrowest Construction LP, Petrowest Services Rentals LP, Petrowest GP Ltd. et Trans Carrier Ltd. *Intimées*

et

Centre canadien d'arbitrage commercial, Arbitration Place, Chartered Institute of Arbitrators (Canada) Inc., Insolvency Institute of Canada et Fédération canadienne de l'entreprise indépendante *Intervenants*

agreements, and also pointed to the "attendant danger of inconsistent rulings" (para. 34).

3. *"Incapable of Being Performed"*

[144] An arbitration agreement is considered "incapable of being performed" where "the arbitral process cannot effectively be set in motion" because of a physical or legal impediment beyond the parties' control (McEwan and Herbst, at § 3:58; Casey, at ch. 3.7.3; *Prince George*, at para. 35; Lamm and Sharpe, at p. 300; Kröll, at p. 326; van den Berg, at p. 159; D. Schramm, E. Geisinger and P. Pinsolle, "Article II", in H. Kronke et al., eds., *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (2010), 37, at p. 108).

[145] Physical impediments rendering an arbitration agreement incapable of being performed may include the following: (a) inconsistencies, inherent contradictions, or vagueness in the arbitration agreement that cannot be remedied by interpretation or other contractual techniques; (b) the non-availability of the arbitrator specified in the agreement; (c) the dissolution or non-existence of the chosen arbitration institution; or (d) political or other circumstances at the seat of arbitration rendering arbitration impossible (McEwan and Herbst, at § 3:58; Casey, at ch. 3.7.3; van den Berg, at p. 159; Kröll, at pp. 330-42). In all these circumstances, the arbitration agreement is incapable of being performed because it is impossible for the parties to obtain the specific arbitral procedures for which they bargained. Importantly, financial impecuniosity alone does not render an arbitration agreement incapable of being performed (D. St. John Sutton, J. Gill and M. Gearing, *Russell on Arbitration* (24th ed. 2015), at p. 379; Casey, at ch. 3.5.1; D. Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (2nd ed. 2010), at p. 355). Legal impediments may also lead to an incapacity to perform an arbitration agreement. For example, an arbitration agreement may be incapable of being performed because the subject matter of the

LLR (par. 34). La juge Pepall a fait remarquer qu'un renvoi à l'arbitrage entraînerait un retard indu en raison des [TRADUCTION] « trois sentences distinctes » qui seraient requises en vertu des conventions d'arbitrage, et a également souligné le « danger connexe de décisions contradictoires » (par. 34).

3. *« Non susceptible d'être exécutée »*

[144] Une convention d'arbitrage est considérée comme « non susceptible d'être exécutée » lorsque [TRADUCTION] « le processus arbitral ne peut être efficacement mis en œuvre » en raison d'un obstacle physique ou juridique indépendant de la volonté des parties (McEwan et Herbst, § 3:58; Casey, c. 3.7.3; *Prince George*, par. 35; Lamm et Sharpe, p. 300; Kröll, p. 326; van den Berg, p. 159; D. Schramm, E. Geisinger et P. Pinsolle, « Article II », dans H. Kronke et autres, dir., *Recognition and Enforcement of Foreign Arbitral Awards : A Global Commentary on the New York Convention* (2010), 37, p. 108).

[145] Les obstacles physiques qui rendent une convention d'arbitrage non susceptible d'être exécutée peuvent inclure : a) des incohérences, des contradictions inhérentes ou des imprécisions dans la convention d'arbitrage auxquelles l'interprétation ou d'autres techniques contractuelles ne peuvent remédier; b) la non-disponibilité de l'arbitre désigné dans la convention; c) la dissolution ou l'inexistence de l'institution d'arbitrage choisie; ou d) des circonstances politiques ou autres au siège de l'arbitrage qui rendent l'arbitrage impossible (McEwan et Herbst, § 3:58; Casey, c. 3.7.3; van den Berg, p. 159; Kröll, p. 330-342). Dans tous ces cas, la convention d'arbitrage est non susceptible d'être exécutée parce qu'il est impossible pour les parties de mettre en œuvre les procédures arbitrales qu'elles ont négociées. Fait important, le manque de ressources financières, à lui seul, ne rend pas une convention d'arbitrage non susceptible d'être exécutée (D. St. John Sutton, J. Gill et M. Gearing, *Russell on Arbitration* (24e éd. 2015), p. 379; Casey, c. 3.5.1; D. Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (2e éd. 2010), p. 355). Des obstacles juridiques peuvent également faire en sorte qu'il est impossible d'exécuter une convention d'arbitrage. Par exemple, une convention d'arbitrage peut être non susceptible

dispute is covered by an express legislative override of the parties' right to arbitrate (see *Seidel*, at para. 40).

(ii) The *BIA* Provides Jurisdiction to Find an Arbitration Agreement "Inoperative"

[146] The broad and flexible powers granted to superior courts under the *BIA*, particularly in the receivership context, provide further support for the foregoing interpretation of s. 15(2) of the *Arbitration Act*. The *Arbitration Act* and the *BIA* are not incompatible, such that no paramountcy concerns arise.

[147] The *BIA* is remedial legislation that is intended, in part, to provide for an orderly and efficient distribution of a bankrupt's funds to various creditors. As such, it is to be given a liberal interpretation in order to facilitate its objectives (*Century Services*, at para. 15; *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 43). Section 183(1) of the *BIA* confirms that superior courts have jurisdiction in bankruptcy and insolvency matters which may be exercised concurrently with their jurisdiction in ordinary civil matters (Houlden, Morawetz and Sarra, at § 8:2; *Cantore v. Nemaska Lithium Inc.*, 2020 QCCA 1333, at para. 8 (CanLII)).

[148] Further, under s. 243(1)(c) of the *BIA*, a court may appoint a receiver to, among other things, "take any . . . action that the court considers advisable", if the court considers it "just or convenient to do so". This very expansive wording has been interpreted as giving judges the "broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise" in relation to court-ordered receiverships (*DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation*, 2021 ABCA 226, 459 D.L.R. (4th) 538, at para. 20; see also Houlden, Morawetz and Sarra, at § 12:18; *Dianor*, at paras. 57-58). Section 243(1)(c) thus permits a court to do not only what "justice dictates" but also what "practicality demands" (*Dianor*, at para. 57; *Canada (Minister of Indian Affairs and Northern*

d'être exécutée parce que l'objet du différend est visé par une dérogation législative expresse au droit des parties de recourir à l'arbitrage (voir *Seidel*, par. 40).

(ii) La *LFI* confère la compétence pour conclure qu'une convention d'arbitrage est « inopérante »

[146] Les pouvoirs vastes et souples conférés par la *LFI* aux cours supérieures, en particulier dans le contexte d'une mise sous séquestre, renforcent davantage l'interprétation du par. 15(2) de l'*Arbitration Act* exposée ci-haut. L'*Arbitration Act* et la *LFI* ne sont pas incompatibles, de sorte qu'aucune question de prépondérance ne se pose.

[147] La *LFI* est une loi réparatrice qui vise, en partie, à assurer la distribution ordonnée et efficace des actifs du failli aux divers créanciers. Ainsi, il faut l'interpréter de façon libérale pour favoriser l'atteinte de ses objectifs (*Century Services*, par. 15; *Third Eye Capital Corporation c. Ressources Dianor Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, par. 43). Le paragraphe 183(1) de la *LFI* confirme que les cours supérieures ont juridiction en matière de faillite et d'insolvabilité et que cette juridiction peut être exercée de manière concurrente à celle qu'elles possèdent en matière civile ordinaire (Houlden, Morawetz et Sarra, § 8:2; *Cantore c. Nemaska Lithium Inc.*, 2020 QCCA 1333, par. 8 (CanLII)).

[148] De plus, en vertu de l'al. 243(1)c) de la *LFI*, le tribunal peut, s'il est convaincu que « cela est juste ou opportun », nommer un séquestre qu'il habilite, entre autres, « à prendre toute [. . .] mesure qu'il estime indiquée ». Ce libellé très large a été interprété comme conférant aux juges le [TRADUCTION] « mandat le plus vaste possible dans le cadre des procédures d'insolvabilité afin de leur permettre de réagir à toute circonstance susceptible de se produire » dans le contexte de mises sous séquestre ordonnées par le tribunal (*DGDP-BC Holdings Ltd. c. Third Eye Capital Corporation*, 2021 ABCA 226, 459 D.L.R. (4th) 538, par. 20; voir aussi Houlden, Morawetz et Sarra, § 12:18; *Dianor*, par. 57-58). L'alinéa 243(1)c) permet donc au tribunal de faire non seulement ce que la [TRADUCTION] « justice commande », mais

Development) v. Curragh Inc. (1994), 114 D.L.R. (4th) 176 (Ont. C.J. (Gen. Div.)), at p. 185).

[149] In my view, practicality demands that a court have the ability, in limited circumstances, to decline to enforce an arbitration agreement following a commercial insolvency. Said differently, ss. 243(1)(c) and 183(1) provide a statutory basis on which a court may, in certain circumstances, find an arbitration agreement inoperative within the meaning of s. 15(2) of the *Arbitration Act*.

[150] Peace River resists this interpretation, relying on s. 72(1) of the *BIA* as interpreted by this Court in *GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123. In short, it argues that s. 243(1)(c) of the *BIA* cannot empower a court to find an arbitration agreement unenforceable, as this would "abrogate" a contracting party's substantive right to a stay in favour of arbitration under s. 15 of the *Arbitration Act*, contrary to s. 72(1) of the *BIA*.

[151] I disagree. Section 72(1) merely confirms the constitutional doctrine of federal paramountcy, affirming that the *BIA* prevails where there is a "genuine inconsistency" between provincial laws relating to property and civil rights and the *BIA* (*Moloney*, at para. 40). It is well established that harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility (*Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at paras. 64 and 66). Peace River's proposed interpretation of s. 72(1) of the *BIA* overlooks the fact that a party's "right" to have its dispute referred to arbitration under s. 15 of the *Arbitration Act* arises only where the court finds that the arbitration agreement at issue is not void, inoperative, or incapable of being performed. I have already explained that the statutory exception for inoperability may apply in certain insolvency scenarios. In other words, there is

également ce que les « considérations pratiques exigent » (*Dianor*, par. 57; *Canada (Minister of Indian Affairs and Northern Development) c. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (C.J. Ont. (Div. gén.)), p. 185).

[149] À mon avis, des considérations pratiques exigent que, dans certaines circonstances particulières, le tribunal ait la capacité de refuser l'exécution d'une convention d'arbitrage dans le contexte d'une insolvabilité commerciale. Autrement dit, l'al. 243(1)c) et le par. 183(1) fournissent un fondement législatif permettant au tribunal, dans certaines circonstances, de conclure qu'une convention d'arbitrage est inopérante au sens du par. 15(2) de l'*Arbitration Act*.

[150] Peace River s'oppose à cette interprétation en s'appuyant sur le par. 72(1) de la *LFI* tel que notre Cour l'a interprété dans *Société de crédit commercial GMAC — Canada c. T.C.T. Logistics Inc.*, 2006 CSC 35, [2006] 2 R.C.S. 123. En bref, elle soutient que l'al. 243(1)c) de la *LFI* ne peut permettre à un tribunal de déclarer qu'une convention d'arbitrage est inexécutoire, car cela reviendrait à « abroger » le droit substantif à une suspension d'instance en faveur de l'arbitrage que confère l'art. 15 de l'*Arbitration Act* à la partie contractante. Selon Peace River, cela irait à l'encontre du par. 72(1) de la *LFI*.

[151] Je ne suis pas d'accord. Le paragraphe 72(1) ne fait que confirmer le principe constitutionnel de la prépondérance fédérale en précisant que la *LFI* prévaut en cas « d'incompatibilité véritable » entre les lois provinciales concernant la propriété et les droits civils et la *LFI* (*Moloney*, par. 40). Il est bien établi que les tribunaux doivent donner aux lois provinciale et fédérale une interprétation harmonieuse plutôt qu'une interprétation qui mène à une incompatibilité (*Orphan Well Association c. Grant Thornton Ltd.*, 2019 CSC 5, [2019] 1 R.C.S. 150, par. 64 et 66). L'interprétation du par. 72(1) de la *LFI* que propose Peace River ne tient pas compte du fait que le « droit » d'une partie à ce que son différend soit soumis à l'arbitrage en vertu de l'art. 15 de l'*Arbitration Act* ne prend naissance que lorsque le tribunal conclut que la convention d'arbitrage en cause n'est pas nulle, inopérante ou non susceptible d'être exécutée. J'ai déjà expliqué que l'exception prévue par la loi en ce qui a trait

TAB TWO

Century Services Inc. *Appellant*

v.

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

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

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

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

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

Century Services Inc. *Appelante*

c.

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

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

2010 CSC 60

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TAB THREE

COURT OF APPEAL FOR ONTARIO

CITATION: Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc., 2019 ONCA 508
DATE: 20190619
DOCKET: C62925

Pepall, Lauwers and Huscroft JJ.A.

BETWEEN

Third Eye Capital Corporation

Applicant
(Respondent)

and

Ressources Dianor Inc. /Dianor Resources Inc.

Respondent
(Respondent)

and

2350614 Ontario Inc.

Interested Party
(Appellant)

Peter L. Roy and Sean Grayson, for the appellant 2350614 Ontario Inc.

Shara Roy and Nilou Nezhat, for the respondent Third Eye Capital Corporation

Stuart Brotman and Dylan Chochla, for the receiver of the respondent Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.

Nicholas Kluge, for the monitor of Essar Steel Algoma Inc., Ernst & Young Inc.

maximum of 50 per cent of the benefit. This court allowed the appeal and held that a vesting order under s. 100 of the CJA could not be granted where to do so would contravene a specific provision of the *Pension Benefits Act*: at para. 16. Lang J.A. stated at para. 16 that even if a vesting order was available in equity, that relief should be refused where it would conflict with the specific provisions of the *Pension Benefits Act*. In *obiter*, she observed that s. 100 of the CJA "does not provide a free standing right to property simply because the court considers that result equitable": at para. 19.

[37] The motion judge in the case under appeal rejected the applicability of *Trick* stating, at para. 37:

> That case [*Trick*] i[s] not the same as this case. In that case, there was no right to order the CPP and OAS benefits to be paid to the wife. In this case, the BIA and the *Courts of Justice Act* give the Court that jurisdiction to order the property to be sold and on what terms. Under the receivership in this case, Third Eye is entitled to be the purchaser of the assets pursuant to the bid process authorized by the Court.

[38] It is unclear whether the motion judge was concluding that either statute provided jurisdiction or that together they did so.

[39] Based on the *obiter* in *Trick*, absent an independent basis for jurisdiction, the CJA could not be the sole basis on which to grant a vesting order. There had to be some other root for jurisdiction in addition to or in place of the CJA.

[40] In their article "Vesting Orders Part 1", Bish and Cassey write at p. 49:

> Section 100 of the CJA is silent as to any transfer being on a *free and clear* basis. There appears to be very little written on this subject, but, presumably, the power would flow from the court being a court of equity and from the very practical notion that it, pursuant to its equitable powers, can issue a vesting order transferring assets and should, correspondingly, have the power to set the terms of such transfer so long as such terms accord with the principles of equity. [Emphasis in original.]

[41] This would suggest that provided there is a basis on which to grant an order vesting property in a purchaser, there is a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity.

[42] This leads me to consider whether jurisdiction exists under s. 243 of the BIA both to sell assets and to set the terms of the sale including the granting of a vesting order.

(e) Section 243 of the BIA

[43] The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Motor Company of Canada, Limited v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146, at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247, at para. 9; *Re Bell*, 2013 ONSC 2682, at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.), at para. 4. Within this context, and in order to understand

the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.

The Wording and Purpose of s. 243

[44] Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so. As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

[45] Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:

[70] These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described, which involve sales rather than a restructuring, are commonplace. The need for greater codification and guidance on the sale of assets outside of the ordinary course of business in restructuring proceedings is highlighted by Professor Wood's discussion of the objective of restructuring law. He notes that while at one time, the objective was relatively uncontested, it has become more complicated as restructurings are increasingly employed as a mechanism for selling the business as a going concern: Wood, at p. 337.

[71] In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do

not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.

Section 243 – Jurisdiction to Grant a Sales Approval and Vesting Order

[72] This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

[73] The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Gen. Div.), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co. Ltd. and Scouler* (1991), 108 N.S.R. (2d) 198 (N.S.C.A.), at para. 34, "the essence of a

receiver's powers is to liquidate the assets". The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *1117387 Ontario Inc. v. National Trust Company*, 2010 ONCA 340, 262 O.A.C. 118, at para. 77.

[74] This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (in Chambers), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230, *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.), aff'd (2000), 47 O.R. (3d) 234 (C.A.).

[75] Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that has not yet been sold or realized" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

[76] It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

[77] Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain.

[78] I should first indicate that the case law on vesting orders in the insolvency context is limited. In *Re New Skeena Forest Products Inc*., 2005 BCCA 154, 9 C.B.R. (5th) 267, the British Columbia Court of Appeal held, at para. 20, that a court-appointed receiver was entitled to sell the assets of New Skeena Forest Products Inc. free and clear of the interests of all creditors and contractors. The court pointed to the receivership order itself as the basis for the receiver to request a vesting order, but did not discuss the basis of the court's jurisdiction to grant the order. In 2001, in *Re Loewen Group Inc.,* Farley J. concluded, at para. 6, that in the CCAA context, the court's inherent jurisdiction formed the

TAB FOUR

Court of Queen's Bench of Alberta

Citation: BA Energy Inc. (Re) 2010 ABQB 507

Date: 20100805
Docket: 0801 16292
Registry: Calgary

In the Matter of Section 193 of the Alberta *Business Corporations Act*, R.S.A. 2000, c. B-9, as amended; and in the matter of the *Judicature Act*, R.S.A. 2000, c. J-2, as amended,

And in the Matter of a Proposed Arrangement involving Value Creation Inc., BA Energy Inc. and the holders of common shares of Value Creation Inc.

And in the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended; and in the Matter of BA Energy Inc.

Corrected judgment: A corrigendum was issued on August 13, 2010; the corrections have been made to the text and the corrigendum is appended to this judgment.

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

Introduction

[1] Dresser-Rand Canada, Inc. ("Dresser-Rand") applies for acceptance of its late amended proof of claim so that it may participate in a distribution to unsecured creditors pursuant to the plan of arrangement and reorganization of BA Energy Inc. ("BA Energy") under the *Companies' Creditors Arrangement Act.*

[2] The issue is whether Dresser-Rand, having initially filed a claim which it characterized as fully secured on the basis of holding assets that it described as having a value equal to its claim,

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
3. If relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing?
4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

[34] In identifying these criteria and applying them to specific late claims, Wittmann, J. A. favoured a "blended approach", taking into consideration both the standards set out under the *Bankruptcy and Insolvency Act.* and the U.S. Bankruptcy Rules, and informed by concepts drawn from the approaches taken in a variety of areas of law when dealing with late notice or delays in process. It is clear from the nature of the criteria that the question of whether a late claim should be accepted is an equitable consideration, taking into account the specific circumstances of each case.

A. Inadvertence and Good Faith

[35] Wittmann, J.A. noted that "inadvertence" in the context of the first criterion includes carelessness, negligence or accident and is unintentional.

[36] BA Energy submits that Dresser-Rand's conduct in this case cannot be described as careless, negligent or accidental, but arose from a deliberate intent to reframe its claim as an unsecured claim when it became apparent that there would be a distribution to unsecured creditors of approximately $0.55 per dollar of claim.

[37] It is clear that Dresser-Rand was aware of BA Energy's process under the CCAA from shortly after the initial order and had retained counsel active on its behalf as early as March, 2009. It filed its initial proof of claim in a timely manner in May, 2009. It was aware from August, 2009 that BA Energy had repudiated the agreement but it was also clear that from March, 2009, Dresser-Rand took the position that it was free to exercise a right of sale of the equipment in its possession. I agree that it cannot be said that Dresser-Rand's amended proof of claim arose from inadvertence.

[38] BA Energy alleges that Dresser-Rand has acted in bad faith in putting forth its recharacterized and amended claim only when it became apparent that it may do better as an unsecured creditor, given the level of distribution to unsecured creditors anticipated by the successful monetization of assets.

[39] While there is insufficient evidence to reach the conclusion that Dresser-Rand acted in bad faith, it is true that it would have been clear to creditors in the relevant time period that a successful plan with an acceptable distribution to unsecured creditors was a strong possibility. At

the least, Dresser-Rand delayed approximately eight months before taking any substantial or meaningful steps to value the assets in its possession in order to come to a valuation of its security. While Scott Kaffka, an employee of a U.S. affiliate of Dresser-Rand, suggests in his affidavits that Dresser-Rand was investigating the possibility of remarketing the equipment before January, 2010, it is also clear from the affidavits and cross-examination on them that relatively little was done in that regard until Mr. Kaffka became involved and contacted an equipment dealer to obtain an estimate of value for the compressor on January 28, 2010, some eleven months after counsel for Dresser-Rand first stated that it took the position that it was entitled to sell the equipment. It is noteworthy that on January 27, 2010, counsel to Dresser-Rand advised the Monitor that Dresser-Rand was still assessing its position, and that the opinion as to of value that Dresser-Rand relies upon was not formally prepared until March 19, 2010.

[40] The consequences of the delay in adequately investigating the value of the assets it held as security for its claim, which accounts for most of the delay in filing the amended claim, must be borne by Dresser-Rand. The question of the resale value of the compressor was a question within the reasonable control of Dresser-Rand to determine.

[41] The objective of a claims procedure order is to attempt to ensure that all legitimate creditors come forward on a timely basis. A claims procedure order provides the debtor and the Monitor with the information necessary to fashion a plan that may prove acceptable to the requisite majority of creditors given the financial circumstances of the debtor and that may be sanctioned by the court. The fact that accurate information relating to the amount and nature of claims is essential for the formulation of a successful plan requires that the specifics of a claims procedure order should generally be observed and enforced, and that the acceptance of a late claim should not be an automatic outcome. The applicant for such an order must provide some explanation for the late filing and the reviewing court must consider any prejudice caused by the delay.

[42] The claims procedure process was developed to give creditors a level playing field with respect to their claims and to discourage tactics that would give some creditors an unjustified advantage. Situations that give rise to concerns of improper manipulation of the process by a creditor must be carefully considered.

[43] Dresser-Rand was offered an opportunity to amend its claim after the purchase agreement with BA Energy was formally repudiated, and did so on September 22, 2010, confirming its initial claim with only a slight variation in amount claimed. As late as December 21, 2009, Dresser-Rand characterized its claim as a fully-secured claim its Notice of Dispute and concedes that it believed at least to this point in time that the compressor was worth at least as much as its claim. Dresser-Rand submits that there was delay by the Monitor in responding to the amended claim, but a three-month delay in the circumstances of a large restructuring with many claims is not unusual. Dresser-Rand also submits that the Monitor should have reacted more quickly to its February 19, 2010 suggestion that it was open to accepting an unspecified cash offer from BA Energy to settle its claim. While the Monitor did not respond for roughly a month, it is clear that

the Monitor was involved in preparing and filing a key report on the restructuring with the Court and also involved in a major monetization of BA Energy's assets that would subsequently fund the plan.

B. Prejudice Caused by the Delay

[44] BA Energy, in consultation with the Monitor, prepared its plan in the early months of 2010 without making any provision for an unsecured deficiency claim from Dresser-Rand. Given what had been communicated among the parties with respect to Dresser-Rand's claim at this point of time, this was not unreasonable.

[45] It is difficult to determine what the effect Dresser-Rand's late amended claim may have had on the decisions of creditors with respect to whether to approve the plan. All but one creditor voted on the plan by proxy, and some of those proxies were authorized before Dresser-Rand served other creditors with a Notice of Motion with respect to its revised claim on April 12, 2010. Dresser-Rand states in its brief that 16 out of 30 proxies were submitted after April 7, 2010. Therefore, roughly half of the creditors in number had already voted on the plan several days prior to receiving notice of Dresser-Rand's late claim.

[46] With respect to the materiality of the claim, it would if accepted comprise approximately 5.4% of the total pool of affected creditors and, if paid from plan proceeds, would reduce the amount available to unsecured creditors from 55 cents per dollar of a claim to 53 cents per dollar of claim. The Dresser-Rand claim therefore is not as insignificant as the late claims accepted by the Court in *Blue Range.*

[47] As noted in *Blue Range* at paragraph 40, the fact that creditors may receive less money if a late claim is accepted is not prejudice relative to the second criterion. The test is whether creditors by reason of the late claim lost a realistic opportunity to do anything that they otherwise might have done. In this case, it is not possible to determine if any of the proxy votes cast in favour of the plan would have been affected by knowledge of the late claim. It is only apparent that a significant number of creditors were not aware of the claim when they decided how to vote.

[48] During the sanction hearing of April 16, 2010, BA Energy indicated that, instead of reducing the distribution to other creditors if Dresser-Rand's late claim was accepted by the Court, BA Energy would find another way to pay the required distribution to Dresser-Rand.

[49] Consideration of prejudice is not restricted to prejudice to other creditors. The second criterion also requires consideration of prejudice to the debtor company or other interested parties: *Blue Range* at paras. 14 and 18. The timing of the late claim with respect to the stage of proceedings is a key consideration in determining whether there has been prejudice: *Blue Range* at para. 36.

TAB FIVE

COURT FILE NUMBER	2501-01893
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	APEX OPPORTUNITIES FUND LTD.
RESPONDENTS	BETA ENERGY CORP. and KADEN CREDITOR TRUST
DOCUMENT	CLAIMS PROCESS ORDER

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Fasken Martineau DuMoulin LLP
Barristers and Solicitors
3400 First Canadian Centre
350 – 7th Avenue SW
Calgary, Alberta T2P 3N9

Attention: Robyn Gurofsky / Tiffany Bennett
Telephone: (403) 261-9469 / (403) 261-5355
Email: rgurofsky@fasken.com / tbennett@fasken.com
File Number 304091.00008

DATE ON WHICH ORDER WAS PRONOUNCED: **August 12, 2025**

LOCATION WHERE ORDER WAS PRONOUNCED: **Calgary, Alberta**

NAME OF JUSTICE WHO MADE THIS ORDER: **The Honourable Justice R. W. Armstrong**

UPON THE APPLICATION of FTI Consulting Canada Inc. in its capacity as (a) the Court-appointed receiver and manager (the "**Receiver**") of the undertakings, properties and assets of Beta Energy Corp. ("**Beta**"), and (b) trustee of a trust established by Creditor Trust Settlement appended as Schedule "C" to the Transaction Approval and Reverse Vesting Order granted by this Court on July 2, 2025 (the "**Creditor Trust**" and, together with Beta Energy Corp., the "**Debtors**") for, among other things, an Order approving the Claims Process (as defined herein); **AND UPON HAVING READ** the within Notice of Application, the Third Report of the Receiver dated July 31, 2025 (the "**Third Report**"), the Affidavit of Service of Holly Zemp, affirmed August 8, 2025, and the other pleadings and materials previously filed in these

proceedings; **AND UPON HEARING** from counsel for the Receiver and such other counsel or interested parties in attendance at the hearing of this Application,

IT IS HEREBY ORDERED AND DECLARED THAT:

1. Service of the notice of this Application for this Order and supporting materials is hereby declared to be good and sufficient, and this Application is properly returnable today.

DEFINITIONS, TIME AND CURRENCY DENOMINATION

2. All capitalized terms not otherwise defined in this Order shall have the definitions set out in **Schedule "A"**. All references to the singular in this Order include the plural and the plural include the singular.

3. All references as to time shall mean local time in Calgary, Alberta, any reference to an event occurring on a Business Day shall mean prior to 4:00 p.m. on such Business Day unless otherwise indicated in this Order and any event that occurs on a day that is not a Business Day shall be deemed to occur on the next Business Day.

CLAIMS PROCESS APPROVED

4. The Claims Process, including the Claims Bar Date, is hereby approved.

5. The Receiver is hereby authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which forms delivered hereunder are completed and executed and the time by which they are submitted, and may, where they are satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this Order, including in respect of the completion, execution and time of delivery of such forms, and may request any further documentation from a Creditor that the Receiver may require in order to determine the validity of a Claim.

6. Copies of all forms delivered by or to a Creditor and determinations of Claims by the Receiver, or the Court, as the case may be, shall be maintained by the Receiver, subject to further order of the Court.

CLAIMS PROCESS FORMS

7. Each of the:

   (a) Instruction Letter attached as **Schedule "B"** hereto;

   (b) Proof of Claim attached as **Schedule "C"** hereto;

   (c) Notice of Revision or Disallowance attached as **Schedule "D"** hereto;

   (d) Notice of Dispute attached as **Schedule "E"** hereto;

   (e) Claims Notice attached as **Schedule "F"** hereto; and

   (f) Notice to Creditors attached as **Schedule "G"** hereto,

   are hereby approved in substantially the forms attached to this Order. Despite the foregoing, the Petitioners and the Receiver may, from time to time, make minor changes to such forms as the Petitioners and Receiver consider necessary or desirable.

NOTICE OF CLAIMS PROCESS

8. Forthwith after the date of this Order, and in any event within two (2) Business Days following the date of this Order, the Receiver shall post on the Receiver's Website copies of this Claims Process Order, the Instruction Letter, a blank Proof of Claim, and a blank Notice of Dispute.

9. The Receiver shall cause the Notice to Creditors, in substantially the form attached as Schedule G hereto, to be published in the *DOB Energy*, with such notice being published for at least two (2) Business Days, as soon as practicable after the date of this Order, and in any event no later than August 29, 2025 for the first posting and no later than September 5, 2025 for the second posting.

10. Good and sufficient service and delivery of notices of this Order, the Claims Process and the Claims Bar Date on all Persons who may be entitled to receive notice thereof shall occur upon the documents enumerated in paragraph 8 hereof being posted on the Receiver's Website, the Claims Package being sent to Creditors in accordance with this Order and the Notice to Creditors being published in accordance with paragraph 9 hereof. No other notice or service need be given or made and no other document or material need be sent to or served upon any Person in respect of this Order or the Claims Process.

11. The accidental failure by the Receiver to transmit or deliver the Claims Package in accordance with this Order or the non-receipt of such materials by any Person entitled to delivery of such materials shall not invalidate the Claims Process or the Claims Bar Date.

NOTICE TO CREDITORS

12. With respect to any Known Creditors, the Receiver is hereby authorized and directed to implement the Claims Process as soon as practicable following the date of this Order, and in any event no later than ten (10) Business Days thereafter, by sending to them a copy of the following:

    (a) an Instruction Letter;

    (b) a Claims Notice (if appliable), which shall set forth the Claim a Known Creditor has against any or all of the Debtors, according to the Debtors' books and records;

    (c) a blank Proof of Claim form; and

    (d) a blank Notice of Dispute.

13. To the extent that any Person that does not receive a Claims Package seeks documents relating to the Claims Process, they shall, prior to the Claims Bar Date, make such request to the Receiver and the Receiver shall cause a Claims Package to be sent to such Person or direct the Person to the documents posted on the Case Website, and otherwise

respond to any reasonable request relating to the Claims Process as may be appropriate in the circumstances.

SERVICE

14. The Receiver may, unless otherwise specified by this Order, serve and deliver any letters, notices or other documents to Creditors or any other Person by forwarding copies thereof by prepaid registered mail, courier, personal delivery, facsimile transmission or email to such Persons at their respective addresses or contact information as last shown on the records of the Debtors or as set out in a Proof of Claim. Any such service and delivery shall be deemed to have been received: (a) if sent by prepaid registered mail, on the third (3rd) Business Day following dispatch; (b) if sent by courier or personal delivery, on the next Business Day following dispatch; and (c) if delivered by electronic transmission, by 4:00 p.m. on such Business Day, and if delivered after 4:00 p.m. on a Business Day or on a day other than a Business Day, on the following Business Day.

15. Any Proof of Claim, Notice of Dispute or other notice or communication required to be provided or delivered by a Creditor to the Receiver under this Order shall be in writing in substantially the form, if any, provided for in this Order and will be sufficiently given only if delivered by prepaid registered mail, courier, personal delivery or email addressed to:

FTI Consulting Inc., in its capacity as the Court-Appointed Receiver and Manager of Beta Energy Corp. and Trustee of the Kaden Creditor Trust

Suite 1610, 520 Fifth Avenue SW
Calgary, Alberta T2P 3R7

Attention: Longmai Yan
Phone: (604) 484-9516
Email: KadenEnergy@FTIConsulting.com

16. Any such notice or communication delivered by a Creditor shall be deemed to be received upon actual receipt thereof by the Receiver if received before 4:00 p.m. on a Business Day or, if delivered after 4:00 p.m. on a Business Day or on a day other than a Business Day, on the next Business Day.

17. If, during any period in which notice or other communications are being given or sent pursuant to this Order, a postal strike or postal work stoppage of general application should occur, such notice or other communications sent by prepaid registered mail and then not received shall not, absent further order of this Court, be effective and notices and other communications given during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, personal delivery, facsimile transmission or email in accordance with this Claims Process Order.

18. In the event this Claims Process Order is later amended by further order, the Receiver shall post such further order on the Receiver's Website and the Receiver may serve such further order on the Service List and such posting and service (if any) shall constitute adequate notice of the amendments made.

SUBMITTING PROOFS OF CLAIM AND NOTICES OF DISPUTE

19. In the event a Person receives a Claims Notice and agrees with the assessment of the amount and classification of its Claim as set out in the Claims Notice, it need not file a Proof of Claim or take any further action and upon no further action being taken, the Claim shall be deemed a Proven Claim.

20. In the event a Person receives a Claims Notice and disagrees with the assessment of either the amount or classification (or both) of its Claim as set out in the Claims Notice, it must deliver a Proof of Claim to the Receiver in the manner set out in paragraph 14 so that the Proof of Claim is received by the Receiver no later than the Claims Bar Date. Failure to submit a Proof of Claim by the Claims Bar Date will result in such Person's Claim being allowed for the amount set forth in the Claims Notice.

21. In the event a Person receives a Claims Package but does not receive a Claims Notice and that Person wishes to assert a Claim, they must deliver a Proof of Claim to the Receiver in the manner set out in paragraph 14 so that the Proof of Claim is received by the Receiver no later than the Claims Bar Date. Failure to submit a Proof of Claim by the Claims Bar Date will result in a Person's Claim, if any, being forever barred and extinguished and, for greater certainty, such Person will be forever prohibited from

making or enforcing a Claim against the Debtors, and such Person will not be entitled to receive any further notice in respect of the Claims Process.

22. If a Person does not receive a Claims Package but wishes to assert a Claim, such Person must submit a Proof of Claim to the Receiver in the manner set out in paragraph 14 hereof so that the Proof of Claim is received by the Receiver no later than the Claims Bar Date. The failure by a Person who did not receive a Claims Package to submit a Proof of Claim to the Receiver by the Claims Bar Date will result in such Person's Claim, if any, being forever barred and extinguished and, for greater certainty, such Person will be forever prohibited from making or enforcing a Claim against the Debtors.

ADJUDICATION OF CLAIMS

23. The Receiver shall review all Proofs of Claim received and shall:

    (a) accept the Claim set out in such Proof of Claim, in its entirety;

    (b) revise the amount, secured status, or priority of the Claim set out in such Proof of Claim for distribution purposes; or

    (c) disallow the Claim set out in such Proof of Claim for distribution purposes.

24. If the Receiver wishes to disallow a Claim or revise the amount, secured status, or priority of the Claim set out in a Proof of Claim, the Receiver shall send such Person a Notice of Revision or Disallowance advising that the Person's Claim, as set out in its Proof of Claim, has been either revised or disallowed and the reasons therefor. If the Receiver does not send a Notice of Revision or Disallowance to a Person, the Claim as set out in the applicable Proof of Claim shall be a Proven Claim. Unless otherwise agreed to by the Receiver, or ordered by the Court, all Claims set out in Proofs of Claim that are received after the Claims Bar Date are deemed to be disallowed, and the Receiver need not deliver a Notice of Revision or Disallowance in respect of such Claim.

25. Prior to revising or disallowing a Claim, the Receiver may attempt to consensually resolve any dispute regarding the classification, priority and/or amount of any Claim with the applicable Creditor.

26. Any Person who is sent a Notice of Revision or Disallowance pursuant to paragraph 24 of this Order and who wishes to dispute such Notice of Revision or Disallowance must:

(a) within fifteen (15) Business Days after the date of the deemed receipt of the applicable Notice of Revision or Disallowance or such other date as may be agreed in writing to by the Receiver, deliver a completed Notice of Dispute to the Receiver; and

(b) within ten (10) Business Days after the date of the deemed receipt of the Notice of Dispute, or such other date as may be agreed in writing by the Receiver, file with the Court and serve the Receiver with a Notice of Application and all affidavits in support, to resolve the Disputed Claim (an "**Adjudication Application**"), which application shall be made in these proceedings and heard as a hearing *de novo*.

27. If a Creditor who is sent a Notice of Revision or Disallowance pursuant to paragraph 24 fails to deliver a Notice of Dispute and Adjudication Application within the time limits in paragraph 26, then, subject only to further order of this Court, the Claim shall be deemed accepted at the amount, secured status, and priority set forth in the Notice of Revision or Disallowance, if any, and the Creditor will:

(a) if the entire Claim is disallowed:

(i) not be permitted to participate in any distribution on account of any such Claim;

(ii) not be entitled to receive any further notice in respect of the Claims Process; and

(iii) be forever barred and enjoined from asserting or enforcing any Claim against the Debtors or the Receiver, and all such Claims shall be forever barred and extinguished; and

(b) where the Claim has been revised by the Receiver:

(i) possess a Proven Claim in the amount, secured status and priority of such revised Claim;

(ii) only be entitled to receive any distribution in an amount proportionate to the revised amount and in accordance with any revised security status or priority of such Claim; and

(iii) be forever barred and enjoined from asserting or enforcing any Claim (A) greater than the revised amount, or (B) with a different security status or priority against the applicable Debtor or the Receiver.

28. Upon receipt of a Notice of Dispute and Adjudication Application, the Receiver may attempt to consensually resolve the dispute regarding the Claim, failing which, the Adjudication Application will be heard and determined by the Court.

29. The Claims Bar Date and the amount and status of every Proven Claim as determined under the Claims Process, including any determination as to the nature, amount, value, priority or validity of any Claim, shall be final for all purposes (unless otherwise provided for in any subsequent order of this Court), and for any distribution made to Creditors, whether in these proceedings or in any of the proceedings authorized by this Court or permitted by statute, including a bankruptcy affecting the Debtors.

30. Notwithstanding anything contained in this Claims Process Order, Unaffected Claims shall not be extinguished or otherwise affected by this Claims Process Order.

31. Notwithstanding anything to the contrary in this Order, the Receiver may at any time:

(a) refer a Claim for resolution to this Court for any purpose where in the Receiver's discretion, such a referral is preferable or necessary for the resolution or the valuation of the Claim;

(b) settle and resolve any Disputed Claims;

(c) extend the time period within which the Receiver, a Creditor any other party is required to take any steps related to the adjudication of Claims pursuant to this

Claims Process Order, provided that no extension of time by the Receiver with respect to the adjudication of Claims pursuant to this paragraph or otherwise shall impact a Creditor's obligations to deliver a Proof of Claim to the Receiver pursuant to the terms of this Order, or the application of the Claims Bar Date to any Creditor.

GENERAL PROVISIONS

32. Notwithstanding any other provisions of this Order, the delivery by the Receiver of a Claims Package, and the submission by any Person of any Claims Process Forms shall not, for that reason alone, grant any Person standing in these proceedings.

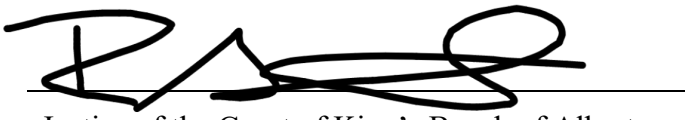
33. In the event of any discrepancy between this Order and the Instruction Letter, this Order shall govern.

34. This Court requests the aid and recognition of other Canadian and foreign Courts, tribunals, and regulatory or administrative bodies to act in aid of and to be complementary to this Court in carrying out the terms of this Claims Process Order where required. All courts, tribunals, and regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Receiver and its agents in carrying out the terms of this Order.

35. The Receiver is at liberty and is hereby authorized and empowered to apply to any court, tribunal, or regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

36. The Receiver and any other Person affected may apply to this Court from time to time for directions from the Court with respect to this Claims Process Order and the Claims Process, or for such further order or orders as any of them may consider necessary or desirable to amend, supplement or replace this Claims Process Order, including the schedules to this Claims Process Order, on not less than seven (7) days' notice to all parties on the Service List and 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.

37. The Receiver may, from time to time, apply to this Court to extend the time for any action which the Receiver is required to take, if reasonably required to carry out its duties and obligations pursuant to this Order, and the Receiver may apply for advice and direction concerning the discharge of its powers and duties under this Order or the interpretation or application of this Order.



Justice of the Court of King's Bench of Alberta

SCHEDULE "A"

DEFINITIONS

1. "**Assessments**" means Claims of His Majesty the King in Right of Canada or any Province or Territory or Municipality, state, county or any other taxation authority in any Canadian or foreign jurisdiction, including, without limitation, amounts which may have arisen under any notice of assessment, notice of objection, notice of reassessment, notice of appeal, audit, investigation, demand or similar request from any taxation authority;

2. "**BIA**" means the Bankruptcy and Insolvency Act (Canada);

3. "**Business Day**" means any day other than a Saturday, Sunday, or a day on which banks in Calgary, Alberta are authorized or obligated by applicable law to close or otherwise are generally closed;

4. "**Claim**" means any right or claim of any Person that may be asserted or made in whole or in part against Beta and/or the Creditor Trust, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, in existence on, or which is based on an event, fact, act or omission which occurred at law or in equity, including by reason of the commission of a tort (intentional or unintentional), any breach of contract or other agreement (oral or written), any breach of duty (including, without limitation, any legal, statutory, equitable or fiduciary duty), any right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise) or for any reason whatsoever against Beta and/or the Creditor Trust or their property or assets, and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not any right or claim is executory or anticipatory in nature including any Assessments and any right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action whether existing at present or

commenced in the future, together with any other rights or claims not referred to above that are or would be claims provable in bankruptcy had either Beta or Kaden become bankrupt, as of February 13, 2025, and for greater certainty, includes a Secured Claim or any Equity Claim, but does not include an Unaffected Claim;

5. "**Claims Bar Date**" means 4:00 p.m. (Calgary time) on September 30, 2025, or such other date as may be ordered by the Court;

6. **"Claims Notice**" means the notice sent to Known Creditors of the Creditor Trust substantially in the form attached as Schedule F to the Claims Process Order, setting out the amount, secured status, and priority of a Claim, where the Receiver has sufficient information to make a reasonable assessment of such Claim according to the books and records of the receivership estate;

7. "**Claims Package**" means the document package which shall be disseminated to any potential Creditor in accordance with the terms of the Claims Process Order, including the Claims Process Instruction Letter, Claims Notice (if applicable), Proof of Claim, Notice of Dispute, and such other materials as the Receiver may consider appropriate;

8. "**Claims Process**" means the determination and adjudication of Claims to be undertaken and administered by the Receiver pursuant to the terms of this Claims Process Order;

9. "**Claims Process Forms**" means the Claims Process Instruction Letter, Claims Notice (if applicable), Proof of Claim, Notice of Revision or Disallowance, and Notice of Dispute;

10. "**Claims Process Order**" means the order of this Court made in these proceedings on August 12, 2025 establishing the Claims Process;

11. "**Court**" means the Court of King's Bench of Alberta;

12. "**Creditor**" means any Person asserting a Claim, or a trustee, liquidator, receiver, manager, or other Person acting on behalf of such Person;

13. "**Creditor Trust**" means the Kaden Creditor Trust created pursuant to the Kaden Creditor Trust Settlement approved by the Order of the Honourable Justice R.A. Neufeld on July 2, 2025 in the within receivership proceedings;

14. "**Disputed Claim**" means, with respect to a Claim, the amount of the Claim or such portion thereof which has not been determined to be a Proven Claim in accordance with the process set forth in the Claims Process Order, which is disputed and which is subject to adjudication in accordance with the Claims Process Order, and is not barred pursuant to the Claims Process Order;

15. "**Equity Claim**" has the meaning set forth in section 2 of the BIA;

16. "**includes**" means includes, without limitation, and "including" means including, without limitation;

17. "**Instruction Letter**" means the letter substantially in the form attached as Schedule B to the Claims Process Order explaining the Claims Process;

18. "**Known Creditors**" means those creditors whose Claims are known to the Receiver, based on the books and records of the Debtors;

19. "**Notice of Dispute**" means the notice substantially in the form attached as Schedule E to the Claims Process Order that may be delivered by a Person who has received a Notice of Revision or Disallowance to dispute such Notice of Revision or Disallowance;

20. "**Notice of Revision or Disallowance**" means the notice substantially in the form attached as Schedule D to the Claims Process Order that may be delivered by the Receiver to a Person advising that the Person's Claim has been revised or disallowed in whole or in part as set out in its Proof of Claim;

21. "**Notice to Creditors**" means the notice for publication in substantially the form attached as Schedule G to the Claims Process Order;

22. "**Person**" means any individual, firm, partnership, joint venture, venture capital fund, association, trust, trustee, executor, administrator, legal personal representative, estate,

group, body corporate (including a limited liability company and an unlimited liability company), corporation, unincorporated association or organization, governmental authority, syndicate or other entity, whether or not having legal status;

23. "**Proof of Claim**" means the form to be completed and filed by a Person who wishes to assert a Claim, substantially in the form attached as Schedule C to the Claims Process Order;

24. "**Proven Claim**" means any Claim that has been deemed to be a Proven Claim or otherwise admitted in whole or in part pursuant to the provisions of the Claims Process Order;

25. "**Receiver's Website**" means the Receiver's website located in respect of the within proceedings at https://cfcanada.fticonsulting.com/kadenenergy;

26. "**Receivership Charges**" means collectively, the Administration Charge, the Receiver's Charge and the Receiver's Borrowings Charge (each as defined in the Receivership Order); and any other charge over the Debtors' assets created by any other order of this Court in the within receivership proceedings;

27. "**Secured Claim**" means a Claim of a Person who asserts that it is a "secured creditor" within the meaning of the BIA;

28. "**Service List**" means the service list maintained by the Receiver in these proceedings and posted on the Receiver's Website;

29. "**this Order**" means the Claims Process Order to which this Schedule A is appended;

30. "**Unaffected Claim**" means, collectively, and subject to further order of this Court:

    (a) any Claim secured by any of the Receivership Charges; and

    (b) any Claim to payment of reasonable retention bonuses to certain key employees, contractors and consultants of, formerly, Kaden Energy Ltd., the combined total

of which should not exceed $225,000, as contemplated in the Order of the Honourable Justice M. Bourque granted March 27, 2025.

SCHEDULE "B"

CLAIMS PROCESS INSTRUCTION LETTER

IN THE MATTER OF THE RECEIVERSHIP OF BETA ENERGY CORP. AND THE KADEN CREDITOR TRUST

This Instruction Letter must be read together with the Claims Process Order of the Court of King's Bench of Alberta (the "**Court**") granted on August 12, 2025 (the "**Claims Process Order**"). The Claims Process Order establishes a Claims Process by which Claims against the receivership estate of Beta Energy Corp. ("**Beta**") and the Creditor Trust are established.

A copy of the Claims Process Order is available at https://cfcanada.fticonsulting.com/kadenenergy. All capitalized terms not otherwise defined in this document have the same meanings ascribed to them in Schedule "A" of the Claims Process Order.

As part of the Claims Process, you have been identified as potentially having a Claim against one or more of Beta or the Creditor Trust (collectively, the "**Debtors**"). This Instruction Letter provides important details regarding the documents sent to you in the Claims Package and how to respond to them.

Please note that certain steps you may wish to take with respect to your Claim must be done prior to the Claims Bar Date, which is **4:00 p.m. (Calgary time) on September 30, 2025**. Failure to take certain actions prior to the Claims Bar Date may impact any Claim you may have and can result in a Claim becoming forever barred or extinguished.

A. Scope of Claims

The definition of "Claim" is found in the Claims Process Order.

B. Overview of the Claims Process

Where the Receiver has sufficient information to make a reasonable assessment of a Claim, the Receiver has set out the amount and status of that Claim based on the Debtors' books and records in the Claims Notice included in the Claims Package. Where the Receiver does not have

sufficient information to make a reasonable assessment of a Claim, you will either receive a Claims Package without the Claims Notice, or failing that, you should contact the Receiver for the Claims Package. Additional information and forms related to the Claims Process can be found on the Receiver's Website or obtained by contacting the Receiver at the address indicated below and providing your contact information including name, address, and email address.

i. ***Claims Notice***

If you have received a Claims Notice, you have two options:

(a) If you do not wish to dispute your Claim as set out in the Claims Notice:

If you agree with the assessment of your Claim as set out in the Claims Notice, you need not take any further action. Your Claim will be considered a Proven Claim for the purpose of the Claims Process.

(b) If you wish to dispute your Claim as set out in the Claims Notice:

If you disagree with the assessment of your Claim as set out in the Claims Notice, you must complete and return to the Receiver a Proof of Claim setting forth the amount and status of your alleged Claim. A blank Proof of Claim is enclosed.

The Proof of Claim must attach all appropriate documentation evidencing the Claim. For more information on what to include in the Proof of Claim, please refer to section iii, below. The completed Proof of Claim must be received by the Receiver by **4:00 p.m. (Calgary time) on September 30, 2025**, being the **Claims Bar Date**.

If no Proof of Claim is received by the Receiver by the Claims Bar Date, subject to further Order of the Court, you will be deemed to have accepted the Claim set forth in the Claims Notice, any such further Claims against the Debtors will be **FOREVER BARRED AND EXTINGUISHED**, and you will be prohibited from making or enforcing any such further Claim against the Debtors or the receivership estate, or participating in any distribution to Creditors.

ii. ***No Claims Notice***

If you did not receive a Claims Notice, it means the Receiver did not have sufficient information from the Debtors' books and records to calculate your Claim, if any. If you believe you have a Claim against the Debtors or their properties or assets, of any nature whatsoever, including an unsecured, secured, contingent or unliquidated Claim, and your Claim was not assessed by the Receiver, you must send a Proof of Claim in the prescribed form to the Receiver. A blank Proof of Claim is enclosed. The Proof of Claim must attach all appropriate documentation evidencing the Claim. For more information on what to include in the Proof of Claim, please refer to section iii, below. The completed Proof of Claim must be received by the Receiver by **4:00 p.m. (Calgary time) on September 30, 2025**, being the **Claims Bar Date**.

iii. ***Proof of Claim***

If you are required to submit a Proof of Claim, either because the Receiver did not deliver a Claims Notice or because you disagree with the amount, classification or priority of your Claim as set out in the Claims Notice, the Proof of Claim must:

(a) attach all appropriate documentation evidencing your Claim;

(b) provide full particulars of your Claim, including amount, description of transaction(s) or agreement(s) giving rise to the Claim, name of any guarantor(s) which have guaranteed the Claim, particulars and copies of any security and amount of Claim allocated thereto, date and number of invoices, particulars of all credits, discounts, etc., claimed;

(c) be sent to the Receiver, together with the required supporting documentation, by registered mail, courier, email (in one PDF file), or personal delivery addressed to:

FTI Consulting Inc., in its capacity as the Court-Appointed Receiver and Manager of Beta Energy Corp. and Trustee of the Kaden Creditor Trust

Suite 1610, 520 Fifth Avenue SW
Calgary, Alberta T2P 3R7

Attention: Longmai Yan
Phone: (604) 484-9516
Email: KadenEnergy@FTIConsulting.com

Where a Proof of Claim is received by the Receiver, the Receiver will review the Proof of Claim and, as soon as reasonably practicable, determine whether the Claim set out in the applicable form is accepted, disputed in whole, or disputed in part.

iv. ***Notice of Revision or Disallowance***

If the Receiver disagrees with some or all of your Claim as set out in the Proof of Claim you deliver to the Receiver, the Receiver will issue a Notice of Revision or Disallowance to you advising that your Claim as set out in the applicable form has been revised or disallowed and the reasons for such revision or disallowance.

If you receive a Notice of Revision or Disallowance, and object to the revision or disallowance, as applicable, you must:

(a) submit to the Receiver a Notice of Dispute by registered mail, courier, email (in PDF), or personal delivery to the Receiver **within 15 Business Days** of the date of deemed delivery of the Notice of Revision or Disallowance. A blank Notice of Dispute is enclosed; and

(b) file with the Court and serve on the Receiver, a Notice of Application seeking to dispute the Notice or Revision or Disallowance, along with all supporting affidavit material **within 10 Business Days** after the date of deemed delivery of the Notice of Dispute.

The dispute of the Notice of Revision or Disallowance shall proceed as a hearing *de novo,* and the parties may adduce evidence in respect of the Claim not previously included in connection with the applicable Proof of Claim, or in connection with the corresponding Notice of Revision or Disallowance.

IF YOU DO NOT RECEIVE A CLAIMS NOTICE FROM THE RECEIVER ASSESSING YOUR CLAIM, AND YOU FAIL TO FILE A PROOF OF CLAIM FORM BY THE CLAIMS BAR DATE, YOUR CLAIM(S) WILL BE FOREVER BARRED AND EXTINGUISHED, AND YOU WILL BE PROHIBITED FROM MAKING OR ENFORCING A CLAIM AGAINST THE DEBTORS OR THE RECEIVERSHIP ESTATE.

DATED this [●] day of [●], 2025 at Calgary, Alberta

FTI Consulting Inc., in its capacity as the Court-Appointed Receiver and Manager of Beta Energy Corp. and Trustee of the Kaden Creditor Trust and not in its personal or corporate capacity

Per: _____
Name: Brett Wilson, CFA
Title: Managing Director

SCHEDULE "C"

FORM OF PROOF OF CLAIM

IN THE MATTER OF THE RECEIVERSHIP OF BETA ENERGY CORP. AND THE KADEN CREDITOR TRUST.

Please read the enclosed Claims Process Instruction Letter carefully prior to completing this Proof of Claim Form. All capitalized terms not otherwise defined in this document have the same meanings as are found in Schedule "A" of the Claims Process Order.

Please also review the Claims Process Order, which is posted to the Receiver's Website at: https://cfcanada.fticonsulting.com/kadenenergy.

You only need to complete this Proof of Claim Form if:

(a) you have received a Claims Notice as part of your Claims Package and disagree with the amount, classification or priority of the Claim as set out in the Claims Notice; or

(b) you have not received a Claims Notice as part of your Claims Package and wish to assert a Claim against the Debtors or the receivership estate; or

(c) you have not received a Claims Package and wish to assert a Claim against the Debtors or the receivership estate.

CASE REFERENCE NUMBER: _____ *(to be entered by the Receiver)*

Regarding the claim of _____ (the "**Creditor**"), all notices or correspondence regarding this Claim to be forwarded to the Creditor at the following address:

Full Legal Name of Creditor: _____

Full Mailing Address:

_____

Contact Person Name and Position: _____

Contact Person Telephone Number: _____

Contact Person Email address: _____

In the Matter of the Receivership of Beta Energy Corp. and the Kaden Creditor Trust, and the Claim of _____ *(name of Creditor)*

I, _____ *(name of Creditor or representative of the Creditor)*, of _____ *(city and province)* do hereby certify that:

❑ **1.** I am the Creditor

or

❑ I am _____ of the Creditor.
(if an officer or employee of the company, state position or title)

2. I have knowledge of all the circumstances connected with the Claim referred to in this form.

3. _____ *(Beta Energy Corp. and/or Kaden Energy Ltd.)* (the "**Debtor**") was, as at February 13, 2025, and still is indebted to the Creditor in the sum of $_____, as specified below and in the Statement of Account or Affidavit attached and marked as Schedule "A" hereto, after deducting any counterclaim to which the Debtor is entitled:

Debtor Name:	**Amount of Claim:**	**Whether the Claim is Secured**	**Value of Security Held (if any)**
		□ Yes □ No	
		□ Yes □ No	
		□ Yes □ No	

(Provide full particulars of the Claim, including amount, description of transaction(s) or agreement(s) giving rise to the Claim, name of any guarantor(s) which have guaranteed the

Claim, particulars and copies of any security and amount of Claim allocated thereto, date and number of invoices, particulars of all credits, discounts, etc., claimed. Attach all supporting documents as Schedule "A" to this Proof of Claim.)

All information submitted in this Proof of Claim must be true, accurate and complete. Filing false information relating to your Claim may result in your Claim being disallowed in whole or in part and may result in further penalties.

This Proof of Claim must be received by the Receiver by 4:00 p.m. (Calgary time) on September 30, 2025 (the "**Claims Bar Date**").

IF YOU DO NOT RECEIVE A CLAIMS NOTICE FROM THE RECEIVER ASSESSING YOUR CLAIM, AND YOU FAIL TO FILE A PROOF OF CLAIM FORM BY THE CLAIMS BAR DATE, YOUR CLAIM(S) WILL BE FOREVER BARRED AND EXTINGUISHED, AND YOU WILL BE PROHIBITED FROM MAKING OR ENFORCING A CLAIM AGAINST THE DEBTORS OR THE RECEIVERSHIP ESTATE.

This Proof of Claim Form must be delivered by registered mail, courier, email (in one PDF file), or personal delivery addressed to:

FTI Consulting Inc., in its capacity as the Court-Appointed Receiver and Manager of Beta Energy Corp. and Trustee of the Kaden Creditor Trust

Suite 1610, 520 Fifth Avenue SW
Calgary, Alberta T2P 3R7

Attention: Longmai Yan
Phone: (604) 484-9516
Email: KadenEnergy@FTIConsulting.com

DATED at _____ this ____ day of _____, 2025.

WITNESS

Per: _____
Name:

(CREDITOR NAME)

Per: _____
Name:
Title:

SCHEDULE "D"

NOTICE OF REVISION OR DISALLOWANCE

IN THE MATTER OF THE RECEIVERSHIP OF BETA ENERGY CORP. AND THE KADEN CREDITOR TRUST

TO: [INSERT NAME AND ADDRESS OF CREDITOR] (the "**Claimant**")

RE: Claim Reference Number _____

This Notice of Revision or Disallowance must be read together with the Claims Process Order of the Court of King's Bench of Alberta (the "**Court**") granted on August 12, 2025 (the "**Claims Process Order**"). The Claims Process Order establishes a Claims Process by which Claims against the receivership estate of Beta Energy Corp. ("**Beta**") and the Kaden Creditor Trust established by Creditor Trust Settlement appended as Schedule "C" to the Transaction Approval and Reverse Vesting Order granted by the Court on July 2, 2025 (the "**Creditor Trust**" and, together with Beta, the "**Debtors**").

A copy of the Claims Process Order is available at https://cfcanada.fticonsulting.com/kadenenergy. All capitalized terms not otherwise defined in this document have the same meanings as are found in Schedule "A" of the Claims Process Order.

Pursuant to the Claims Process Order, the Receiver hereby gives you notice that your Proof of Claim has been reviewed by the Receiver, and that your Claim has been revised or disallowed your Claim as follows:

Debtor Name:	**Amount of Claim as Submitted:**	**Amount Allowed by the Receiver:**	
		As secured	**As unsecured**

Reason for the Revision or Disallowance:

_____

_____

_____

_____

_____

_____

_____

_____

If you do not agree with this Notice of Revision or Disallowance, please take notice of the following:

To dispute a Notice of Revision or Disallowance you MUST:

1. deliver a Notice of Dispute, a blank copy of which is enclosed in your Claims Package, by registered mail, courier, email (in one PDF file), or personal delivery to the address indicated so that such Notice of Dispute is received by the Receiver within 15 Business Days (before 4:00 p.m. Calgary time) after the date of delivery of this Notice of Revision or Disallowance, or such other date as may be agreed to by the Receiver; and

2. file with the Court and serve on the Receiver a Notice of Application seeking to appeal the Notice of Revision or Disallowance, along with all supporting affidavit materials, within 10 Business Days after the date of the Notice of Dispute, or such other date as may be agreed to by the Receiver or as the Court may order.

Address for service of Notice of Dispute:

FTI Consulting Inc., in its capacity as the Court-Appointed Receiver and Manager of Beta Energy Corp. and Trustee of the Kaden Creditor Trust

Suite 1610, 520 Fifth Avenue SW
Calgary, Alberta T2P 3R7

Attention: Longmai Yan
Phone: (604) 484-9516
Email: KadenEnergy@FTIConsulting.com

IF YOU DO NOT DELIVER A NOTICE OF DISPUTE BY THE TIME SPECIFIED, OR DO NOT FILE AND SERVE A NOTICE OF APPLICATION SEEKING TO APPEAL THE NOTICE OF REVISION OR DISALLOWANCE BY THE DATE SPECIFIED, THE NATURE AND AMOUNT OF YOUR CLAIM, IF ANY, SHALL BE AS SET OUT IN THIS NOTICE OF REVISION OR DISALLOWANCE.

DATED this [●] day of [●], 2025 at [●]

FTI Consulting Inc., in its capacity as the Court-Appointed Receiver and Manager of Beta Energy Corp. and Trustee of the Kaden Creditor Trust, and not in its personal or corporate capacity

Per: _____
Name: Brett Wilson, CFA
Title: Managing Director

SCHEDULE "E"

NOTICE OF DISPUTE

IN THE MATTER OF THE RECEIVERSHIP OF BETA ENERGY CORP. AND THE KADEN CREDITOR TRUST

RE: Claim Reference Number _____

This Notice of Dispute must be read together with the Claims Process Order of the Court of King's Bench of Alberta (the "**Court**") granted on August 12, 2025 (the "**Claims Process Order**"). The Claims Process Order establishes a Claims Process by which Claims against the receivership estate of Beta Energy Corp. ("**Beta**") and the Kaden Creditor Trust established by Creditor Trust Settlement appended as Schedule "C" to the Transaction Approval and Reverse Vesting Order granted by the Court on July 2, 2025 (the "**Creditor Trust**" and, together with Beta, the "**Debtors**").

A copy of the Claims Process Order is available at https://cfcanada.fticonsulting.com/kadenenergy. All capitalized terms not otherwise defined in this document have the same meanings as are found in Schedule "A" of the Claims Process Order.

Pursuant to the Claims Process Order, _____ (the "**Claimant**") hereby gives notice that the Claimant intends to dispute the Notice of Revision or Disallowance bearing Case Reference Number _____ and dated _____ issued by the Receiver, and asserts a Claim as follows:.

Debtor Name:	**Amount Allowed by the Receiver:**		**Amount Claimed by the Claimant:**	
	As secured	**As unsecured**	**As secured**	**As unsecured**

TOTAL CLAIM:				

(Insert particulars of your Claim per the Notice of Revision or Disallowance, and the value of your Claim as asserted by you.)

Reason for Dispute:

_____

_____

_____

_____

_____

_____

_____

_____

(Provide full particulars of why you dispute the Receiver's revision or disallowance of your Claim as set out in the Notice of Revision or Disallowance, and provide all supporting documentation, including amount description of transaction(s) or agreement(s) giving rise to the Claim, name of any guarantor(s) which have guaranteed the Claim, particulars and copies of any security and amount of Claim allocated thereto, date and number of invoices, particulars of all credits, discounts, etc., claimed. The particulars provided must support the value of the Claim as claimed by you above.)

I hereby certify that:

1. I am the Claimant or an authorized representative of the Claimant;

2. I have knowledge of all the circumstances connected with this Claim;

3. The Claimant submits this Notice of Dispute of Revision or Disallowance in respect of the Claim referenced above;

4. All available documentation in support of the Claimant's dispute is attached.

All information submitted in this Notice of Dispute must be true, accurate and complete. Filing false information relating to your Claim may result in your Claim being disallowed in whole or in part and may result in further penalties.

This Notice of Dispute must be received by the Receiver by 4:00 p.m. (Calgary time) on the day that is 15 Business Days after the Notice of Revision or Disallowance is deemed to have been received by you in accordance with the terms of the Claims Process Order.

In addition to delivering this Notice of Dispute to the Receiver you MUST, within 10 Business Days after the date of the Notice of Dispute (or such other date as may be agreed to by the Receiver or ordered by the Court) file and serve on the Receiver a Notice of Application seeking to appeal the Notice of Revision or Disallowance, along with all supporting affidavit material, such Application must be heard no later than 30 days from the date of the Notice of Dispute, or such other date as the Receiver may agree.

IF YOU DO NOT DELIVER A NOTICE OF DISPUTE BY THE TIME SPECIFIED, OR DO NOT FILE AND SERVE A NOTICE OF APPLICATION SEEKING TO APPEAL THE NOTICE OF REVISION OR DISALLOWANCE BY THE DATE SPECIFIED, THE NATURE AND AMOUNT OF YOUR CLAIM, IF ANY, SHALL BE AS SET OUT IN THE NOTICE OF REVISION OR DISALLOWANCE.

This Notice of Dispute must be delivered by registered mail, courier, email (in one PDF file), or personal delivery addressed to:

FTI Consulting Inc., in its capacity as the Court-Appointed Receiver and Manager of Beta Energy Corp. and Trustee of the Kaden Creditor Trust

Suite 1610, 520 Fifth Avenue SW
Calgary, Alberta T2P 3R7

Attention: Longmai Yan
Phone: (604) 484-9516
Email: KadenEnergy@FTIConsulting.com

DATED at _____ this ____ day of _____, 2025.

WITNESS

Per: _____
Name:

(CREDITOR NAME)

Per: _____
Name:
Title:

SCHEDULE "F"

CLAIMS NOTICE

IN THE MATTER OF THE RECEIVERSHIP OF BETA ENERGY CORP. AND THE KADEN CREDITOR TRUST

TO: [INSERT NAME AND ADDRESS OF CREDITOR]

RE: Claim Reference Number _____

This Claims Notice must be read together with the Claims Process Order of the Court of King's Bench of Alberta (the "**Court**") granted on August 12, 2025 (the "**Claims Process Order**"). The Claims Process Order establishes a Claims Process by which Claims against the receivership estate of Beta Energy Corp. ("**Beta**") and the Kaden Creditor Trust established by Creditor Trust Settlement appended as Schedule "C" to the Transaction Approval and Reverse Vesting Order granted by the Court on July 2, 2025 (the "**Creditor Trust**" and, together with Beta, the "**Debtors**").

A copy of the Claims Process Order is available at https://cfcanada.fticonsulting.com/kadenenergy. All capitalized terms not otherwise defined in this document have the same meanings as are found in Schedule "A" of the Claims Process Order.

Based on a review of the Debtors' books and records, the Receiver has identified you as a Person with a Claim against the Debtors (or one of them) or the receivership estate with respect to which the Receiver has sufficient information to make a reasonable assessment of your Claim. This Claims Notice sets out the amount and status of your Claim according to the Debtors' books and records, and as accepted by the Receiver, as follows:

CLAIM AGAINST: [INSERT NAME AND ADDRESS OF DEBTOR] (the "Debtor")

Your Claim has been assessed as a [**secured/unsecured**] claim in the amount of $[●] against the Debtor. Details of your Claim, including any security granted in respect thereof, are set out in the attached schedule.

If you agree with the Receiver's assessment of your Claim, you do not need to take any further action.

IF YOU WISH TO DISPUTE THE ASSESSMENT OF YOUR CLAIM, YOU MUST TAKE THE STEPS OUTLINED BELOW.

If you wish to dispute the assessment of your Claims(s), you MUST complete a Proof of Claim enclosed with the Claims Package sent to you. Your completed Proof of Claim must be received by the Receiver by 4:00 p.m. (Calgary time) on September 30, 2025, being the Claims Bar Date.

IN ACCORDANCE WITH THE TERMS OF THE CLAIMS PROCESS ORDER, IF YOU FAIL TO FILE A PROOF OF CLAIM FORM BY THE CLAIMS BAR DATE, YOUR CLAIM(S) WILL BE DEEMED AS SET FORTH IN THIS CLAIMS NOTICE. ANY ADDITIONAL CLAIM(S) WILL BE FOREVER BARRED AND EXTINGUISHED, AND YOU WILL BE PROHIBITED FROM MAKING OR ENFORCING SUCH ADDITIONAL CLAIM AGAINST THE DEBTORS OR THE RECEIVERSHIP ESTATE.

The Proof of Claim Form must be delivered by registered mail, courier, email (in one PDF file), or personal delivery addressed to:

FTI Consulting Inc., in its capacity as the Court-Appointed Receiver and Manager of Beta Energy Corp. and Trustee of the Kaden Creditor Trust

Suite 1610, 520 Fifth Avenue SW
Calgary, Alberta T2P 3R7

Attention: Longmai Yan
Phone: (604) 484-9516
Email: KadenEnergy@FTIConsulting.com

DATED this [●] day of [●], 2025 at [●]

FTI Consulting Inc., in its capacity as the Court-Appointed Receiver and Manager of Beta Energy Corp. and Trustee of the Kaden Creditor Trust, and not in its personal or corporate capacity

Per: _____
Name: Brett Wilson, CFA
Title: Managing Director

SCHEDULE "G"

FORM OF NOTICE TO CREDITORS

RE: IN THE MATTER OF THE RECEIVERSHIP OF BETA ENERGY CORP. AND THE KADEN CREDITOR TRUST

PLEASE TAKE NOTICE that on August 12, 2025, the Court of King's Bench of Alberta issued an order (the "**Claims Process Order**") in the receivership proceedings of Beta Energy Corp. and the Kaden Creditor Trust (collectively, the "**Debtors**"), requiring all Persons who assert a Claim against the Debtors, whether unliquidated, contingent or otherwise, to file a Proof of Claim FTI Consulting Inc. (the "**Receiver**") on or before 4:00 p.m. (Calgary time) on [●], 2025 (the "**Claims Bar Date**") by sending the Proof of Claim to the Receiver by registered mail, courier, email (in one PDF file), or personal delivery addressed to:

FTI Consulting Inc., in its capacity as the Court-Appointed Receiver and Manager of Beta Energy Corp. and Trustee of the Kaden Creditor Trust

Suite 1610, 520 Fifth Avenue SW
Calgary, Alberta T2P 3R7

Attention: Longmai Yan
Phone: (604) 484-9516
Email: KadenEnergy@FTIConsulting.com

Pursuant to the Claims Process Order, Claims Packages, including the form of Proof of Claim, will be sent to all Known Creditors pursuant to the terms of the Claims Process Order. Persons wishing to assert a Claim against the Debtors may also obtain the Claims Process Order and Claims Package from the Receiver's Website at: https://cfcanada.fticonsulting.com/kadenenergy, or by contacting the Receiver at KadenEnergy@FTIConsulting.com.

Only Proofs of Claim **actually received** by the Receiver on or before 4:00 p.m. (Calgary time) on September 30, 2025 will be considered filed by the Claims Bar Date. **It is your responsibility to ensure that the Receiver receives your Proof of Claim by the Claims Bar Date.**

CLAIMS WHICH ARE NOT RECEIVED BY THE CLAIMS BAR DATE WILL BE BARRED AND EXTINGUISHED FOREVER.

If you have any questions regarding the claims process or the Claims Packages, please contact the Receiver at KadenEnergy@FTIConsulting.com.

DATED this [●] day of [●], 2025 at Calgary, Alberta.

TAB SIX

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to January 19, 2026

Last amended on December 12, 2024

À jour au 19 janvier 2026

Dernière modification le 12 décembre 2024

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

Single judge may exercise powers, subject to appeal

(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

R.S., c. C-25, s. 9.

Un seul juge peut exercer les pouvoirs, sous réserve d'appel

(2) Les pouvoirs conférés au tribunal par la présente loi peuvent être exercés par un seul de ses juges, sous réserve de l'appel prévu par la présente loi. Ces pouvoirs peuvent être exercés en chambre, soit durant une session du tribunal, soit pendant les vacances judiciaires.

S.R., ch. C-25, art. 9.

Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Forme des demandes

10 (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

General power of court

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

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

TAB SEVEN

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bul River Mineral Corporation (Re),* 2014 BCSC 1732

Date: 20140915
Docket: S113459
Registry: Vancouver

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

And

In the Matter of the *Business Corporations Act,* S.B.C. 2002, c. 57 and the *Business Corporations Act*, R.S.A. 2000, c. B-9

And

In the Matter of Bul River Mineral Corporation, Big Bear Metal Mining Corporation, Earth's Vital Extractors Limited, Fort Steele Mineral Corporation, Fort Steele Metals Corporation, Fused Heat Ltd., Gallowai Metal Mining Corporation, Giant Steeples Mineral Corporation, Grand Mineral Corporation, International Feldspar Ltd., Jao Mine Developers Ltd., Kutteni Diamonds Ltd., Stanfield Mining Group of Canada Ltd., Sullibin Mineral Corporation, Sullibin Multi Metal Corporation, Super Feldspars Corporation, White Cat Metal Mining Corporation, Zeus Metal Mining Corporation, Zeus Metals Corporation and Zeus Mineral Corporation

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	Colin D. Brousson
Counsel for CuVeras, LLC:	William C. Kaplan, Q.C. Peter Bychawski
Counsel for Eldon Clarence Stafford	J. Roger Webber, Q.C.
Counsel for Gordon Preston and Carol Preston	Robert M. Curtis, Q.C.

a) all creditors and shareholders were given the opportunity to review the Creditor List;

b) in the event a creditor or shareholder agreed with the "Claim Particulars" listed in the Creditor List (which included the number and class of shares), the creditor or shareholder did not need to file a Proof of Claim with the petitioners. In that event, the Claim Particulars in the Creditor List would be deemed to be the creditor or shareholder's proven claim for voting and distribution purposes under any restructuring plan subsequently filed by the petitioners;

c) in the event a creditor or shareholder objected to the Claim Particulars in the Creditor List, or wished to advance another claim, the creditor or shareholder had to, on or before October 17, 2011 (the "Claims Bar Date"), deliver to the petitioners, with a copy to the Monitor, a notice of such objection in the form of a Notice of Dispute, together with a Proof of Claim and supporting documentation;

d) in the event a Notice of Dispute was not submitted on or before the Claims Bar Date, the creditor or shareholder was deemed to have accepted the amount owing and all other Claim Particulars set out in the Creditor List, and was forever barred from advancing any other claim against the petitioners or participating in any plan subsequently filed by the petitioners;

e) where a Notice of Dispute and/or Proof of Claim was filed by a creditor or shareholder, the petitioners were deemed to have accepted it unless they delivered to the creditor or shareholder a Notice of Disallowance on or before October 31, 2011 (later extended to November 15, 2011); and

f) in the event of the petitioners delivering a Notice of Disallowance, a creditor or shareholder had 21 days to seek a determination from the court of the validity and value of and particulars of the claim by filing and serving

> the petitioners and the Monitor with application materials. A creditor or shareholder who failed to file and serve such materials by the deadline was deemed to have accepted the particulars of its claim set out in the Notice of Disallowance.

[28] The Claims Process Order did not contemplate the appointment of a claims officer or the participation of the Monitor in the process of assessing the validity of the Proofs of Claim and/or Notices of Dispute submitted to the petitioners through the Claims Process. Nor did the Claims Process allow any independent review of claims submitted by other creditors of the petitioners or by CuVeras as the interim financier.

(i) Jurisdiction of the Court

[29] Before turning to claims process orders specifically, it is important to keep in mind the broad remedial objectives of the *CCAA* to facilitate a restructuring rather than a liquidation of assets: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 15-18, 56. As the Supreme Court of Canada has noted, it is now well recognized that a supervising judge of a *CCAA* proceeding has a "broad and flexible authority" or statutory jurisdiction to makes such orders as are necessary to achieve those objectives: *Century Services* at paras. 19, 57-66.

[30] The discretionary authority of the court is confirmed by s. 11 of the *CCAA* which provides that the court may make any order that it considers "appropriate in the circumstances". As Madam Justice Deschamps observed in *Century Services*, whether an order will be appropriate is driven by the policy objectives of the *CCAA*:

> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for

> successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[31] Claims process orders are an important step in most restructuring proceedings. In *Timminco Limited (Re)*, 2014 ONSC 3393, Mr. Justice Morawetz reviewed the "first principles" relating to claims process orders and their purpose within *CCAA* proceedings:

> [41] It is also necessary to return to first principles with respect to claims-bar orders. The CCAA is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the CCAA, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.
>
> [42] Adherence to the claims-bar date becomes even more important when distributions are being made (in this case, to secured creditors), or when a plan is being presented to creditors and a creditors' meeting is called to consider the plan of compromise. These objectives are recognized by s. 12 of the CCAA, in particular the references to "voting" and "distribution".
>
> [43] In such circumstances, stakeholders are entitled to know the implications of their actions. The claims-bar order can assist in this process. By establishing a claims-bar date, the debtor can determine the universe of claims and the potential distribution to creditors, and creditors are in a position to make an informed choice as to the alternatives presented to them. If distributions are being made or a plan is presented to creditors and voted upon, stakeholders should be able to place a degree of reliance in the claims bar process.

[32] The overall objective of achieving certainty within the restructuring proceedings - for both debtor and creditor - is what drives this process. In this vein, counsel makes an effort to draft a claims process order to achieve these objectives. A claims bar date is typically set. The process is typically designed with some idea of the issues that either have arisen or might arise in the restructuring. My comments in *Steels Industrial Products Ltd. (Re)*, 2012 BCSC 1501 are apposite:

> [38] Similar issues often arise in *CCAA* proceedings where counsel and the Court must be mindful of issues that may arise in relation to the determination of claims in that proceeding. There are no set rules, but care must be taken in the drafting of the claims process order to ensure that the process by which claims are determined is fair and reasonable to all

> stakeholders, including those who will be directly affected by the acceptance of other claims. In *Winalta Inc. (Re)*, 2011 ABQB 399, Madam Justice Topolniski stated that "[p]ublic confidence in the insolvency system is dependent on it being fair, just and accessible".
>
> [39] Many *CCAA* proceedings provide for an independently run claims process (for example, by the monitor), the cost of which again would be borne by the general body of creditors: see for example, *Pine Valley Mining Corp. (Re)*, 2008 BCSC 356. To this extent, the statutory procedure under the *BIA* and the claims process under the *CCAA* will have similar features, which is understandable since the overriding intention under both is to conduct a proper claims process: see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 24 and 47.

[33] Nevertheless, issues can and do arise that no one is able to foresee at the time of the claims process order. In that event, the court retains its discretion to address the application of the claims process order: *Timminco* at para. 38. In that case, the claims process order specifically allowed the court to order a further claims bar date. No such provision is found in the Claims Process Order but I do not consider that its absence is sufficient to oust the statutory jurisdiction of the court in appropriate circumstances.

[34] This, of course, is a different issue in that by the failure of the petitioners to deliver a Notice of Disallowance in respect of the claims in issue, they were deemed to have been accepted by the petitioners. This is not a case where a creditor is seeking to avoid the consequences of not filing materials by the time of the Claims Bar Date. Nevertheless, in my view, the court still retains the statutory jurisdiction to consider the validity of claims that might otherwise, by the Claims Process Order, be deemed to have been accepted.

[35] The Prestons and Mr. Stafford do not suggest that the court lacks the jurisdiction to reconsider the issues that arise in relation to their claims. The Prestons do, however, contend that it is not appropriate that any reconsideration take place at this time.

(ii) Review of the Claims

[36] The stated purpose of the *CCAA* is to facilitate compromises and arrangements between companies and their creditors (see also s. 6 of the *CCAA*). In

accordance with that fundamental objective or purpose, it is axiomatic that it is necessary to determine what are the true claims of the creditors as might be compromised or arranged.

[37] A "creditor" is not defined in the *CCAA*, unlike the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 (the "*BIA*") where it is defined as meaning "a person having a claim provable as a claim" under that *Act* (s. 2). Both the *CCAA* and the *BIA* define "claim" by reference to liabilities "provable" under the *BIA*. Specifically, s. 2(1) of the *CCAA* defines "claim" as meaning:

> any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*.

Section 2 of the *BIA* defines a "claim provable in bankruptcy" as "any claim or liability provable in proceedings under this Act by a creditor".

[38] Section 121(1) of the *BIA* addresses which claims are "provable claims":

> 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[39] In substance, this same statutory definition is applied in the *CCAA* and represents a point of convergence consistent with the harmonization of certain aspects of insolvency law under both the *CCAA* and *BIA*: *Century Services* at para. 24. In addition, as noted by CuVeras, this definition is essentially used in the Claims Process Order by its definition of "Claim".

[40] Various authorities establish that a "provable debt" must be due either at law, or in equity, by the bankrupt to the person seeking to prove a claim and must be recoverable by legal process: *Excelsior Electric Dairy Machinery Ltd. (Re)*, [1923] 2 C.B.R. 599 (Ont. S.C.), 3 D.L.R. 1176; *Farm Credit Corporation v. Dunwoody Limited,* [1988] 68 C.B.R. (N.S.) 255 (Alta. C.A.), 51 D.L.R. (4th) 501, leave to appeal to S.C.C. refused, 73 C.B.R. (N.S.) xxvii (note), 100 60 D.L.R. (4th) vii (note);

Central Capital Corp. (Re), [1995] 29 C.B.R. (3d) 33 (Ont. Gen. Div.), O.J. No. 19 ("*Central Capital*"), aff'd [1996] 27 O.R. (3d) 494 (C.A.), 38 C.B.R. (3d) 1 ("*Central Capital* (ONCA)"); *Negus v. Oakley's General Contracting* (1996), 40 C.B.R. (3d) 270 (N.S.S.C.), 152 N.S.R. (2d) 172.

[41] In a *CCAA* proceeding, a claims process order is the means by which the "claims" of the creditors are determined. By reason of that process, the debtor is able to determine the nature and extent of its debts and liabilities so as to enable it to formulate a plan of arrangement. There are no rules as to when a claims process may be implemented although it is usually early in the process in anticipation of a plan and distributions to creditors. In that respect, a debtor company will be seeking some certainty regarding the determination of claims for that purpose.

[42] In *Timminco*, the Court, prior to citing relevant authorities at para. 52, outlined many of the factors that might be considered by the court in relation to deciding whether to allow claims to be advanced after the claims bar date:

> [51] Counsel to Mr. Walsh submit that courts have historically considered the following factors in determining whether to exercise their discretion to consider claims after the claims-bar date: (a) was the delay caused by inadvertence and, if so, did the claimant act in good faith? (b) what is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay[?] (c) if relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing? and (d) if relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

[43] As I have stated above, the broad jurisdiction of the court under s. 11 of the *CCAA* allows the court to make such orders as are "appropriate". While the above factors have been considered in the past, there is no finite list that detracts from a consideration of all relevant circumstances. Nevertheless, the general considerations of delay and prejudice typically arise, just as they do in this case.

[44] I return to the factual circumstances relating to the Claims Process and the Claims Process Order. The petitioners were themselves responsible for reviewing the Proofs of Claim and/or Notices of Dispute submitted in the Claims Process. The

principal individual involved in the review was Mr. Hewison who did so with the assistance of counsel. It is apparent that the only factors considered in his review included whether a claim related to a trade debt or whether it related to an equity interest in the petitioners.

[45] The Prestons argue that the Claims Process was well known to everyone and that its purpose was to establish the amount and nature of all claims. This is clearly self-evident, but back in late 2011, it was the case that the course of the restructuring proceedings was anything but certain. In fact, the ability of the petitioners to continue the proceedings was tenuous and they were scrambling to find interim financing which they eventually secured with CuVeras in November 2011. By that time, the Claims Process was essentially completed. Even so, understandably, the parties were concerned to proceed as quickly as possible to obtain further technical reports on the proven or inferred mine resources in order to determine whether a viable mine even existed. They did receive those later reports, which included a further RPA report and the Snowden report. In these circumstances, Mr. Hewison did not undertake any substantive review of the claims.

[46] The Prestons further say that, since they faithfully complied with the Claims Process Order, it would be patently unfair to now revisit the characterization of their claim. While they raise the matter of the three year plus delay, no elements of prejudice have been alleged. In my view, the delay, while relevant, will have little effect on the ability of the parties to address the substance of the matter. Nor have any rights been extinguished or compromised by reason of any delay. Accordingly, the objective of certainty has less force in this case where the plan of arrangement has yet to be formulated and the claimants have yet to consider that plan and vote on it. I note that similar considerations were at play in *Timminco* where it was apparent that no plan would ever be put to the creditors.

[47] Finally, the Prestons argue that the Claims Process Order constituted the sole form of adjudication of the validity and nature of the claims submitted. It is true, of course, that the petitioners had an opportunity to consider these claims.

TAB EIGHT

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Soccer Express Trading Corp. (Re),* 2020 BCSC 749

Date: 20200512
Docket: S204288
Registry: Vancouver

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

- AND -

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57, AS AMENDED

- AND -

IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED

- AND -

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF SOCCER EXPRESS TRADING CORP. AND KAHUNAVERSE SPORTS GROUP INC.

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

Counsel for Petitioners, Soccer Express Trading Corp. and Kahunaverse Sports Group Inc.:	C.J. Ramsay K.G. Mak N. Carlson (A/S)
Counsel for Monitor, PricewaterhouseCoopers Inc.:	V. Tickle L. Williams
Counsel for Greyrock Capital Incorporated:	K. Robertson D. Jackson

[98] As previously stated, the Petitioners' cash flow projections to July 31, 2020 assume that the purchase of product is based on COD terms with most suppliers, which increases the pressure on cash flow and results in a much higher level of borrowings than anticipated. The Petitioners concede that, with the critical supplier declaration in favour of adidas and the requirement imposed on adidas to fund on the above terms, it is very possible that the full extent of this further borrowing will not be required.

[99] Pursuant to s. 11.2(4) of the *CCAA*, any increase in borrowing involves a consideration of the following factors, 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 referred to in paragraph 23(1)(b), if any.

[100] The Petitioners' cash flow sets out the requirements to help fund working capital as sports teams source uniforms and equipment to ready themselves for the spring/summer season. In addition, the Petitioners will require funding for on-going operations as they work towards finalizing the transaction with Greyrock and concluding these proceedings.

[101] The Monitor will continue to oversee the Petitioners' business and financial affairs during these *CCAA* proceedings; that will include drawdowns on the Interim Lending Facility so as to ensure that it is being used only as needed. While perhaps the full amount will not be required, increasing the limit affords the Petitioners the flexibility of accessing those funds as circumstances arise, again with oversight by the Monitor.

[102] No creditor of the Petitioners will be materially prejudiced as a result of the increase in the Interim Lender's Charge, including adidas since the Critical Supplier Charge ranks ahead of the Interim Lender's Charge and the further borrowings will be available, if needed, to fund payments to adidas with respect to ongoing supply.

[103] The Monitor supports the increase to the Interim Lending Facility and the Interim Lender's Charge.

[104] I conclude that the s. 11.2(4) factors support an increase to the Interim Lending Facility as proposed.

Claims Process Order

[105] In conjunction with the Monitor, the Petitioners have developed and are seeking approval of a Claims Process Order to call for the submission of claims against the Petitioners.

[106] Pursuant to s. 11 of the *CCAA*, the Court may make any order that it considers appropriate in the circumstances. Courts have in past relied on this broad statutory authority under the *CCAA* to grant claims process orders.

[107] The proposed Claims Process Order allows for the usual steps and procedures in such a claims process, consistent with what has been previously ordered in many other restructurings. In particular, the process sets a claims bar date of June 30, 2020 to file claims or, with respect to a restructuring claim, within 10 days of receiving a notice of disclaimer or resiliation.

[108] The Monitor supports the proposed Claims Process Order. The Monitor opines that this process should facilitate the implementation of a plan and the overall restructuring.

[109] I conclude that, consistent with the statutory objectives of the *CCAA*, the claims process will bring some certainty to this restructuring proceeding in determining the claims that must be addressed by the Petitioners in any plan of arrangement. The proposed Claims Process Order is granted on the terms sought,

with amendment of the various timelines set out in the proposed order to extend them by two business days, given the delay in giving these reasons.

Extension of Stay

[110] Finally, the Petitioners are seeking to extend the stay period to July 31, 2020.

[111] No stakeholder objects to such an extension.

[112] The Monitor supports such an extension, confirming that the Petitioners have acted and continue to act in good faith and with due diligence, as required by s. 11.02(2) of the *CCAA*.

[113] Clearly the extension of the stay is necessary for a number of reasons to advance the restructuring. The further time will allow the Petitioners to continue operations with a view to developing a longer term strategy that does not include supply from adidas. In addition, once the Claims Process is completed, a clearer picture will emerge toward developing a plan of arrangement for consideration of the creditors and the Court. Finally, as matters move along, the Petitioners and Greyrock can move toward completion of the SPA.

[114] These reasons are consistent with the purpose and objectives of the *CCAA* and will enable the Petitioners to proceed with an orderly sale of their assets to maximize recovery to stakeholders, including all unsecured creditors which of course includes adidas.

[115] I am satisfied that an extension of the stay to July 31, 2020 is appropriate in the circumstances and it is so ordered.

"Fitzpatrick J."

TAB NINE

Editor's Note: Corrigendum released on December 3, 2012. Original judgment has been corrected with text of corrigendum appended.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Steels Industrial Products Ltd. (Re),* 2012 BCSC 1501

Date: 20121011
Docket: S122514
Registry: Vancouver

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

And

In the Matter of a Plan of Compromise or Arrangement of

0487826 B.C. Ltd., formerly known as Steels Industrial Products Ltd.

Petitioner

Corrected Judgment: The text of the judgment was corrected at paragraph 28 where changes were made on December 3, 2012.

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioner:	D.E. Gruber
Counsel for the Monitor, McMillan LLP:	P.J. Reardon
Counsel for S.I.P. Holdings Ltd. and Fama Holdings Ltd.:	D. Hyndman
Counsel for Henry Company Canada Inc. and Stone Industries Inc.:	J. McLean, Q.C.
Place and Date of Hearing:	Vancouver, B.C. September 19, 2012
Place and Date of Judgment:	Vancouver, B.C. October 11, 2012

CRO, he is an independent officer of the court and, in particular, independent of the related parties. The suggestion is made that his review of the claims is entitled to substantial deference and that funding for any further review should be refused. I would note again, however, that even as late as August 23, 2012, Mr. Wood indicated that he was still in the process of reviewing information regarding these claims.

[30] For all that Mr. Wood appears to have some knowledge of these claims, it is of some significance to me that he has provided no assistance, as an officer of this Court, to the Court in terms of the level of his knowledge with respect to all aspects of these claims. Nor has he disclosed any further work that he has done in reviewing these claims subsequent to receiving the Proofs of Claim and the objections of the Disputing Creditors.

[31] Furthermore, I consider that the Proofs of Claim, with the limited information disclosed and limited documentation attached, leave much to be desired in terms of fully understanding these claims.

[32] There is absolutely no backup with respect to the amounts claimed by S.I.P. Holdings as of July 1, 2005. There appear to be complex transactions after that date involving sales of real estate and tenancy arrangements. No doubt, there is a wealth of documentation which supports those transactions and presumably, the amounts or debts said to arise from those transactions and reductions or payments made.

[33] With respect to the Fama Holdings claim, I appreciate that this amount is referenced in the audited 2010 financial statements. But later reductions are said to arise from real estate sales by S.I.P. Holdings and no details relating to those transactions are provided.

[34] Support for both Proofs of Claim is sparse in terms of particulars provided; there appear to be only vague references to figures that are “reflected in the financial statements of Steels” or “known to Steels”. Such general statements do little to

provide the necessary backup so that other creditors may fully understand these claims and determine whether they are valid.

[35] To a large extent, the submissions made by Steels/the CRO, S.I.P. Holdings and Fama Holdings amount to them saying "trust the auditors" and "trust me". Despite this, the Disputing Creditors continue to harbour concerns and I think justifiably so.

[36] We are therefore at the stage where, despite some efforts, the parties have failed to advance a better understanding of these related party claims through the provision of further information and documentation. The Disputing Creditors' position is, in any event, that a forensic accountant, such as Mr. Cheevers, will be required to fully review the matter.

[37] Under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), the claims process is undertaken by a trustee in bankruptcy. Pursuant to s. 135, a trustee is required to examine every proof of claim and may require further evidence in support of a claim prior to determining, valuing or disallowing a claim. The cost of that review is borne by the estate as a whole since it is intended to benefit the body of creditors.

[38] Similar issues often arise in *CCAA* proceedings where counsel and the Court must be mindful of issues that may arise in relation to the determination of claims in that proceeding. There are no set rules, but care must be taken in the drafting of the claims process order to ensure that the process by which claims are determined is fair and reasonable to all stakeholders, including those who will be directly affected by the acceptance of other claims. In *Winalta Inc. (Re)*, 2011 ABQB 399, Madam Justice Topolniski stated that "[p]ublic confidence in the insolvency system is dependent on it being fair, just and accessible".

[39] Many *CCAA* proceedings provide for an independently run claims process (for example, by the monitor), the cost of which again would be borne by the general body of creditors: see for example, *Pine Valley Mining Corp. (Re)*, 2008 BCSC 356.

To this extent, the statutory procedure under the *BIA* and the claims process under the *CCAA* will have similar features, which is understandable since the overriding intention under both is to conduct a proper claims process: see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 24 and 47.

[40] Indeed, this was the underlying basis upon which the Claims Process Order was granted, particularly as it related to a review of the third party claims. That Order clearly contemplated that other creditors would have the ability to challenge these third party claims, even in the face of the claims process as originally crafted. Again, as stated above, the process set out in the Order was not followed in that there was no independent involvement or assistance by the Monitor or E&Y, as was initially intended. Nor did Steels provide any of the Disputing Creditors with "other material documents in its possession" as contemplated by paragraph 25 of that Order.

[41] In this case, no report from the Monitor has been prepared in any case. As for Mr. Wood in his capacity as CRO, I do not accede to the arguments that this Court should grant any particular deference to his review or conclusions, particularly in the face of the evidentiary deficiencies with respect to the Proof of Claims and his failure to further assist the Court in addressing such deficiencies. Fama Holdings and S.I.P. Holdings have the burden of proving their claims, and this requires more than providing general statements and unclear financial statements.

[42] In all of these circumstances, I have no hesitation in concluding that an independent review of these related parties claims is appropriate and should be undertaken. In addition to understanding how these particular transactions arose and the financial consequences arising from those transactions, an independent review would also focus on the proper characterization of the amounts said to be owed. It is possible, as suggested by counsel for the Disputing Creditors, that some or all of these amounts may have been equity investments in Steels, as opposed to debt. In that event, such equity claims would only be satisfied after all unsecured claims were paid. A similar issue was raised by the disputing creditors in *Pine Valley Mining*.

[43] Counsel for Steels/the CRO and also counsel for S.I.P. Holdings and Fama Holdings contend that the application is premature. Counsel for Steels/the CRO states that Mr. Wood will cooperate in speaking to counsel for the Disputing Creditors in providing documents as requested. No similar offer has been made by S.I.P. Holdings and Fama Holdings. Further, it is suggested that paragraph 27 of the Claims Process Order contemplates a preliminary hearing to discuss the claims and that the issues, including the provision of any further information and documentation, can be addressed at that time.

[44] I would not accede to these arguments that the application is premature. The related party claims have been presented and it does not appear that there is cooperation between the parties, at least to this point in time, with respect to providing the necessary information and backup documentation. In addition, even once such information and documentation is provided to counsel for the Disputing Creditors, it is evident to me that a forensic accounting of these claims will be required in the circumstances. I see no need to engage the court process in addressing these claims until that full review has taken place and positions are crystallized. It may be, for example, that upon that full review, the Disputing Creditors are satisfied that there are no issues to be addressed and that these are valid claims.

[45] I would also note that there is some urgency in dealing with these third party claims. I understand that matters relating to the assets sale are moving to a conclusion which will dictate the actual amount of funds to be distributed. It is intended that a plan will be submitted later this year which will provide for distributions to unsecured creditors. A failure to resolve issues relating to these claims, or resolve them in a timely manner, will result in delayed payment to all unsecured creditors. This is to be avoided if at all possible.

[46] In conclusion, an independent review of these claims is necessary in the circumstances. An adequate review of these related party claims has not been made. The consequences of a successful challenge to some or all of these claims

TAB TEN

CITATION: Re TOYS "R" US (CANADA) LTD., 2018 ONSC 609
COURT FILE NO.: CV-17-00582960-00CL
DATE: 20180125

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TOYS "R" US (CANADA) LTD. TOYS "R" US (CANADA) LTEE

BEFORE: F.L. Myers J.

COUNSEL: *Brian F. Empey and Bradley Wiffen,* counsel for the applicant
Jane Dietrich, counsel for Grant Thornton Limited, the Monitor
Linc Rogers, counsel for JPMorgan Chase Bank, NA, DIP Agent
Jesse Mighton, counsel for Crayola Canada
Linda Galessiere, counsel for various landlords
Timothy R. Dunn, counsel for CentreCorp Management Services Limited
Adam Slavens and Jonathan Silver, counsel for LEGO
Sean Zweig, counsel for the Unsecured Creditors Committee of Toys "R" Us Inc. and other debtors in Chapter 11 proceedings before the United States Bankruptcy Court for the Eastern District of Virginia

HEARD: January 25, 2018

ENDORSEMENT

[1] Toys "R" Us (Canada) Ltd. Toys "R" Us (Canada) Ltee asks the court to extend the time that it remains under protection of the *CCAA* while it attempts to restructure. It also asks the court to approve a draft claims procedure by which the outstanding claims of its creditors can be recognized and quantified.

[2] No significant stakeholder opposed the relief sought and I have granted it accordingly.

[3] I am satisfied that the applicant is acting in good faith and with due diligence in pursuit of its restructuring process to date. These are the findings required for it to be entitled to an extension of time under the statute. The applicant's financial results through the holidays exceeded conservative forecasts. It reports that it has sufficient liquidity to operate in the normal course throughout the proposed extended period without drawing upon its extraordinary financing. The extension of time will allow the applicant to advance a going concern

restructuring process here and in coordination with its affiliates in the US. The Monitor supports the request. Accordingly the request for an extension of the proceedings is granted.

[4] The outcome of a successful restructuring process usually involves the applicant proposing a plan of compromise or arrangement to its creditors. The creditors have the opportunity to vote on whether they agree to the terms of the plan proposed. To approve a plan, the *CCAA* requires a vote of more than 50% of the creditors in number who hold collectively more than two-thirds of the claims measured by dollar value.

[5] In many cases, instead of a plan, the applicant proposes a value-maximizing liquidating transaction. After a liquidation, there will likely be distributions to creditors of the proceeds of liquidation in cash or other property *pari passu* by rank.

[6] In either case, whether a plan or a liquidating transaction is proposed, it is necessary to determine the precise number of creditors and the precise amount of their respective claims, so that the creditors can vote and/or receive distributions accordingly.

[7] In a bankruptcy governed by the provisions of the *Bankruptcy and Insolvency Act*, RSC 1985, c.B-3, creditors are required to prove their claims individually by delivering to the trustee in bankruptcy sworn proof of claim forms that are accompanied by supporting invoices and other relevant documentation. The *CCAA*, by contrast, does not set out a specific procedure for creditor claims to be proven and counted.

[8] Claims procedure orders are routinely granted under the court's general powers under ss. 11 and 12 of the *CCAA*. Claims procedure orders are designed to create processes under which all of the creditors of an applicant and its directors and officers can submit their claims for recognition and valuation. Claims procedures usually involve establishing a method to communicate to potential creditors that there is a process by which they must prove their claims by a specific date. The procedure usually includes an opportunity for the debtor or its representative to review and, if appropriate, contest claims made by creditors. If claims are not agreed upon and cannot be settled by negotiation, then the claims procedure orders may go on to establish an adjudication mechanism in court or, typically in Ontario, by arbitration that is then subject to an appeal to the court. Claims procedure orders will usually also establish a "claims bar date" by which claims must be submitted by creditors. Late claims may not be allowed as it can be necessary to establish a cut off to give accurate numbers for voting and distribution purposes.

[9] The claims processes in bankruptcy do not necessarily fit well in a *CCAA* proceeding. It is very unusual for a large corporation to go bankrupt and require proof of claims to be delivered by every single creditor under the *BIA* statutory claims process. Creditors of large companies can number in the thousands. It can be very time consuming and therefore very expensive for each of thousands of creditors to submit proof of claims and for the debtor or the Monitor to review, track, and deal with each claim individually. Managing claims processes for a large business can therefore be a very substantial undertaking that is often occurring behind the scenes throughout *CCAA* processes.

[10] Yet, experience shows that the vast majority of claims are usually dealt with consensually. At any given time, most large businesses have readily ascertainable payables outstanding that are carefully tracked electronically by the applicant's financial managers. Requiring each creditor to prove the state of its outstanding claims by submitting invoices then is often just a make work project that provides no real incremental value beyond the information available by just looking at a listing of outstanding trade payables on the debtor's financial systems.

[11] Toys "R" Us has submitted a draft form of claims procedure that addresses the unnecessary cost of requiring its thousands of trade creditors to prove their claims individually. It proposes to list creditor claims from the company's books and records and to provide each known creditor with a simple claim statement that sets out the amount of its claim that is already recognized by the company. If a creditor agrees with the amount that the company says it owes, the creditor need do nothing and the scheduled or listed claim will become the final proven claim at the claims bar date.

[12] The draft claims procedure allows creditors who disagree with the amounts set out in their claims statements to file notices of dispute with the Monitor by the claims bar date to engage an individualized review process.

[13] This negative option scheduled claim process will eliminate the need for filing proofs of claim and supporting evidence in the vast majority of cases. It also ensures that known claims are not lost in procedural uncertainty which always causes a certain percentage of creditors to fail to file their claims on a timely basis.

[14] This is certainly not the first case to use a negative option scheduled claims process like the one proposed here. Creative scheduled claims procedures, like this one, that streamline claims processes, make it easier for all known creditor claims to be recognized and counted, and save significant time and money, are encouraged. Each case must be responsive to its own facts and circumstances. What works in one case may be wholly inapt in another. But in all cases it is appropriate to make efforts to increase efficiency, affordability, and certainty as was done here. The overriding concern of the court is to ensure that any claims procedure process is both fair and reasonable. The negative option scheduled claim process proposed in this case meets both touchstones.

[15] Finally, the proposed minor amendment to the cross-border protocol has already been adopted by the US court. The change proposed is not opposed and it is reasonable to keep the terms of both orders consistent.

[16] Order signed accordingly.

F.L. Myers J.

Date: January 25, 2017

TAB ELEVEN

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

L.R.C. (1985), ch. B-3

Current to January 19, 2026

Last amended on December 12, 2024

À jour au 19 janvier 2026

Dernière modification le 12 décembre 2024

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such modifications as the circumstances require, to consumer proposals.

Where consumer debtor is bankrupt

(2) Where a consumer proposal is made by a consumer debtor who is a bankrupt,

(a) the consumer proposal must be approved by the inspectors, if any, before any further action is taken thereon;

(b) the consumer debtor must have obtained the assistance of a trustee who shall act as administrator of the proposal in the preparation and execution thereof;

(c) the time with respect to which the claims of creditors shall be determined is the time at which the consumer debtor became bankrupt; and

(d) the approval or deemed approval by the court of the consumer proposal operates to annul the bankruptcy and to revest in the consumer debtor, or in such other person as the court may approve, all the right, title and interest of the trustee in the property of the consumer debtor, unless the terms of the consumer proposal otherwise provide.

1992, c. 27, s. 32; 1997, c. 12, s. 58.

adaptations de circonstance, aux propositions de consommateur.

Application de la présente loi

(2) Dans le cas d'une proposition de consommateur faite par un failli :

a) la proposition doit être approuvée par les inspecteurs, le cas échéant, avant que toute autre mesure ne soit prise à son égard;

b) le débiteur consommateur doit avoir obtenu les services d'un syndic pour agir comme administrateur dans le cadre de la préparation et de l'exécution de la proposition;

c) le moment par rapport auquel les réclamations des créanciers sont déterminées est celui où le débiteur consommateur est devenu un failli;

d) l'approbation — effective ou présumée — de la proposition par le tribunal a pour effet d'annuler la faillite et de réattribuer au débiteur consommateur, ou à toute autre personne que le tribunal peut approuver, le droit, le titre et l'intérêt complets du syndic aux biens du débiteur, à moins que les conditions de la proposition ne soient à l'effet contraire.

1992, ch. 27, art. 32; 1997, ch. 12, art. 58.

PART IV

Property of the Bankrupt

Property of bankrupt

67 (1) The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person;

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;

(b.1) goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);

(b.2) prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or

PARTIE IV

Biens du failli

Biens du failli

67 (1) Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

a) les biens détenus par le failli en fiducie pour toute autre personne;

b) les biens qui, selon le droit applicable dans la province dans laquelle ils sont situés et où réside le failli, ne peuvent faire l'objet d'une mesure d'exécution ou de saisie contre celui-ci;

b.1) dans les circonstances prescrites, les paiements qui sont faits au failli au titre de crédits de taxe sur les produits et services et qui ne sont pas des biens visés aux alinéas a) ou b);

b.2) dans les circonstances prescrites, les paiements prescrits qui sont faits au failli relativement aux besoins essentiels de personnes physiques et qui ne sont pas des biens visés aux alinéas a) ou b);

(b.3) without restricting the generality of paragraph (b), property in a *registered retirement savings plan*, a *registered retirement income fund* or a *registered disability savings plan*, as those expressions are defined in the *Income Tax Act*, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that

(i) is not subject to the operation of this Act, or

(ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the *Family Orders and Agreements Enforcement Assistance Act*, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

b.3) sans restreindre la portée générale de l'alinéa b), les biens détenus dans un *régime enregistré d'épargne-retraite*, un *fonds enregistré de revenu de retraite* ou un *régime enregistré d'épargne-invalidité*, au sens de la *Loi de l'impôt sur le revenu*, ou dans tout régime prescrit, à l'exception des cotisations aux régimes ou au fonds effectuées au cours des douze mois précédant la date de la faillite,

mais ils comprennent :

c) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération, y compris les remboursements qui lui sont dus au titre de la *Loi de l'impôt sur le revenu* relativement à l'année civile — ou à l'exercice lorsque celui-ci diffère de l'année civile — au cours de laquelle il a fait faillite, mais à l'exclusion de la partie de ces remboursements qui :

(i) soit sont des sommes soustraites à l'application de la présente loi,

(ii) soit sont des sommes qui lui sont dues et qui sont saisissables en vertu d'un bref de saisie-arrêt signifié à Sa Majesté en application de la *Loi d'aide à l'exécution des ordonnances et des ententes familiales* dans lequel il est nommé comme débiteur;

d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

Deemed trusts

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

Fiducies présumées

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)a), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

Exceptions

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

Exceptions

(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a ***province providing a comprehensive pension plan*** as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a ***provincial pension plan*** as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

R.S., 1985, c. B-3, s. 67; 1992, c. 27, s. 33; 1996, c. 23, s. 168; 1997, c. 12, s. 59; 1998, c. 19, s. 250; 2005, c. 47, s. 57; 2007, c. 36, s. 32; 2019, c. 29, s. 134.

d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est ***une province instituant un régime général de pensions*** au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un ***régime provincial de pensions*** au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

L.R. (1985), ch. B-3, art. 67; 1992, ch. 27, art. 33; 1996, ch. 23, art. 168; 1997, ch. 12, art. 59; 1998, ch. 19, art. 250; 2005, ch. 47, art. 57; 2007, ch. 36, art. 32; 2019, ch. 29, art. 134.

Directives re surplus income

68 (1) The Superintendent shall, by directive, establish in respect of the provinces or one or more bankruptcy districts or parts of bankruptcy districts, the standards for determining the surplus income of an individual bankrupt and the amount that a bankrupt who has surplus income is required to pay to the estate of the bankrupt.

Instructions du surintendant — revenu excédentaire

68 (1) Le surintendant fixe, par instruction, pour les provinces ou pour un ou plusieurs districts ou parties de district, des normes visant l'établissement du revenu excédentaire du failli qui est une personne physique et de la somme que celui-ci doit verser à l'actif de la faillite.

Definitions

(2) The following definitions apply in this section.

surplus income means the portion of a bankrupt individual's total income that exceeds that which is necessary to enable the bankrupt individual to maintain a reasonable standard of living, having regard to the applicable standards established under subsection (1). (*revenu excédentaire*)

total income

(a) includes, despite paragraphs 67(1)(b) and (b.3), a bankrupt's revenues of whatever nature or from whatever source that are earned or received by the bankrupt between the date of the bankruptcy and the date of the bankrupt's discharge, including those received as damages for wrongful dismissal, received as

Définitions

(2) Les définitions qui suivent s'appliquent au présent article.

revenu excédentaire Le montant du revenu total d'une personne physique en faillite qui excède ce qui est nécessaire au maintien d'un niveau de vie raisonnable, compte tenu des normes applicables mentionnées au paragraphe (1). (*surplus income*)

revenu total Malgré les alinéas 67(1)b) et b.3), revenus de toute nature ou source gagnés ou reçus par le failli entre la date de sa faillite et celle de sa libération, y compris les sommes reçues entre ces dates à titre de dommages-intérêts pour congédiement abusif ou de règlement en matière de parité salariale, ou en vertu d'une loi fédérale ou provinciale relative aux accidents du travail. Ne sont pas visées par la présente définition les sommes

TAB TWELVE

Federal Court Cour fédérale

Date: 20150817

Docket: T-1940-13

Citation: 2015 FC 977

Ottawa, Ontario, August 17, 2015

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Plaintiff

and

CALLIDUS CAPITAL CORPORATION

Defendant

ORDER AND REASONS

[1] The Defendant in the underlying action, Callidus Capital Corporation ("Callidus"), has brought a motion for this Court to determine a question of law, pursuant to Rule 220 of the *Federal Courts Rules*, SOR/98-106.

[19] Finally, the Crown attacks the cases relied on by Callidus and argue that they do not involve a "pre-existing personal and independent liability" of secured creditors. The Crown argues that the legislative intent of the 1992 BIA reforms was not to diminish the Crown ability to recover from secured creditors before bankruptcy, but to bolster recovery for unsecured creditors in a bankruptcy context.

III. Analysis

[20] In my view, the question of law should be answered in the affirmative. A plain reading of the legislation and an examination of the relevant jurisprudence establish that upon the bankruptcy of Cheese Factory, the deemed trust under section 222(1) of the ETA was rendered ineffective against Callidus for collected but unremitted GST and HST.

[21] The issues in this case are similar to those considered by the Supreme Court in *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 ("Century"). I employ the same reasoning used by the Supreme Court of Canada in that case to the question of law at issue here, keeping in mind that in this case we are **not** dealing with source deductions and there was never a Requirement To Pay or garnishment served.

[22] Section 222(1) of the ETA explicitly provides that GST or HST collected is deemed held in trust for the Crown and it is not the property of the collector. The deemed trust mechanism applies also to third parties and for all purposes.

[23] Section 222(3) of the ETA is an extension of the deemed trust: if the collected GST and or HST are not paid, the equivalent funds or property of the tax debtor are deemed to be property of the Crown, despite any security interest. The extension of the trust gives the Receiver General greatest priority over all other claims and security interests. This absolute priority of claims contrasts sharply with the ordinary creditor status of the Crown in bankruptcy as seen in section 222(1.1).

[24] Section 222(1.1) of the ETA, provides that the deemed trust is extinguished upon bankruptcy of the tax debtor. Sections 67(2) and 67(3) of the BIA work in conjunction with the provision by reinforcing with strong language that the deemed trust does not exist following bankruptcy unless the amounts deducted are considered source deductions, i.e. income tax, Canada Pension Plan deductions or Employment Insurance deductions.

[25] In *Century*, the Supreme Court of Canada outlined the legislative history that led to the enactment of section 222(1.1) in 1992 ("the 1992 amendments"). The Court wrote that prior to these amendments, Crown claims had priority; however, legislative reform proposals at the time recommended that Crown claims should not receive preferential treatment.

[26] Madam Justice Deschamps writing for the majority in *Century* discussed priorities when dealing with the BIA and *Companies Creditors Arrangement Act*, RSC, c C-36 ("CCAA") in the context of deemed trusts. She covered the history of the priority scheme in insolvency and the policy backdrop for the development of the law. The Court noted that Parliament appeared to

move away from asserting priority for Crown claims in insolvency law and more specifically, found that:

> [45] …Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.
>
> Emphasis added

[27] However, Justice Deschamps also recognized a potential inconsistency in the Crown's position in relation to the CCAA:

> [47] Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.
>
> [49] Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. ….. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan

Statement of Facts did not disclose that a notice of garnishment or RTP was issued to Callidus. In this case, the Agreed Statement of Facts describes that a notice by letter was provided, not an official RTP notice.

[39] The Crown argues that the same logic applies to this case, however, it is very different. In *TD Bank*, the RTP was issued, and the moneys became immediately subject to the RTP, which endured when bankruptcy was sought in that case. Had Callidus received such a notice, it would have created the obligation for Callidus to pay the unremitted GST despite seeking bankruptcy. The Crown's contention that collection tools should be harmonious and that independent liability continues notwithstanding subsequent bankruptcy would make the BIA and CCAA at odds with each other, which is what the Supreme Court majority decision attempted to prevent in *Century*.

[40] Most importantly, the Crown does not reconcile how the proposed scenario, where a "pre-existing, fully engaged cause of action" against Callidus reconciles with section 222(1.1). The Crown argues that whether the deemed trust operates or not----does not impact that this separate cause of action has crystalized, but does not reconcile section 222(1.1) with its position that a separate cause of action exists. The Crown is attempting to re-characterize the question of law to be answered. The question was not whether Callidus was independently liable, but whether the trust continues to operate notwithstanding bankruptcy.

[41] The personal liability of a secured creditor is not distinguished or identified as an exception in either section 222(1.1) or 222(3) of the ETA or section 67(3) and 67(3) of the BIA which would justify the Crown's argument. Furthermore, the authority the Crown submits refers

to an explicit "crystallization" moment when the person becomes liable for the tax despite subsequent bankruptcy. This defeats the Crown's argument that other collection tools available under the ETA, specifically section 317 and 325(1), do not expire on bankruptcy of the tax debtor.

[42] Callidus persuasively argued their interpretation of the purpose of the 1992 amendments; introducing section 222(1.1) was to oust the Crown priority over all other interests in bankruptcy. I disagree with the Crown's characterization that the legislative intent behind the 1992 amendments reforms was to elevate the claims of unsecured creditors rather than to diminish Crown priority. It is clear from my reading of *Caisse* and *Century* that the amendments were intended to reduce the priority of the Crown. I find that the bankruptcy of Cheese Factory engaged section 222(1.1) of the ETA such that the deemed trust under section 222(1) and 222(3) are ineffective.

IV. Costs

[43] The parties were asked at the end of the hearing if they could reach an agreement as to the amount of costs that should be awarded to the successful party. The Court thanks the parties for providing an agreed figure in the amount of $2,600.00 inclusive of HST and disbursements.

[44] I am awarding costs payable forthwith in the amount of $2,600.00 to Callidus Capital Corporation by the Receiver General for Canada on behalf of the Plaintiff, Her Majesty the Queen.

ORDER

THIS COURT ORDERS that:

1. The Question of Law presented by agreement of the parties is answered in the affirmative;

2. Costs payable forthwith in the amount of $2,600.00 to Callidus Capital Corporation by the Receiver General for Canada on behalf of the Plaintiff, Her Majesty the Queen.

"Glennys L. McVeigh"
Judge

TAB THIRTEEN

Callidus Capital Corporation *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Insolvency Institute of Canada, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers' Association
Interveners

Indexed as: Callidus Capital Corp. *v.* Canada

2018 SCC 47

File No.: 37768.

2018: November 8.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Taxation — Goods and services tax — Collection and remittance — Trust for amounts collected — Effect of bankruptcy — Statute creating deemed trust on property of tax debtor in favour of Crown for payment of all amounts of tax collected by tax debtor but not remitted to Crown — Statute also providing that after tax debtor becomes bankrupt, deemed trust does not apply to amounts that were collected or became collectible by tax debtor prior to bankruptcy — Tax debtor failing to remit collected harmonized sales tax and goods and services tax — Crown seeking payment of unremitted tax from tax debtor's secured creditor on basis of statutory deemed trust mechanism — Tax debtor making assignment in bankruptcy — Crown commencing action against creditor for recovery of unremitted tax — Creditor bringing motion on consent for determination of question of law — Federal Court holding that bankruptcy of tax debtor and application of statute render deemed trust ineffective as against secured creditor who received, prior to the bankruptcy, proceeds from the assets of the tax debtor that were deemed to be held in trust for the Crown — Majority of Court of Appeal setting aside

Callidus Capital Corporation *Appelante*

c.

Sa Majesté la Reine *Intimée*

et

Institut d'insolvabilité du Canada, Association canadienne des professionnels de l'insolvabilité et de la réorganisation et Association des banquiers canadiens
Intervenants

Répertorié : Callidus Capital Corp. *c.* Canada

2018 CSC 47

N° du greffe : 37768.

2018 : 8 novembre.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe et Martin.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit fiscal — Taxe sur les produits et services — Perception et remise — Montants perçus détenus en fiducie — Effet de la faillite — Fiducie présumée créée par la loi en faveur de la Couronne à l'égard des biens d'un débiteur fiscal en vue du paiement de tous les montants perçus au titre de la taxe par le débiteur fiscal mais non remis à la Couronne — Autre disposition de la loi précisant qu'à compter du moment de la faillite d'un débiteur fiscal la fiducie présumée ne s'applique plus aux montants perçus ou devenus percevables par ce dernier avant la faillite au titre de la taxe — Absence de remise par le débiteur fiscal de la taxe de vente harmonisée et de la taxe sur les produits et services — Demande de paiement des taxes non remises présentée à un créancier garanti du débiteur fiscal sur la base du mécanisme de la fiducie présumée établi par la loi — Cession en faillite par le débiteur fiscal — Introduction par la Couronne contre le créancier d'une action en recouvrement des taxes non remises — Dépôt par consentement d'une requête du créancier en vue de faire trancher un point de droit — Décision de la Cour fédérale portant que la faillite du débiteur fiscal et l'application de la loi ont

determination — Federal Court order reinstated — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222.

Statutes and Regulations Cited

Excise Tax Act, R.S.C. 1985, c. E-15, s. 222.

APPEAL from a judgment of the Federal Court of Appeal (Pelletier, Near and Rennie JJ.A.), 2017 FCA 162, 414 D.L.R. (4th) 132, 51 C.B.R. (6th) 15, 37 E.T.R. (4th) 177, [2017] G.S.T.C. 60, 8 P.P.S.A.C. (4th) 1, [2017] F.C.J. No. 767 (QL), 2017 CarswellNat 3599 (WL Can.), setting aside a decision of McVeigh J., 2015 FC 977, 28 C.B.R. (6th) 209, 13 E.T.R. (4th) 43, [2015] G.S.T.C. 105, 5 P.P.S.A.C. (4th) 29, [2015] F.C.J. No. 1111 (QL), 2015 CarswellNat 4410 (WL Can.). Appeal allowed.

Harvey G. Chaiton and *Sam Rappos*, for the appellant.

Michael Taylor and *Louis L'Heureux*, for the respondent.

Grant B. Moffat and *D. J. Miller*, for the intervener the Insolvency Institute of Canada.

Éric Vallières and *Michael J. Hanlon*, for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

Philippe H. Bélanger, *Jocelyn Perreault* and *Pascale Klees-Themens*, for the intervener the Canadian Bankers' Association.

The judgment of the Court was delivered orally by

[1] GASCON J. — We would allow the appeal for the reasons of the dissenting judge in the Federal Court of Appeal, and reinstate the order of Justice McVeigh of the Federal Court that answered in the affirmative the question of law submitted by the parties, with costs throughout in favour of Callidus Capital Corporation.

pour effet de rendre la fiducie présumée inopposable à un créancier garanti qui a reçu, avant la faillite, le produit de biens du débiteur fiscal réputés détenus en fiducie pour la Couronne — Décision infirmée à la majorité par la Cour d'appel — Ordonnance de la Cour fédérale rétablie — Loi sur la taxe d'accise, L.R.C. 1985, c. E-15, art. 222.

Lois et règlements cités

Loi sur la taxe d'accise, L.R.C. 1985, c. E-15, art. 222.

POURVOI contre un arrêt de la Cour d'appel fédérale (les juges Pelletier, Near et Rennie), 2017 CAF 162, 414 D.L.R. (4th) 132, 51 C.B.R. (6th) 15, 37 E.T.R. (4th) 177, [2017] G.S.T.C. 60, 8 P.P.S.A.C. (4th) 1, [2017] A.C.F. nº 767 (QL), 2017 CarswellNat 9496 (WL Can.), qui a infirmé une décision de la juge McVeigh, 2015 CF 977, 28 C.B.R. (6th) 209, 13 E.T.R. (4th) 43, [2015] G.S.T.C. 105, 5 P.P.S.A.C. (4th) 29, [2015] A.C.F. nº 1111 (QL), 2015 CarswellNat 8223 (WL Can.). Pourvoi accueilli.

Harvey G. Chaiton et *Sam Rappos*, pour l'appelante.

Michael Taylor et *Louis L'Heureux*, pour l'intimée.

Grant B. Moffat et *D. J. Miller*, pour l'intervenant l'Institut d'insolvabilité du Canada.

Éric Vallières et *Michael J. Hanlon*, pour l'intervenante l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation.

Philippe H. Bélanger, *Jocelyn Perreault* et *Pascale Klees-Themens*, pour l'intervenante l'Association des banquiers canadiens.

Version française du jugement de la Cour rendu oralement par

[1] LE JUGE GASCON — Nous sommes d'avis d'accueillir le pourvoi pour les motifs du juge dissident de la Cour d'appel fédérale, et de rétablir l'ordonnance de la juge McVeigh de la Cour fédérale qui a répondu par l'affirmative à la question de droit soumise par les parties, et ce, avec dépens devant toutes les cours en faveur de Callidus Capital Corporation.

[2] The question of law at issue was formulated as follows and assumed the existence of a pre-bankruptcy liability under s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"):

Does the bankruptcy of a tax debtor and subs. 222(1.1) of the [*ETA*] render the deemed trust under s. 222 of the *ETA* ineffective as against a secured creditor who received, prior to the bankruptcy, proceeds from the assets of the tax debtor that were deemed to be held in trust for the Plaintiff?

[3] As a result, as it is not necessary to do so to resolve this appeal, this Court is not commenting, one way or the other, on the scope of the deemed trust or any liability under s. 222 of the *ETA* prior to bankruptcy.

Judgment accordingly.

Solicitors for the appellant: Chaitons, Toronto.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

Solicitors for the intervener the Insolvency Institute of Canada: Thornton Grout Finnigan, Toronto.

Solicitors for the intervener the Canadian Association of Insolvency and Restructuring Professionals: McMillan, Montréal.

Solicitors for the intervener the Canadian Bankers' Association: McCarthy Tétrault, Montréal.

[2] La question de droit en litige a été formulée ainsi et présumait l'existence, avant la faillite, d'une responsabilité découlant de l'art. 222 de la *Loi sur la taxe d'accise*, L.R.C. 1985, c. E-15 (« *LTA* ») :

La faillite d'un débiteur fiscal, selon ce que prévoit le par. 222(1.1) de la [*LTA*], a-t-elle pour effet de rendre la fiducie présumée dont parle l'art. 222 de la [*LTA*] inopposable à un créancier garanti qui a reçu, avant la faillite, le produit des biens de ce débiteur fiscal qui était réputé détenu en fiducie pour la demanderesse?

[3] Par conséquent, comme il n'est pas nécessaire, pour trancher le présent pourvoi, de se prononcer sur la portée de la fiducie présumée ou de toute responsabilité découlant de l'art. 222 de la *LTA* avant la faillite, la Cour s'abstient de formuler quelque commentaire à cet égard.

Jugement en conséquence.

Procureurs de l'appelante : Chaitons, Toronto.

Procureur de l'intimée : Procureur général du Canada, Vancouver.

Procureurs de l'intervenant l'Institut d'insolvabilité du Canada : Thornton Grout Finnigan, Toronto.

Procureurs de l'intervenante l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation : McMillan, Montréal.

Procureurs de l'intervenante l'Association des banquiers canadiens : McCarthy Tétrault, Montréal.

TAB FOURTEEN

CITATION: Grant Forest Products Inc. (Re), 2013 ONSC 5933
FILE NO.: CV-09-8247-00CL
DATE: 20130920

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

BETWEEN

IN THE MATTER OF A PLAN OF COMPROMISE OF ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP, Applicants

- and -

GE CANADA LEASING SERVICES COMPANY, et al, Defendants

BEFORE: C. CAMPBELL J.

COUNSEL: Craig J. Hill, Roger Jaipargas for West Face Capital

Alex Cobb, for PWC, Pension Administrator

Mark Bailey, for Superintendent of Financial Services

Richard Swan, Jonathan Bell, for Peter Grant Sr.

David Byers, Daniel Murdoch, for Ernst & Young

Jane Dietrich, for the remaining applicants

HEARD: July 23, 2013

REASONS FOR DECISION

[1] This decision deals with issues in respect of two defined benefit pension plans of Grant Forest Products Inc. (GFPI) both now in the process of being wound up.

[50] The Appellants' first argument would expand the holding of *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60 (CanLII), 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:

> 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 (CanLII), 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*.

[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 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 CanLII 29 (SCC), [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.

[61] In the context of evaluating the important policy considerations of maintaining a stay of proceedings under a liquidating *CCAA,* it is important for the Court to consider the appropriate time for the *CCAA* proceeding to either come to an end or to lift the stay of proceedings to provide for an orderly transition from the *CCAA* process to the *BIA*. These proceedings are a good example. Initially, GE Canada initiated bankruptcy proceedings against GFPI. The response of GFPI was to seek protection under the *CCAA* and carry out an orderly liquidation of its assets. The Court permitted the orderly liquidation of the assets in the context of the *CCAA* to maximize recovery in the assets.

[62] Now, the usefulness of the *CCAA* proceedings has come to an end. Is it appropriate for the Court to allow the Second Lien Lenders to institute bankruptcy proceedings and to forthwith issue a Bankruptcy Order in respect of GFPI? The Second Lien Lenders urge that the regime that will be in place as a result of the Bankruptcy Order will be that contemplated by Parliament in the context of a liquidation and distribution of a bankrupt's assets. The process carried out for the transition from the *CCAA* proceedings to the *BIA* will it is suggested be as intended by Parliament and consistent with the principles established by the Supreme Court of Canada in the *Re Century Services* case.

[63] It is clear that there are insufficient proceeds to pay the claims of all of the creditors of GFPI. Reversing priorities can be a legitimate purpose for the institution of bankruptcy proceedings. Lifting the stay provided for in the Initial Order at this time, the Second Lien Lenders submit is the logical extension of that legitimate purpose. Accordingly, it is said appropriate in the circumstances of this case that the stay be lifted and that a Bankruptcy Order be issued by the Court in respect of GFPI forthwith.

[64] I accept that to impose the same priorities under the *CCAA* as the *BIA* without careful consideration might well undermine the flexibility of the *CCAA*. For example the *CCAA* Court itself may make an order on application on notice declaring a person to be a critical supplier (s.11.4) with the charge in favour of that supplier. This is but one example of the flexibility of the *CCAA* that may not be available under the *BIA* once approved by the Court. The same is the case for DIP financing as was the case in *Indalex*.

(65) Where there is a *CCAA* Plan approved by creditors the effect of the contract created may alter what would otherwise be priorities under the *BIA*.

[66] Where there is a liquidating *CCAA* which proceeds by way of an Initial Order and the subsequent sale of assets with Vesting Orders all the creditors have an opportunity to object to the

sales or process which is in effect an implicit *CCAA* Plan. A vote becomes necessary only when there is lack of consensus and a priority dispute requires resolution by a vote. In this case the claim of the secured creditors exceeded and continues to exceed, the value of the assets.

[67] There may be good and solid reasons acceptable to creditors and stakeholders who agree to a process under the *CCAA* either in a formal Plan or during the course of a liquidation to alter the priorities that would come into play should there be an assignment or petition into bankruptcy.

[68] The position of the Pension Administrator, the Superintendent of Financial Services and those parties in support of their position, in this case is that in the circumstances the deemed trust which they say arises under the *PBA* should prevail over other creditor claims notwithstanding the *CCAA* Initial Order.

[69] The arguments in support of a deemed trust arising upon windup of the pension plans within the *CCAA* regime are summarized as follows:

i) GFPI should not be excused from any obligation with respect to the pension plans.

ii) The wind ups which triggered the deemed trusts were the subject of specific judicial authorization and even assuming the stay of proceedings under the Initial Order applies, leave of the Court has been given to windup which triggers the deemed trusts.

iii) The deemed trusts are triggered automatically upon wind up by independent operation of a valid provincial law which has not been overridden by specific order.

iv) The Second Lien Creditor should not be permitted to challenge the deemed trusts at this stage since they did not challenge the windup orders.[5]

[70] From my review of the decisions of the Supreme Court of Canada in *Century Services* and *Indalex* I am of the view that the task of a *CCAA* supervising judge when confronted with seeming conflict between Federal insolvency statute provisions and those of Provincial pension obligations is to make the provisions work without resort to the issue of federal paramountcy except where necessary.

[71] The decision of the Supreme Court of Canada in *Indalex* assists in the execution of this task. The deemed trust that arises upon wind up prevails when the windup occurs before insolvency as opposed to the position that arises when wind up arises after the granting of an Initial Order.

[5] submission was made in the factum of PWC that all funds held by the Monitor should be regarded as proceeds of accounts and inventory therefore resulting in priority being directed by the Personal Property Security Act (PPSA) s.30 (7) which would subordinate other security to the deemed trusts. This submission was not seriously pursued and in view of the conclusion I reached on other grounds it is not necessary to deal with the argument.

TAB FIFTEEN

COURT FILE NO.: 03-CL-5145
DATE: 20050718

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OR PLANS OF COMPROMISE OR ARRANGEMENT OF IVACO INC. AND THE APPLICANTS LISTED IN SCHEDULE "A"	*Andrew J. Hatnay*, Ontario Agent for the Quebec Pension Committee of Ivaco Inc. *Fred Myers* and *Susan Rowland*, for the Superintendent of Financial Services *Geoff R. Hall*, for QIT-Fer et Titane Inc. *Jeffrey S. Leon*, *Sheryl E. Seigel* and *Richard B. Swan*, for National Bank of Canada *Daniel V. MacDonald*, for the Bank of Nova Scotia *Robert W. Staley*, *Kevin J. Zych* and *Evangelia Kriaris*, for the Informal Committee of Noteholders *Stephanie Fraser*, for Pension Benefit Guaranty Company *Peter F.C. Howard* and *Ashley John Taylor*, for Ernst & Young Inc., the Court-Appointed Monitor **HEARD:** June 13-15, 2005

FARLEY J.

[1] As argued, the Superintendent of Financial Services (Ontario) moved as follows. Paragraphs 1 and 87 of the Superintendent's factum stated:

> 1. The Superintendent of Financial Services ("Superintendent") brings this motion for an Order directing the Monitor to distribute part of the proceeds of sale of the businesses of Ivaco Inc. ("Ivaco") and certain of its subsidiaries to four non-union pension plans in order to protect the

[10] The National Bank, the Bank of Nova Scotia, the Informal Committee of Noteholders, and a very major trade creditor, QIT - Fer et Titane Inc., wish to have the proceedings transformed into BIA proceedings. It would not appear to me that there has been any conduct alleged to have been taken by any of these BIA desirous parties which would be considered "inequitable" in the sense of *Bulut* v. *Brampton (City)* (2000), 48 O.R. (3d) 108 (C.A.); *Re Christian Brothers of Ireland* (2004), 69 O.R. (3d) 507 (S.C.J.). See also *Unisource Canada Inc. (cob Barber-Ellis Fine Papers)* v. *Hong Kong Bank of Canada* (1998), 43 B.L.R. (2d) 226 (Ont. Gen. Div.), affirmed (2000), 15 P.P.S.A.C. (2d) 95 (Ont. C.A.); *AEVO Co.* v. *D & A Macleod Co.* (1991), 4 O.R. (3d) 368 (Gen. Div.).

[11] While in a non-bankruptcy situation, the Ivaco Companies' assets are subject to a deemed trust on account of unpaid contributions and wind up liabilities in favour of the pension beneficiaries by s. 57(3) of the *Pension Benefits Act* (Ontario), in a bankruptcy situation, the priority of such a statutory deemed trust ceases unless there is in fact a "true trust" in which the three certainties of trust law are found to exist, namely (i) certainty of intent; (ii) certainty of subject matter; and (iii) certainty of object. For these three certainties to be met, the trust funds must be segregated from the debtor's general funds. See *British Columbia* v. *Henfrey Samson Belair Ltd.* (1989), 59 D.L.R. (4th) 726 (S.C.C.); *British Columbia* v. *National Bank* (1994), 119 D.L.R. (4th) 669 (B.C.C.A.); *Bassano Growers Ltd.* v. *Price Waterhouse Inc.* (1998), 6 C.B.R. (4th) 199 (Alta. C.A.); *Re IBL Industries Ltd.* (1991), 2 O.R. (3d) 140 (Gen. Div.); *Continental Casualty Co.* v. *Macleod-Stedman Inc.* (1996), 141 D.L.R. (4th), 36 (Man. C.A.). There is no evidence that any of the "required" funds have been segregated or earmarked for the pension beneficiaries; nor did the Superintendent make such a request as a condition of the Heico deal being closed. Since there has been no such segregation, the deemed statutory trusts would not be effective as trusts upon the happening of a bankruptcy: see *Henfrey* at p. 141.

[12] An administrator's lien pursuant to s. 57(5) of the *Pension Benefits Act* (Ontario) would also be ineffective in a bankruptcy. Section 2(1) of the BIA provides that a "secured creditor" includes a person who holds a lien (i.e. a "true lien") on a debt which is actually owing. Even though provincial legislation may deem something to be a lien, that deeming does not make it a s. 2(1) BIA "lien": see *New Brunswick* v. *Peat Marwick Thorne Inc.* (1995), 37 C.B.R. (3d) 268 (N.B.C.A.). While provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred s. 136(1) of the BIA determines the status and priority of claims: see *Deloitte, Haskins & Sells Ltd.* v. *Alberta (Workers' Compensation Board)* (1985), 19 D.L.R. (4th) 577 (S.C.C.); *Husky Oil Operations Ltd.* v. *Minister of National Revenue* (1995), 128 D.L.R. (4th) 1 (S.C.C.).

[13] The Superintendent relies on my earlier decision of *Toronto-Dominion Bank* v. *Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.). However this case is distinguishable in that while there was a bankruptcy petition outstanding at the time of the motion, no one was pressing it forward. The petitioner had died and the bank as the major creditor of Usarco only wished to proceed with a bankruptcy once the property was sold (which property had environmental problems of a significant nature). I indicated at pp. 2 and 4:

> While it is possible for the bank to be substituted or added as a petitioner in the Gold bankruptcy petition … it has not moved to do so. It is now approximately a year and a half since the Gold Petition. The bank will not move in respect of a petition until the Hamilton property is sold. It is unclear when this might happen; no likely timetable was established. In my view, it would be inappropriate for the bank to put all proceedings involving Usarco (including this motion by the administrator) into suspended animation while the bank determined if, as, and when it wished to take action.

Rather in the present case with the Ivaco Companies there are major creditors who wish to proceed forthwith – and for the reason that such a bankruptcy will enhance their position (i.e. the pension deficit claims will become unsecured and rank *pari passu* with the other unsecured claims). See also *Usarco* at p. 5 where I observed:

> One of the primary purposes of a bankruptcy proceeding is to secure an equitable distribution of the debtor's property amongst the creditors; although another purpose may be for creditors to avail themselves of provisions of the BA which may enhance their position by giving them certain priorities which they would not otherwise enjoy.

See also *Re Black Brothers (1978) Ltd.* (1982), 41 C.B.R. (N.S.) 163 (B.C.S.C.); *Bank of Montreal* v. *Scott Road Enterprises Limited* (1989), 73 C.B.R. 273 (B.C.C.A.); *Re Beverley Bedding Corporation* (1982), 40 C.B.R. (N.S.) 95 (Ont. S.C.); *Re Harrop of Milton Inc.* (1979), 22 O.R. (2d) 245 (Ont. S.C.). Once a creditor has established the technical requirements of s. 42 of the BIA for granting a bankruptcy order and the debtor is unable to show why a bankruptcy order ought not to be granted, a bankruptcy order should be made: see *Re Kenwood Hills Development Inc.* (1995), 30 C.B.R. (3d) 44 (Ont. Gen. Div.). A court has the discretion to refuse such an order pursuant to s. 43(7) with the onus being on the debtor to show sufficient cause why the order ought not to be granted. While in the present case, the Ivaco Companies as debtors have not objected to the proposed bankruptcy proceedings, they are not functionally in a position to do so as they are rudderless in this respect (the officers and directors have abandoned ship by resigning some months ago and the Monitor's increased powers not extending to this – see the order of December 17, 2004, which in respect of anything which may be considered touching the pension plan issues, only relates to, in effect a safekeeping of the Heico sale proceeds and other assets of the Ivaco Companies). However for the purposes of this motion, I think it fair to treat the Superintendent as the "champion" of the Ivaco Companies' interests in this issue in a surrogate capacity.

[14] Allow me to observe that the usual situation of invoking a s. 43(7) discretion is where (i) the petitioner has an ulterior motive in pursuing the petition (such as eliminating a competitor or inflicting harm on the debtor (together with its officers, directors, shareholders and/or other creditors) as a revenge tool) or (ii) there is no meaningful purpose to be served by the bankruptcy as there are no assets and no alleged bad conduct to be investigated. What the Superintendent has submitted in opposition to the request to proceed in bankruptcy mode is not of this nature. Nor is

this type of situation of the nature envisaged at para. 12 of *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C.S.C.) at p. 241 where Tysoe J. stated:

> 12. Section 11 of the CCAA has received a very broad interpretation. The main purpose of s. 11 is to preserve the status quo among the creditors of the company so that no creditor will have an advantage over other creditors while the company attempts to reorganize its affairs. The CCAA is intended to facilitate reorganizations involving compromises between an insolvent company and its creditors and s. 11 is an integral aspect of the reorganization process.

There is no such reorganization possible under the existing circumstances. Rather the compromise of claims may be adequately effected under the BIA regime (as opposed to the submission of the Superintendent to appoint an interim receiver to operate under the CCAA proceedings). It would seem to me that those claims which have already been resolved under the CCAA proceeding could be "transferred" as resolved claims into a BIA proceeding.

[15] The Superintendent has not paid out any amount under the PBGF and thus has not effected nor perfected its status as a subrogee.

[16] Given the limited role of the Monitor as indicated above I do not see that the Monitor in fact, law and fairness can be considered a fiduciary to the pension beneficiaries in the nature of an administrator of the Salaried Plans.

[17] Pursuant to s. 57(3) and (4) of the *Pension Benefits Act*, what is the responsibility? It is that the employer (the Ivaco Companies) be deemed to hold the pension funding monies in trust for the pension beneficiaries. However there is no provision in that legislation that the monies be paid out to the pension plan at any particular time. As discussed above, those deemed trusts may be defeated, in the sense of being inoperative to give a priority, in the event of a bankruptcy. The BIA does not contain any provision that the priority position is maintained in a bankruptcy; rather the case law is to the contrary: see *Henfrey* at p. 741; *Bassano* at pp. 201-202; *IBL* at pp. 143-4.

[18] In the end result I do not see that the Superintendent has made a compelling case to the effect that the petitions in bankruptcy should not be allowed to proceed in the ordinary course. I have reached that conclusion by weighing the factors pro and con as discussed above, including the relative benefits to all stakeholders (including workers and pensioners) to maintaining the CCAA proceedings (with the benefit of the suspension of past contributions as per the unopposed (and un-reconsidered) order of November 28, 2003, the fact that no reorganization is now possible as all Ivaco Companies (except Docap) have ceased operations and are without operational assets and that the Ivaco Companies are now essentially in a distribution of proceeds mode.

[19] However, to allow sufficient time for consideration of appeal, no action or step is to be taken with respect to dealing with the bankruptcy for at least 60 days from the release of these

TAB SIXTEEN

Toronto-Dominion Bank v. Usarco Ltd.

Ontario Judgments

Ontario Court of Justice - General Division

Toronto, Ontario

Farley J.

Heard: June 4 and 17, 1991

Judgment: August 2, 1991

Action No. 52384/90

[1991] O.J. No. 1314 | 42 E.T.R. 235 | 28 A.C.W.S. (3d) 392

IN THE MATTER OF Usarco Limited Pension Plan for its Hourly Employees Between The Toronto-Dominion Bank, Plaintiff, and Usarco Limited and Frank Levy, Defendants

(28 paras.)

Case Summary

Receivers — Property subject to receivership — Future pension benefits — Property not subject to receivership — Deemed trust property — Employer's pension contributions owing.

Motion by the administrator of an employee pension plan for an order directing the receiver to pay to the administrator monies payable but not yet paid into the pension plan. The defendant employer ceased operations in 1990. The plaintiff bank was the largest secured creditor and it applied for the appointment of a receiver to sell and dispose of the defendant's assets. A bankruptcy petition was filed but no further steps were taken in that proceeding. The defendant failed to remit contributions to the pension plan for some time. The administrator of the plan argued that the defendant's assets were subject to a lien in favour of the administrator and that the amounts collected by the receiver were held in trust for the beneficiaries of the plan. The bank sought to stay the administrator's motion until the bankruptcy proceedings were completed.
HELD: The administrator's motion was granted.

The security interest of the bank was subordinate to the interest of the beneficiaries of the deemed trust. The deemed trust provisions of sections 58(3) and 58(4) of the Pension Benefits Act referred to the contributions which were to have been made but were not. The bank's security interest took priority over those special payments required to be made by the defendant to fully fund its pension obligations as of the wind-up date. The deemed trust extended to the amount that the defendant was obligated to pay into the pension fund and the interest on unpaid contributions, prorated to the date it ceased operations.

STATUTES, REGULATIONS AND RULES CITED:

Bankruptcy Act, *R.S.C. 1985, c. B-3, ss. 43*(13), 67(a), 70(1), 71(1). Pension Benefits Act, 1987, S.O. 1987, c. 35, ss. 58(3), 58(4), 58(5), 58(6), 59(1), 59(2), 76(1), 76(2). Pension Benefits Act Regulations, ss. 1, 4(1), 4(2), 4(3), 5(1)(b). Personal Property Security Act, 1989, S.O. 1989, c. 16, ss. 30(7), 30(8), 33(1).
Harry Underwood, for Ernst & Yonge Inc., Administrator of the Usarco Limited Pension Plan for hourly employees. M. MacNaughton, for the T-D Bank, a secured creditor of Usarco Limited. N. Saxe, for Coopers & Lybrand Receivers, appointed for Usarco Limited.

FARLEY J.

1 Ernst & Yonge Inc. ("Administrator") is the administrator appointed by the Superintendent of Pensions pursuant to the Pensions Benefit Act, 1987 (Ont.), c. 35 ("PBA") as to the hourly employee pension plan ("Plan") at Usarco Limited ("Usarco").

2 The wind-up date for this Plan was July 13, 1990 being the date that Usarco ceased operations. A bankruptcy petition was filed by A. Gold & Sons Ltd. ("Gold"), dated January 5, 1990; nothing has proceeded in regard to this petition. The Toronto Dominion Bank ("Bank") is the largest creditor, being exposed for some $18 million; it is secured by a general security agreement which was registered under the Personal Property Security Act, 1989 (Ont.), c. 16 ("PPSA") or a predecessor thereof.

3 The Bank applied to the court on October 11, 1990 for the appointment of Coopers & Lybrand Limited ("Receiver") as receiver of Usarco for the purpose of selling or otherwise disposing of Usarco's assets. As of April 30, 1991 the Receiver had collected $503,571 from accounts receivable, $581,343 from inventory sales and $475,238 from realization of other assets. This was a total of $1,560,152 less disbursements of $486,532 leaving cash on hand in the amount of $1,073,620.

4 Usarco conducted its business in Hamilton as a scrap metal dealer and processor. Apparently there are concerns vis-a-vis environmental claims as to the Hamilton property. The Bank indicates that it will not move to join the Gold bankruptcy petition and move it forward (the principal of Gold having died) until the Hamilton property is sold. However, the property is now for sale and the Bank claims that it will proceed expeditiously, after the sale, as to the bankruptcy proceedings.

5 Usarco failed to remit regular and special contributions to the Plan. The Plan did not require employee contributions. Regular contributions are required in respect of benefits accruing in the year contributions are to be made and special contributions are in respect of unfunded liabilities as determined by a triennial actuarial report, the last of which (May 1989) was made as of December 31, 1988. That report showed that Usarco was $206,920 short. Usarco anticipated it would have been able to transfer a surplus in its salaried employees plan to remedy this; however, this was not permitted by the Pension Commission. Since December 31, 1988, Usarco failed to make regular contributions of $47,853.16 and special ones of $121,748.77 for a total of $169,601.93. Missed contributions then on that basis would be a total of $376,521.93.

6 The May 1989 report indicated that as of December 31, 1988 the Plan was unfunded to the extent of $711,071. This amount was made up of $295,044 as at the end of 1985 (to be made up by special payments of $35,192 per year over twelve years) and a further $416,027 as at the end of 1988 (to be made up by special payments of $41,702 over 15 years). Deducting the missed special contributions, previously mentioned, to the wind-up date would result in a net of approximately $600,000. There was no solvency deficiency.

7 On November 7, 1990 and December 20, 1990 the Administrator's counsel wrote to Usarco and the Receiver giving formal notice that all the assets of Usarco were subject to a lien and charge in favour of the Administrator and demanded payment of the amount of the deemed trust (see: s. 58(3)(4)(5)(6) PBA). The then counsel for the Receiver (now counsel for the Bank) wrote back on February 7, 1991 and referred to an enclosed copy of the order of Borins J. of October 11, 1990 appointing the Receiver. Paragraphs 9 and 10 of that order provided that no proceedings be taken against Usarco or the Receiver without leave of the court but that any interested party be at liberty to apply for further orders on seven days' notice.

8 This matter came forward on April 16, 1991 and has been adjourned on consent of the Administrator, Bank and Receiver a number of times. A term of the adjournment was the undertaking by the Receiver to "hold $500,000 collected since November 7, 1991 (sic) from the proceeds of accounts receivable and inventories of Usarco until the return of the motion ...".

9 Leave is granted if it is necessary pursuant to the order of October 11, 1990 to the Administrator to bring its motion to have the Receiver pay to the Administrator, on behalf of the employee beneficiaries of the Plan, the amounts claimed. The Bank's motion to stay the Administrator's motion is dismissed. While it is possible for the Bank to be substituted or added as a petitioner in the Gold bankruptcy petition [s. 43(13) Bankruptcy Act, *R.S.C. 1985, c. B-3* ("BA")], it has not moved to do so. It is now approximately a year and a half since the Gold petition. The Bank will not move in respect of a petition until the Hamilton property is sold. It is unclear when this might happen; no likely timetable was established. In my view it would be inappropriate for the Bank to put all proceedings involving Usarco (including this motion by the Administrator) into suspended animation while the Bank determined if, as and when it wished to take action. While the Bank might point to the fact that the Receiver has undertaken to hold $500,000 until the return of this motion to advance its assertion that the Administrator would not be prejudiced awaiting the disposition of the bankruptcy petition, I am mindful of the Bank's position that a bankruptcy petition would reverse priorities, that the amount claimed by the administrator is in excess of $500,000 and that the $500,000 being held does not have any interest attributed to it.

10 The relevant provisions of the legislation are as follows:

PBA	PPSA	BA	PBA Regs.
s.58(3)(4)(5)(6)	s.30(7)(8)	s.43(13)	s.1 (certain definitions)
s.59(1)(2)	s.33(1)	s.67(a)	s.4(1)(2)(3)
s.76(1)(2)		s.70(1) s.71((1)	s.5(1)(b)

I have set these out in an appendix.

11 It would appear that if the bankruptcy had come into effect as of a date prior to the Administrator's claim the subject matter of the deemed trust would not have come into existence: see: Re IBL Industries Ltd. *(1991), 2 O.R. (3d) 140* (O.C.J.) relying on British Columbia v. Henfrey Samson Belair Ltd. *(1989), 75 C.B.R. (N.S.) 1* (S.C.C.). The Henfrey Samson case at p.18 pointed out the principle that the provinces cannot create priorities that would be effective under the BA by their own legislation. One of the primary purposes of a bankruptcy proceeding is to secure an equitable distribution of the debtor's property amongst the creditors; although another purpose may be for creditors to avail themselves of provisions of the BA which may enhance their position by giving them certain priorities which they would not otherwise enjoy: see: Black Bros. (1978) Ltd. *(1982), 41 C.B.R. (N.S.) 163* (B.C.S.C.).

12 Section 71(1) of the BA provides that a bankruptcy will have relation back to the date the bankruptcy petition was made: see also: In re W *(1921), 2 C.B.R. 176* (Ont. S.C. Registrar) and Re Develox Industries Limited (No. 3) *(1970), 15 C.B.R. (N.S.) 18* (Ont. S.C.).

13 Therefore, since the bankruptcy petition has not been dealt with, we are presently dealing with a claim by the Administrator for certain trust funds held by the Receiver. The security interest of the Bank is subordinate to the interest of the beneficiaries of the deemed trust (represented by the Administrator): (see: s. 30(7) PPSA). The Bank suggested that it was entitled to a purchase money security interest in Usarco's inventory and its proceeds (see: s. 30(8) PPSA). It did not, however, advance any material to support the proposition that it did not need to send out a purchase money security interest notice in light of its assertion that it was the only secured creditor or when the inventory came into Usarco's possession, vis-a-vis the Bank's financing. I must reject the Bank's contention because of this lack of evidence.

14 The Administrator's position is that if it enforces its rights and obtains payment, such payment would not be subject to being put back into the bankruptcy pot pursuant to s. 71(1) of the BA. In support of this proposition the Administrator cites s. 70(1) of the BA. Houlden and Morawetz, Bankruptcy Law of Canada, 3rd ed. (1989) Vol. 1, pp. 3-120 to 3-122 would appear to support that claim and specifically:

> Section 70(1) does not refer to "the date of bankruptcy" but to "every receiving order and every assignment". In A.C. Weeks Ltd. v. C.C.M.T.A. *(1962), 4 C.B.R. (N.S.) 182*, *40 W.W.R. 312* (B.C.C.A.), the British Columbia Court of Appeal held that the doctrine of relation back in s. 71(1) had no application to s. 70(1), and money paid to a judgment creditor after the filing of a petition but before the making of a receiving order could be retained by the creditor. (p. 3-120.1-3-121)

15 Aside from the Weeks case cited in Houlden and Morawetz the following cases would also appear to support the Administrator's proposition: Price Waterhouse Ltd. v. Marathon Realty Co. Ltd. *(1979), 32 C.B.R. (N.S.) 71* (Man. Q.B.); Re Sara *(1985), 56 C.B.R (N.S.) 282* (Ont. S.C.); Re Southern Fried Foods Limited. *(1976), 21 C.B.R. (N.S.) 267* (Ont. S.C.); J.J.H. McLean Company, Limited v. Newton In re Kaplan Estate *(1926), 8 C.B.R. 61* (Man. C.A.).

16 The Administrator is taking the steps that it feels are necessary to perfect its claim for the monies in advance of the determination of the bankruptcy petition, one that conceivably may never be proceeded with further. In this respect it is further ahead in the foot race than was the creditor attempting to perfect under the PPSA in Re Hillstead Limited *(1979), 32 C.B.R. (N.S.) 55* (Ont. S.C.) or the union in the Re IBL case, supra. In those cases the claimants brought their action after the bankruptcy was determined so that there was no hope of having completely executed payment prior to the bankruptcy determination. The deemed trust provision would also imply a fiduciary obligation on the part of Usarco. A trustee in bankruptcy stepping into the shoes of Usarco must deal with that fiduciary obligation.

17 It seems to me that the Administrator's position would be stronger than the types of claims set out in the above cases since it comprises a trust claim. If so, then according to s. 67(a) of the BA such trust property would not be property of a bankrupt divisible amongst its creditors. The Administrator asserts that the deemed trust under the PBA has been converted into a true trust either (a) by notice or (b) by virtue of an actual separation of the funds by the Receiver. A true trust would, if it exists, prevail against a competing claim of a trustee in bankruptcy. While it appears to me that the Administrator gave notice to the Receiver by the November and December letters (with an estimated amount of the deemed trust of $489,928) it does not seem that the Receiver had notice of any further claim until June 19, 1991 when the Administrator advanced a further claim for approximately $600,000 plus interest. As to the question of an actual separation of funds by the Receiver, the Administrator relies on the terms of the undertaking given on one of the multiple adjournments of this matter. Its text is as follows:

> On consent adjourned to May 13, 1991 on the undertaking of the Receiver to
>
> 1. hold $500,000 collected since November 7, 1991 from the proceeds of accounts receivable and inventories at Usarco until the return of the motion on May 13, 1991, and
> 2. notify the Applicant of any motion for an order directing the Receiver to pay any funds in its hand to any creditor of Usarco or Frank Levy.
>
> (Indicated signed by counsel for the Bank, Receiver and Administrator)

TAB SEVENTEEN

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, and in the Matter of a Plan or Plans of Compromise or Arrangement of Ivaco Inc. et al.

[Indexed as: Ivaco Inc. (Re)]

83 O.R. (3d) 108

Court of Appeal for Ontario,
Laskin, Rosenberg and Simmons JJ.A.
October 17, 2006

Debtor and creditor -- Companies' Creditors Arrangement Act -- Pensions -- Monitor appointed under CCAA not having fiduciary duty to debtor Company's pension plan beneficiaries -- Company or Monitor not having duty under Pension Benefits Act to keep unpaid contributions to pension plan in separate account -- Motions judge not required by CCAA to order that amount of deemed trust under Pension Benefits Act for unpaid contributions be paid at end of CCAA proceedings but before bankruptcy -- No gap existing between CCAA and Bankruptcy and Insolvency Act in which provincial deemed trusts can be executed -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 -- Pension Benefits Act, R.S.O. 1990, c. P.8.

Debtor and creditor -- Companies' Creditors Arrangement Act -- Powers of court -- Motions judge ordering transfer of debtor Companies' head offices from Qubec to Toronto -- CCAA not giving motions judge authority to order transfer -- Motions judge not having to resort to CCAA because he had express authority to order transfer under s. 191 of Canada Business Corporations Act -- Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 191 -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36. [page109]

decision in Re Stelco in support of their argument. However, that case differs from the present case in a material way. In Re Stelco, the issue was whether a motions judge in CCAA proceedings could order the removal of two members of the company's board of directors under s. 109(1) of the CBCA. The power to remove directors is vested in the shareholders. Blair J.A. held that the motions judge could not rely on the court's discretion under s. 11 of the CCAA to override or supplant the specific power in s. 109(1) of the CBCA. The discretion under s. 11 must be used to control the court's processes, not the company's processes.

[84] By contrast, in the present case, s. 191 of the CBCA gives the court express authority to order the transfer of the head office of a company that is subject to an order under the CCAA. Thus, to make a transfer order, the court need not rely on its discretion under s. 11 of the CCAA.

[85] However, the jurisdiction in s. 191(2) is discretionary, as evidenced by the use of the word "may". Therefore, the remaining question on this ground of appeal is whether the motions judge properly exercised his discretion in ordering the transfer. I think that he did.

[86] Ivaco and Ifastgroupe had not actively carried on business since the sale of their assets to Heico was completed in December 2004. The Monitor holds the proceeds of the sales in bank accounts in Toronto. Because of the lengthy and complex CCAA proceedings, the Ontario Superior Court -- Commercial List is familiar with the affairs of Ivaco and Ifastgroupe. Having all the issues common to all the Companies administered at the same [page131] time before the court familiar with these issues will facilitate the most efficient, consistent and just administration and distribution of their estates.

[87] The QPC, in particular, objects to these head office transfers. It argues that the motions judge's order will enable the creditors to defeat a future motion to transfer to the Qubec Superior Court the question whether the Companies participating in the Ivaco Salaried Plan are "solidarily liable", that is jointly and severely liable, under Qubec law

for satisfying the obligation to fund the plan.

[88] The underpinning of the QPC's argument is as follows: the "solidarily liable" provision is unique to Qubec law and therefore should be decided by a Qubec court. Whether the Qubec or the Ontario Superior Court presides over this future motion will turn on the application of the forum conveniens principle. One relevant factor in assessing the forum conveniens is the residence or place of business of the parties. According to the QPC, transferring Ivaco's and Ifastgroupe's head offices to Toronto will tip the scales in favour of the Ontario Superior Court hearing the "solidarily liable" motion.

[89] It seems to me that this is a weak argument. The QPC has not yet brought this motion. When it does, the Ontario Superior Court can assess the relevant considerations affecting the appropriate forum. Now, however, the motions judge's transfer order just makes good sense. He, therefore, exercised his discretion properly. I would not give effect to this ground of appeal.

D. Conclusion

[90] The motions judge did not err in law in refusing to order the immediate payment of the amount of the deemed trusts under the Pension Benefits Act or in refusing to segregate that amount. Nor did he err in exercising his discretion to lift the stay under the CCAA and permit the bankruptcy petitions to proceed. Finally, the motions judge did not err in ordering that the head offices of Ivaco and Ifastgroupe be transferred from Qubec to Toronto. Accordingly, I would dismiss the Superintendent's appeal.

[91] If the parties cannot agree on the costs of the appeal, they may make written submissions to the court. These submissions should be delivered within 30 days of the release of these reasons.

Appeal dismissed. [page132]

Notes

Note 1: Taking into accout a $12 million distribution to the National Bank permitted by the motions judge in December 2004.

TAB EIGHTEEN

Court of Queen's Bench of Alberta

Citation: MNP Ltd v Canada Revenue Agency, 2022 ABQB 320

Date: 20220503
Docket: BK03 115694
Registry: Edmonton

Between:

MNP Ltd., acting in its capacity as Trustee in Bankruptcy of the Estate of Skyrider Holdings Ltd. and not in its personal capacity

Applicant

- and -

Canada Revenue Agency and Royal Bank of Canada

Respondents

Reasons for Judgment of the Honourable Mr. Justice M. J. Lema

---

A. Introduction

[1] What does a writ of enforcement's "binding interest", acquired on registration against a debtor's land, mean after the debtor's bankruptcy?

[2] The trustee in bankruptcy argues that the pre-bankruptcy priority arising from that interest continues after bankruptcy, that the trustee acquires that priority position on the debtor's bankruptcy, and that, on behalf of registered writ-holders (and, in fact, all unsecured creditors), the trustee can assert the binding interest and resulting priority position against a down-title

iii. The purpose of the legislation

The object of s. 223 of the *ITA* is "to provide that CRA has a deemed security interest … to allow CRA access to assets of a taxpayer in order to satisfy a tax debt": *Canada (Attorney General) v. Keith G. Collins Ltd.*, 2008 MBCA 92 at para. 16.

Upon the bankruptcy event, the judgments underlying the September 1, 2016 order were stayed. Those judgment creditors are subject to the provisions of the *BIA*. They are not secured creditors under the *BIA*: *Beaver Trucking* at 319–20. The Trustee is attempting to transform the Other Judgments into something they are not.

The Trustee fixates on the general purpose of the *BIA,* which includes the financial rehabilitation of debtors and the orderly and equitable distribution of assets amongst unsecured creditors. However, the Supreme Court of Canada has recently cautioned against "fixating on one objective to the exclusion of others": *R. v. Rafilovich*, 2019 SCC 51 at para. 30. The *BIA*'s general purpose must be balanced with other important interests: *Rafilovich*, at para. 30. **The purpose of s. 223(11.1) of the *ITA* is to elevate an unsecured claim for the payment of tax arrears to secured claim in the event of a bankruptcy. The purpose of s. 87(2) of the *BIA* is to subordinate that secured claim only to "securities" registered prior to the CRA's registration. The Trustee's interpretation is incompatible with that purpose. The general purpose of the *BIA* does not justify a modification of the purpose of s. 223(11.1).**

Moreover, if the Trustee's argument was correct, the Crown would never be able to utilize the provisions of s. 87(2) of the *BIA*. The federal bankruptcy law and its purpose would be frustrated. In my view, **the provisions of ss. 223(5),(6), and (11.1) of the *ITA* combined with those of s. 87 of the *BIA* oust the rateable distribution scheme under the *BIA* as it otherwise would have applied to a claim by the CRA for unpaid taxes.**

For the foregoing reasons, I conclude that Master Taylor's interpretation of the legislation was correct and that he made no reviewable error. The Trustee's appeal of his decision on the merits is dismissed. [paras 49-66] [emphasis added]

[46] As the trustee pointed out, ss. 87(2) *BIA* does not define the "securities" to which CRA's deemed security interest is subordinate.

[47] However, noting the same interlocking nature of ss. 223(11.1) *ITA* and ss. 86 and 87 *BIA*, and especially the various references in s. 87 to "security", plus the obvious aim for CRA to achieve secured status in the identified circumstances, "securities" in ss. 87(2) obviously refers to other secured creditors i.e. cannot produce a deferral to unsecured creditors.

[48] Another clue comes from the *BIA*'s base definition of "secured creditor" i.e. "a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor … as security for a debt due or accruing due to the person from the debtor …." Even without definition "security" (or "securities"), Parliament here signals the kinds of interests -- i.e. the security or securities – which quality a creditor as secured.

[49] Again, all agree that the "binding interests" held by the writ holders here, at least before bankruptcy, do not make them secured creditors.

[50] The trustee also argued that, in its deferral aspect, ss. 87(2) does not say that CRA's deemed security is subordinate "only" to the identified securities i.e. CRA might be subordinate to other parties, such as the binding-interest writ-holders here.

[51] I reject that argument: with an express reference to the parties to whom CRA is subordinate, the word "only" was not needed. Parliament obviously was not contemplating another, unexpressed, kind of creditor to whom CRA would be subordinate.

[52] The internal deferral in ss. 87(2) *BIA* of CRA's deemed security interest to previously registered secured interests does not assist the writ holders here.

Priority reversal not inherently unfair

[53] Fundamentally, the trustee resists the vaulting of CRA, via its deemed security provision, over previously registered writ holders.

[54] Here it invoked Professor Cuming's analysis, later in the above-cited article, of the "priority flip" problem (pp 478-480) and perceived policy problems.

[55] But Parliament made the decision to confer a deemed-security interest on CRA in defined circumstances. At the same time, it decided which creditors would have priority over that interest (prior registered secured creditors) and which would not (all others).

[56] The existence of a priority reversal expressly contemplated by Parliament is obviously no justification for effectively reading out the reversal.

[57] This is particularly so considering that, until November 30, 1992 (per s. 136 of the *Bankruptcy and Insolvency General Rules*), all Crown claims (federal and provincial), whether reflected in writs and whether any such writs were registered or not, enjoyed preferred status, per paras. 136(1)(h) and (j) *BIA*. CRA's deemed security interest here reflects a much narrower conception of Crown priority.

[58] Any perception of the priority reversal's unfairness or other negative effect is for those considering or advocating for *ITA* and *BIA* amendments: ***Re Ivaco Inc***, 2006 CanLII 34551 (ONCA) at paras 75-77.

D. RBC's claim as secured creditor

[59] The trustee acknowledged RBC as a secured creditor, albeit (at minimum) only in respect of Skyrider's personal property existing at the date of bankruptcy.

[60] Necessarily, that did not include its lands at that date.

[61] The issue here is whether RBC was or became a secured creditor in respect of the monies (which are personal property) derived from those lands after the date of bankruptcy.

[62] RBC advanced nuanced arguments about having an inchoate secured interest in those monies, dating back to many years before bankruptcy, when it took its GSA here.

[63] Case law supports the general notion that after-acquired property can be seen, even before coming into existence, as reached by pre-existing security i.e. from the time the security became enforceable.

[64] On the other hand, the *PPSA* and many cases confirm that security does not "attach" to such property before it exists.

[65] However, the trustee did not advance any argument turning on RBC's attachment or perfection (or otherwise), limiting its argument, as against RBC, to the same binding-interest argument explored above. The trustee appeared to assume that RBC had, or could have, a secured position, per its GSA, in the "monies" derived from the lands, albeit subject to the binding-interest writ holders being paid first.

[66] Per the trustee, only once those writs were paid would CRA (as the downstream albeit secured creditor) and RBC (implicitly recognized as a secured creditor for any monies remaining after clearance of the binding-interest writs) be entitled to any monies.

[67] As it turns out, as discussed above, the binding-interest writs fell away here on bankruptcy, leaving only CRA (with its deemed security interest) and RBC (with its apparently-recognized-as-secured position on "monies") contending over the land proceeds.

[68] The parties advised that, in this scenario, there are sufficient monies to pay out both CRA and RBC i.e. there is no need to determine their priorities vis-à-vis each other.

[69] Accordingly, I proceed on the basis that RBC is a secured creditor in respect of the monies derived from the lands (both via foreclosure and trustee sales), as is CRA.

E. Conclusion

[70] Once Skyrider became bankrupt, the priorities landscape changed.

[71] The binding interests stemming from writ registration were undercut, with the unsecured creditors (other than CRA) shorn of their judgment-enforcement positions and relegated to waiting and watching the trustee gather and realize the assets and then distribute them per the *BIA* priorities scheme.

[72] Under that scheme, secured creditors come before unsecured creditors, regardless of their relative positions before bankruptcy.

[73] In this case, both CRA (via its deemed security interest) and RBC (via its GSA apparently reaching monies generated during the bankruptcy) are secured creditors.

[74] That character entitles them to priority payment under s. 136 *BIA*.

[75] The non-CRA writ holders are only entitled, per s. 141 *BIA*, to any amounts remaining after those secured claims are paid in full.

F. Costs

[76] The parties offered preliminary submissions on costs at the tail-end of the application.

[77] If they are unable to agree on costs by May 16th, they can send me their submissions (via maximum 1.5-page letter) by May 30th, and I will decide on costs

TAB NINETEEN

Action No.: 2501-09028
E-File Name: CVK25UCAPITAL
Appeal No.:———————————

IN THE ALBERTA COURT OF JUSTICE
JUDICIAL CENTRE OF CALGARY

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

AND IN THE MATTER OF THE RECEIVERSHIP OF
CLEO ENERGY CORP.

P R O C E E D I N G S

Calgary, Alberta
December 18, 2025

Transcript Management Services
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D.G. Segal	For Canada Revenue Agency
A.E. Reperto	For Canada Revenue Agency
G.F. Body	For Canada Revenue Agency
J. Reid	For the Proposal Trustee Alvares & Marsal
B. Lavallee	Court Clerk

THE COURT: All right. Well, good morning, everyone. Sorry I had to cancel the decision a few weeks ago. I had a scheduling conflict, so -- but here we are today. So I am just going to read my oral decision and then we will go from there.

Ruling

THE COURT: The Minister of National Revenue applies for an order allocating the receiver's charge and the receiver's borrowing charge amongst the various assets comprising the property of CLEO Energy and directing the receiver to forthwith pay to the Receiver General of Canada $899,907.51, to be applied to the deemed portion of CLEO's GST account. It is not disputed that the CRA has filed a $1,355,296.64 GST claim in respect of CLEO's pre-filing unremitted GST, and of that amount, $899,907.51 is subject to the deemed trust and I am just going to refer to that as "the GST deemed trust amount".

In its bench brief, the CRA states the issue as follows: Is the CRA entitled to be paid the GST deemed trust amount from the sale proceeds of CLEO's assets? The short answer is no.

On June 2nd, 2025, Justice Burns granted sale approval and vesting orders in respect of two proposed transactions. In both cases, the sale approval and vesting orders authorized the receiver to use the sale proceeds to pay off the administration charge and the interim lenders charge. That is what the receiver did. The time to have sought a different outcome about the use of the sale proceeds was at -- sales proceeds was at the hearing on June 2nd, 2025, not now as a collateral attack on Justice Burns' orders five months later.

I do agree with the CRA that a registrant like CLEO is required to remit GST collected on behalf of the Crown, and if that happens, section 222 of the *Excise Tax Act* extends a

deemed trust over all the property of the registrant up to the amount of GST collected. It requires that proceeds from the sale of that property be remitted in priority to other security interests.

I also agree with the CRA that the GST priority is equivalent in terms to the payroll deemed trust, but that only remains true unless the registrant becomes bankrupt, at which point, the priority of the GST deemed trust amount ceases and unremitted GST debt is treated in the same manner as any other unsecured debt.

The CRA acknowledges that the receivership order imposes a stay of collection on the creditors of CLEO. However, according the CRA, the stay does not relieve the receiver of its obligation to remit to the Receiver General proceeds from the sale of CLEO's assets which it says subsection 222(3) of the *Excise Tax Act* requires it to do.

The CRA's argument fails because subsection 222(3) imposes the payment obligation on the person who collected the amount as or on account of tax under division 2. In this case, that person is CLEO, such that the resulting payment obligation in subsection 222(3) applies to CLEO, not the receiver. The receiver seeks and follows the Court's orders, and that is what the receiver has done.

With respect to the CRA's argument that sections 270 of the *Excise Tax Act* obliges receivers to obtain a clearance certificate from the minister confirming that payment of all amounts payable for the current period and any previous period has been made, whether the receiver is liable under section 270 for the failure to do so is a matter that is within the exclusive jurisdiction of the Tax Court of Canada, not this Court, and I will not comment on that any further.

I would also dismiss the CRA's application to allocate the receiver's charge and the receiver's borrowing charge amongst the various assets to exhaust other net assets before depleting the sale proceeds. At paragraph 30 of its bench brief, the CRA describes the payment of the administration charge and the borrowing charge out of the sale proceeds as a "choice" made by the receiver. It was not a choice. It was what the sale approval and vesting orders directed. The CRA's application to re-allocate proceeds is no more than a ninth inning attempt to circumvent Parliament's deliberate legislative policy decision to reverse the GST priority upon the bankruptcy of the registrant.

At the reverse vesting order hearing and likely earlier, it was abundantly clear that once the transactions under the RVO were completed, residual co. would be bankrupted and the GST deemed trust amount would be treated as any other unsecured debt. The CRA's current applications are efforts to negate that result.

However, the CRA did not oppose the reverse vesting order, and the language it requested was included in the resulting reverse vesting order. If the CRA is opposed to the inevitable bankruptcy of residual co. and the resulting re-ordering of priorities, CRA ought to have opposed the RVO. It did not do so. CRA's applications are dismissed.

And that concludes my reasons.

Okay. We are adjourned.

PROCEEDINGS CONCLUDED

Certificate of Record

I, Brooke Lavallee, certify this recording is a record made of the oral evidence in proceedings, held in courtroom 1001 at the Court of King's Bench in Calgary, Alberta, December 18th, 2025, and that I was the court official in charge of the sound-recording machine during the proceeding.

Certificate of Transcript

I, Corie Dombrosky, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Corie Dombrosky, Transcriber
Order Number: TDS-1100098
Dated: December 18, 2025

TAB TWENTY

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.,* 2014 BCSC 1855

Date: 20141002
Docket: S-139627
Registry: Vancouver

Between:

Leslie & Irene Dube Foundation Inc. and 1076586 Alberta Ltd.

Petitioners

And

P218 Enterprises Ltd., Wayne Holdings Ltd., Okanagan Valley Asset Management Corporation, Willow Green Estates Inc., BMK 112 Holdings Inc., 0720609 B.C. Ltd., 0757736 B.C. Ltd., 0748768 B.C. Ltd., Dr. T. O'Farrell Inc., Pinloco Holdings Inc., 602033 B.C. Ltd., Andrian W. Bak, MD, FRCPC, Inc., Interior Savings Credit Union, Valiant Trust Company, Mara Lumber (Kelowna) (2007) Ltd., Rona Revy Inc., Rocky Point Engineering Ltd., Mitsubishi Electric Sales Canada Inc., BFI Canada Inc., John Byrson & Partners, Winn Rentals Ltd., 0964502 B.C. Ltd., Denby Land Surveying Limited, Mega Cranes Ltd., Weq Britco LP, Roynat Inc., Mcap Leasing Inc., Bodkin Leasing Corporation, HSBC Bank Canada, and Bank of Montreal

Respondents

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Receiver, Ernest & Young Inc.:	J.D. Schultz J.R. Sandrelli
Counsel for the Petitioners:	D.E. Gruber
Counsel for Valiant Trust Company:	J.D. Shields
Counsel for 0964502 B.C. Ltd.:	C.K. Wendell

Before entering into the SL 6 Purchase Agreement, the Receiver considered comparable sales for strata office property in the Kelowna marketplace.

[46] The Receiver seeks court approval of the addendum. The Bond Holders and the Lien Claimants oppose such an order on the basis that a further appraisal is required.

[47] On the basis of the evidence before me, particularly that Dr. Yap has already installed fixtures and has set up a specialized office for his medical practice, that the terms of the SL 6 Purchase Agreement are considered reasonable by the Receiver and Aquilini and that Dr. Yip will be paying his portion of the Development's operating costs thereby not only reducing, at least to a small degree, the overall operating costs being paid by the Receiver but also adding occupancy to the Development which will undoubtedly assist in the lease or sale of other portions, I am satisfied that the SL 6 Purchase Agreement should be approved.

Increasing the Receiver's Borrowing Charge

[48] The Receiver has provided to the court a breakdown of the additional expenses it anticipates will be incurred through to the end of the stalking horse process as follows:

a) Phase 1 completion costs:

i. completion payables:	$200,000
ii. parking lot and courtyard landscaping:	$100,000

b) interest and fees on financing:

i. Interest accrued to date:	$150,000
ii. future fees and interest:	$100,000

c) Professional fees:	$450,000
d) fees from leasing activities:	$125,000

e) engagement of Colliers for SH Process:	$50,000
f) other consulting fees:	$75,000
g) office, utility and operating expenses:	$52,500
h) contingency:	$55,000
TOTAL	$1,357,500

[49] The Receiver seeks to amend the Receivership Order pronounced January 27, 2014, as amended February 6, 2014 such that its permitted borrowing charge is increased from $2.5 million to $3.5 million.

[50] The Bond Holders and the Lien Claimants oppose the increase on the basis that there is no evidence as to where the increase in financing will come from or what the rate will be and that no particulars have been provided as to who the money will be paid to or why.

[51] I agree that approval of an increase in the borrowing charge in a vacuum is not desirable. However, I understand that negotiations are underway with the lender. I am satisfied that there is a need for the Receiver's borrowing charge to be increased, particularly given that more work will be required regarding the valuation and marketing of the Development.

[52] I am prepared to allow the increase on the condition that the financial terms for the increase are no less favourable to the creditors than the current terms of the Receiver's borrowing charge.

Approval of the Receiver's Activities to Date

[53] The Receiver seeks approval of its activities as set out in its first and second reports to the Court dated January 30 and August 14, 2014, respectively.

[54] The court has inherent jurisdiction to review and approve or disapprove the activities of a court appointed receiver. If the receiver has met the objective test of demonstrating that it has acted reasonably, prudently and not arbitrarily, the court

may approve the activities set out in its report to the court: *Bank of America Canada v. Willann Investments Ltd*., [1993] O.J. No. 1647 (Ct. J.) at paras. 3-5, aff'd [1996] O.J. No. 2806 (C.A.); *Lang Michener v. American Bullion Minerals Ltd.*, 2005 BCSC 684 at para. 21.

[55] I accept that the Receiver has essentially fulfilled its mandate with respect to completion of Phase 1. Its activities as set out in its first report are approved.

[56] After completion of Phase 1, the Receiver commenced on a sale process in an attempt to maximize the return for the creditors. It may well be that the Receiver will be able to demonstrate that the steps it took in this regard were objectively reasonable. However, given my previous comments, I am not satisfied that the Receiver has shown that the stalking horse bid process it entered into was done prudently. It is premature to approve its activities in this regard.

Sealing Order

[57] Given my ruling on the SH Agreement and my comments that the Altus Group's appraisal dated March 3, 2014 is outdated, there is no need to consider this issue.

Conclusion

[58] The Receiver's applications for a Bidding Procedures Order and a Conditional Vesting Order approving the stalking horse bid subject to the procedures set out in the Bidding Procedures Order is dismissed.

[59] The Receiver's application for an order approving the SL 6 Purchase Agreement is granted.

[60] The Receiver's application for an order amending Paragraphs 19 and 20(c) of the Receivership Order pronounced January 27, 2014, as amended February 6, 2014, such that the term "$2.5 million" is changed to "$3.5 million" is allowed on the condition that the terms of such increase will not be less favourable than the existing terms of the Receiver's borrowing charge.

[61] The activities of the Receiver as set out in its first report dated January 30, 2014 are approved. Approval of the Receiver's activities as set out in its second report dated August 14, 2014 is premature.

[62] The Receiver's application for an order sealing the appraisal of the Development dated March 3, 2014 by Altus Group is adjourned.

"G.C. Weatherill J."
G.C. Weatherill J.

TAB TWENTY-ONE

COURT FILE NO.: 03-CL-5044
DATE: 20040115

SUPERIOR COURT OF JUSTICE - ONTARIO
(COMMERCIAL LIST)

RE: IN THE MATTER OF the Receivership of Regal Constellation Hotel Limited, of The City of Toronto, In the Province of Ontario

AND IN THE MATTER OF s. 41 of the *Mortgages Act*, R.S.O. 1990 c. M.40

BEFORE: Justice Farley

COUNSEL: *John J. Pirie*, for Deloitte & Touche Inc., Court Appointed Receiver and Manager, and for HSBC Bank Canada

Mahesh Uttamchandani, for the Interim Receiver, Deloitte & Touche Inc.

Robert Rueter, for the Debtor, Regal Pacific (Holdings) Limited

HEARD: January 15, 2004

E N D O R S E M E N T

[1] Mr. Rueter, counsel for Regal Pacific (Holdings) Limited ("Holdings") asked for an adjournment of the Receiver's (Deloitte & Touche Inc.) motion for various approvals, but specifically the approval of the Receiver's activities as reflected in their various reports (5 plus a supplemental to the 1st which was sealed until the closing of the sale to 2031903 Ontario Inc. ("203")). He wanted a 4-week adjournment indicating that he had just determined that principals involved in 203 were also involved in Hospitality Investors Group LLC ("HIG") as per the *Toronto Star* article of January 10, 2004. A corporate profile report on 203 was obtained on January 13, 2004 afternoon. I asked Mr. Rueter to put his concerns in writing and he did so as per the attached, which I have marked Appendix A.

[2] I appreciate that Holdings, faced with a shortfall on the hotel realization by the Receiver of some $9 million, would wish to reopen the whole matter and as Mr. Rueter stated, have a new Receiver appointed who would conduct a new sales process – all with the hope that there would/might be a better result which either would generate a surplus or perhaps minimize the amount of the shortfall.

[3] As this was a last minute adjournment request, I indicated that I would reserve on the question of an adjournment, but would continue to hear the Receiver's motion (with a view to minimizing cost, delay and expense), on the contingency that I did not grant the adjournment but that if the adjournment were granted, then that hearing would vaporize into the ether and be a nullity.

[4] Having now reviewed the material once again in light of the unanticipated objection and "new" information (to be fair it would have been new no earlier than January 8, 2004 as Mr. Rueter did not get the unsealed supplemental report to report #1 until then), I have concluded that it is unnecessary and inappropriate to grant the requested Holdings adjournment – and that in refusing that request, I do not see that Holdings will suffer any prejudice. In that respect, I will deal with certain non-Receiver aspects later as to the effect of this order on others aside from the Receiver.

[5] In order to stop interest continuing to accrue, the Receiver paid $23.5 million (having received $24 million on the sale which closed January 5/6, 2004 with 203) to HSBC Bank ("Bank") on January 6, 2004; this, as Mr. Rueter acknowledged, would be beneficial to Holdings in minimizing to that extent its exposure. That payment is hereby approved.

[6] The fees and disbursements of the Receiver appear regular and in accordance with the detailed activities by it, all of which were encompassed by various orders of this court. I would note as well that the hotel was operated (albeit with a sub-contract) for a month before it was decommissioned; there were difficulties with getting accepted offers to close, but the Receiver was diligent in obtaining non-refundable substantial deposits, all of which ($3 million) also went to reducing Holdings' exposure; and the hotel "project" in all other respects a reasonably complicated and difficult asset to deal with and dispose of. Apparently legal fees were directly paid by Bank except to the extent of $22,000 regarding a tax appeal. I am satisfied that the Receiver's fees and disbursements are reasonable and incurred in satisfactorily carrying out its activities; they are approved.

[7] What apparently truly causes Mr. Rueter concern is the issue of approval of the Receiver's activities as detailed in its various reports. However, with respect, while understanding Holdings' concerns about the same principals being involved in various offers, I see no cause to be concerned with the Receiver in this regard. This hotel has been a difficult property for a number of years; it is old and in need of refurbishing; it has been marketed extensively before the receivership. As indicated by Mr. Rueter, before the receivership there was a deal with a corporation which had some principals in common with 203 and HIG. However, this deal did not close and the vendor interests are suing. Nothing in the motion for approval of the Receiver's activities affects that lawsuit. I would note that the objective of any receiver is to receive the highest value for an asset for the benefit of the stakeholders (creditors according to their priority, and below them the shareholders). All cash and unconditional (or easy, certain to fulfill conditions) offers are generally to be preferred, keeping in mind that one must do a reasonable risk/reward analysis. The skill, expertise and experience of a court appointed officer such as a receiver (court appointed) will assist it in doing an analysis to bring to a common level

(apples to apples, converting at appropriate rates various other fruit into apples) comparison and conclusion on which to base a recommendation to the court. As outlined in the Receiver's reports, certain of the higher value offers received (13 in total, as a result of the approved marketing campaign) were eliminated in favour of the 203 one for $25 million because of riskier conditions or the question of having to obtain financing. The HIG offer was withdrawn on September 2, 2003. While the 203 deal for $25 million did not close (while it was unconditional and no mention was made with regard to the need for financing, and with it being understood that the person involved (presented as being the principal of 203) had no funding problem because of past knowledge as to this person), it would not appear that the failure to close can be laid at the door of the Receiver. If the Receiver had not recommended 203's $25 million deal, then it would have had to go further down the ladder (on a risk/reward analysis) which would mean that in "present value" money terms (i.e. at the time of the recommendation after discounting for risk), the proceeds would have been less than $25 million.

[8] Indeed when 203 was unable to close on the specified closing date, the Receiver conducted another analysis and determined that it would likely maximize the proceeds by doing another deal with 203, albeit at $24 million, but keeping in mind the forfeit deposit and the obtaining of a further non-refundable deposit.

[9] While Mr. Rueter alludes to "the sales process was manipulated", I do not see that anything that the Receiver did was in aid of, or assisted such (as alleged). The identity of who the principals were was not in issue so long as a deal could be closed without a vendor take back mortgage.

[10] Mr. Rueter points out the Cocov (one of the principals) affidavit of June 25, 2003 that the property had an "as is" value of $30.65 million. However, this fails to take into account that not only was this affidavit before the receivership commenced (July 4, 2003), but it was in fact in an effort to convince the court that a receiver need not be appointed because there was sufficient value to cover the Bank indebtedness. Affidavits of this nature must be taken with a grain of salt regarding puffery. I note as well that receivership sales are believed generally to generate lower amounts than a sale in the ordinary course of a non-pressed vendor.

[11] It seems to me that the Receiver acted properly and within the mandate given it from time to time by the court. It fulfilled its prime purpose of obtaining as high a value it could for the hotel after an approved marketing campaign. Vis-à-vis the Receiver and that duty, it does not appear to me that the identity of the principals, but more importantly that there was overlap regarding the aborted purchaser from Holdings prior to the receivership, HIG and 203, is of any moment.

[12] Holdings, of course, is free to make whatever allegations it feels appropriate against these entities and their principals and pursue whatever remedies it feels that it may have against them; the approval of the Receiver's activities is not intended in any way to have any impact or in any way to act as a shield for them.

[13] In the end result, it appears to me that the adjournment request is merely to facilitate what Holdings believes is in its best interests – namely, it is under water as to its obligations to the Bank and so is drowned by the sale to 203; it hopes that if enough confusion is created in this approval of the Receiver's activities motion, that it will have the opportunity of being raised from the depths and artificial respiration applied. If it is presently drowned, a new sales process cannot do anything worse vis-à-vis it than drown it at a deeper depth. It will still be drowned, but the Bank in first priority position will be prejudiced in having to look to other sources, including Hong Kong based Holdings, for recovery of the deficit, in that case a greater deficit.

[14] In the end result, the activities of the Receiver as detailed in its various reports are approved. For greater certainty, the activities of no one else are approved.

J. M. Farley

Released: January 15, 2004

Appendix A

HSBC Bank of Canada and Regal Constellation Hotel Limited

My submission respecting the sale process is that neither my client nor the Court to my knowledge were aware that the purchaser under the offer to purchase recommended to the Court by the Receiver, were the same principals as the principals of the purchaser under the $45,000,000 agreement to purchase with Regal marked as Exhibit 1 to the Affidavit of Fernandez sworn June 25, 2003, in Responding Motion Record.

The Court and Regal were advised by the Receiver's counsel on September 9/03 that there was an offer from the purchasers under the Regal Agreement but it was withdrawn when the deposit could not be certified.

Therefore the Court was not aware that the principals behind the offer #1 in the sealed Supplemental Report of the Receiver were the same as the principals behind purchaser #4 who was being recommended to the Court. The sale process was manipulated in that the same principals made offer #1 at $31.0 million and offer #4 at $25 million and that one of those principals, Mr. Cocov, deposed in an affidavit before this Court sworn 25 June 03, that the Hotel has a value of $30,650,000 on an "as is" basis (Responding Motion Record 25 June 03 filed by Goodman and Carr) but it was not known he was a principal of the recommended offeror.

My submission is that these are material facts bearing upon the integrity of the sale process which may well have affected the Court in approving the offer from 2031903 Ontario Inc.

The Supplemental Receiver's Report 8 Sept. 03 was not disclosed to me until last Friday, 8 Jan./04.

Respectfully submitted,
"Robert Rueter"
Counsel for Regal Pacific (Holdings) Limited

TAB TWENTY-TWO

COURT OF APPEAL FOR ONTARIO

CITATION: Bank of Nova Scotia v. Diemer, 2014 ONCA 851
DATE: 20141201
DOCKET: C58381

Hoy A.C.J.O., Cronk and Pepall JJ.A.

BETWEEN

The Bank of Nova Scotia

Plaintiff (Respondent)

and

Daniel A. Diemer o/a Cornacre Cattle Co.

Defendant (Respondent)

Peter H. Griffin, for the appellant PricewaterhouseCoopers Inc.

James H. Cooke, for the respondent Daniel A. Diemer

No one appearing for the respondent The Bank of Nova Scotia

Heard: June 10, 2014

On appeal from the order of Justice Andrew J. Goodman of the Superior Court of Justice, dated January 22, 2014, with reasons reported at 2014 ONSC 365.

Pepall J.A.:

[1] The public nature of an insolvency which juxtaposes a debtor's financial hardship with a claim for significant legal compensation focuses attention on the cost of legal services.

accounts reviewed. The court also relies on its supervisory role and inherent jurisdiction to review a receiver's requests for payment: *Bakemates*, at para. 36 and Kevin P. McElcheran, *Commercial Insolvency in Canada*, 2d ed. (Markham: LexisNexis, 2011), at pp. 185-186.

[31] The receiver is an officer of the court: *Bakemates*, at para. 34. As stated by McElcheran, at p.186:

> The receiver, once appointed, is said to be a "fiduciary" for all creditors of the debtor. The term "fiduciary" to describe the receiver's duties to creditors reflects the representative nature of its role in the performance of its duties. The receiver does not have a financial stake in the outcome. It is not an advocate of any affected party and it has no client. As a court officer and appointee, the receiver has a duty of even-handedness that mirrors the court's own duty of fairness in the administration of justice. [Footnotes omitted.]

(b) Passing of a Receiver's Accounts

[32] In *Bakemates*, this court described the purpose of the passing of a receiver's accounts and also discussed the applicable procedure. Borins J.A. stated, at para. 31, that there is an onus on the receiver to prove that the compensation for which it seeks approval is fair and reasonable. This includes the compensation claimed on behalf of its counsel. At para. 37, he observed that the accounts must disclose the total charges for each of the categories of services rendered. In addition:

> The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

[33] The court endorsed the factors applicable to receiver's compensation described by the New Brunswick Court of Appeal in *Belyea*: *Bakemates*, at para. 51. In *Belyea*, at para. 9, Stratton J.A. listed the following factors:

- the nature, extent and value of the assets;
- the complications and difficulties encountered;
- the degree of assistance provided by the debtor;
- the time spent;
- the receiver's knowledge, experience and skill;
- the diligence and thoroughness displayed;
- the responsibilities assumed;
- the results of the receiver's efforts; and
- the cost of comparable services when performed in a prudent and economical manner.

These factors constitute a useful guideline but are not exhaustive: *Bakemates*, at para. 51.

[34] In Canada, very little has been written on professional fees in insolvency proceedings: see Stephanie Ben-Ishai and Virginia Torrie, "A 'Cost' Benefit

Analysis: Examining Professional Fees in *CCAA* Proceedings" in Janis P. Sarra, ed., *Annual Review of Insolvency Law* (Toronto: Carswell, 2010) 141, at p.151.

[35] Having said that, it is evident that the fairness and reasonableness of the fees of a receiver and its counsel are the stated lynchpins in the *Bakemates* analysis. However, in actual practice, time spent, that is, hours spent times hourly rate, has tended to be the predominant factor in determining the quantum of legal fees.

[36] There is a certain irony associated with this dichotomy. A person requiring legal advice does not set out to buy time. Rather, the object of the exercise is to buy services. Moreover, there is something inherently troubling about a billing system that pits a lawyer's financial interest against that of its client and that has built-in incentives for inefficiency. The billable hour model has both of these undesirable features.

(c) The Rise and Dominance of the Billable Hour

[37] For many decades now, the cornerstone of legal accounts and law firms has been the billable hour. It ostensibly provides an objective measure for both clients and law firms. For the most part, it determines the quantum of fees. From an internal law firm perspective, the billable hour also measures productivity and is an important tool in assessing the performance of associates and partners alike.

TAB TWENTY-THREE

FEDERAL BUSINESS DEVELOPMENT BANK v.
BELYEA and FOWLER
(No. 31/82/CA)

New Brunswick Court of Appeal
Hughes, C.J.N.B., Ryan and Stratton, JJ.A.
January 18, 1983.

Court of Appeal in *Eastern Trust Co. v. Nova Scotia Steel & Coal Co. Ltd.* (1938), 13 M.P.R. 237. In making their award, the court said at p. 240:

> As we view it, we are entitled, in order to fix the remuneration of both receivers and liquidators, to survey the entire operations under their charge since their appointment, to take into consideration the time each of them gave to the work and the responsibilities resting on them as receivers and liquidators, and to determine what the work necessarily done should cost, if conducted prudently and economically.

[6] A lump sum was also awarded a receiver as fair compensation for his services in *Industrial Development Bank v. Garden Tractor and Equipment Co. Ltd.*, [1951] O.W.N. 47. In that case, Marriott, Master, said at p. 48:

> In fixing the compensation of a receiver, the court always has had complete jurisdiction to allow what is fair and reasonable under all the circumstances, but a receiver has no prima facie right to any fixed rate as a trustee in bankruptcy has under The *Bankruptcy Act*. In *Kerr on Receivers*, 11th ed. 1946, at p. 279, it is stated: "In the case of receivers and managers there is no fixed scale. They are sometimes allowed 5 per cent. on the receipts: in other cases their remuneration is fixed at a lump sum or regulated by the time employed by the receiver, his partners and clerks." In *Re Fleming* (1885), 11 P.R. 426, Chancellor Boyd stated: "Five per cent commission may be a reasonable allowance in many cases, but where the estate is large and the services rendered are of short duration and involving no very serious responsibility, such a rate may be excessive."

[7] In fixing a lump sum rather than a percentage fee for a receiver's compensation in *Ibar Developments Ltd. v. Mount Citadel Ltd. et al.* (1978), 26 C.B.R. (N.S.) 17, Saunders, Master, concluded that remuneration on a 5% basis was just too high. He held that the receiver was entitled to a fair fee on the basis of a quantum meruit according to the time, trouble and degree of responsibility involved.

[8] It should perhaps be noted that there is American authority for the proposition that where the duties of the receiver consist in liquidating assets, a commission on the

fund is a more appropriate method of compensation than that based on a fair price for the labour and time employed, and is the one commonly used. Where the compensation is so computed, 5% is the usual and customary rate in ordinary cases. However, the rate varies according to the degree of difficulty or facility in the collection of different receipts: see *75 Corpus Juris Secondum*, p. 1067.

[9] The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

[10] Experienced counsel know that it can be a matter of some difficulty to prove that an account for services is fair and reasonable. In many cases, counsel attempt to establish this fact by calling as witnesses persons who are engaged in the same profession or calling to testify that the charges made by the plaintiff are the usual and normal charges for similar services made by members of that particular profession or calling in their locality. In the present case, where the receiver was a chartered accountant, no evidence was tendered by any member of the accounting profession as to the usual and normal charges made for services similar to those performed by the receiver nor, indeed, was any evidence called other than that of the receiver, to establish the reasonableness of the charges which he unilaterally made for his services.

[11] One of the compelling factors referred to in *Williston on Contracts* (3rd Ed.), Vol. 10, pp. 928-929 as a determinant of the reasonable value of services performed by lawyers is the amount involved. To state this proposition another way, even though a professional is entitled to a fair, just and reasonable compensation measured by the reasonable value of the services rendered, the fees charged must bear some reasonable proportion to the amount of money or the value affected by the controversy or involved in the employment. Thus, in cases where a professional is aware of the amount at issue, courts will impose an underlying or implied limit or maximum on the professional fees it will allow based on what is reasonable in relation to the dollar amount involved

in the particular case: see *J.W. Cowie Engineering Ltd. v. James K. Allen et al.* (1982), 52 N.S.R.(2d) 321; 106 A.P.R. 321 (C.A.).

[12] Generally speaking, courts have been reluctant to award remuneration based solely upon the time spent by the appointee in performing his duties: see *Re Amalgamated Syndicate*, [1901] 2 Ch. 181. They have preferred to award either a lump sum or a commission upon the amount collected or realized by the receiver. However, whether the commission or lump sum method is used in computing the compensation to be paid to a receiver, the compensation awarded must be fair and reasonable having regard to all of the material facts and circumstances of the particular case. In determining the fairness and reasonableness of a receiver's remuneration it is, I think, well to keep in mind what was said by Barker, J., on this subject as long ago as 1894 in *Hall v. Slipp*, 1 N.B. Eq. 37:

> . . . while it is important that a remuneration consistent with the responsibility of the position should be allowed, it is of equal importance that the position should not be made a means simply of absorbing the moneys of creditors and others whose interests it is the duty of this court to protect.
>
> . . .
>
> . . . while, as a general rule, a commission of five per cent. on receipts is allowable, exceptions are made in special cases, both in the way of increasing the amount where unusual work is required, or diminishing it where the amounts are large or the trouble is insignificant.
>
> . . .
>
> It is evidence, if the necessary expenses of administering estates in this court bear so large a proportion to the amount involved as this, the practical result is simply to enrich the court's officers at the expense of the suitors. In my opinion, however, the practice of the court warrants no such result; and I think it only right to point out that it is a mistake to suppose that those who act as receivers are entitled to charge, or will be allowed, a remuneration made up on a scale of fees applicable to leading